Appendix A

Decision of United States Court of Appeals

A-1: Reporter Copy (referenced in text)
A-2: Record Copy

Cody v. McConahay, 2022 U.S. App. LEXIS 579

United States Court of Appeals for the Sixth Circuit

January 7, 2022. Filed

No. 21-3462

JOHN CODY, aka Bobby Thompson, Petitioner-Appellant, v. TIM MCCONAHAY, Warden, Respondent-Appellee.

Prior History: Cody v. Marquis, 2019 U.S. Dist. LEXIS 56519, 2019 WL 1455775 (N.D. Ohio, Apr. 2, 2019)

Core Terms

ineffective, appellate counsel, trial court, district court, jurists, direct appeal, procedural default, right to testify, fail to raise, post-conviction, Appeals, defaulted, trial counsel, state court, deprived, report and recommendation, state appellate court, ineffective-assistance, proceedings, deference, innocence, judicata, counts, novo

Case Summary

Overview

HOLDINGS: [1]-Habeas petitioner claimed that trial court error and the ineffectiveness of his trial counsel deprived him of his right to testify on his own behalf were based on the trial-court record, and thus Ohio law required him to raise those claims in his direct appeal—even his claim of ineffective assistance, given that he had a new attorney on appeal. Because he was aware of the facts supporting the two claims no later than the conclusion of his trial, Ohio's one-petition rule barred him from raising them in a second or successive petition for post-conviction relief under Ohio Rev. Code § 2953.23(A); [2]-Having failed to make a substantial showing that appellate counsel was ineffective, petitioner failed to overcome the procedural default of his underlying claims that the trial court and trial counsel deprived him of his right to testify.

Outcome

Petitioner's application for a certificate of appealability (COA) was denied and his motion to proceed in forma pauperis was denied as moot.

LexisNexis® Headnotes

HN1 **Review, Burdens of Proof**

To obtain a certificate of appealability, a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C.S. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, the petitioner can satisfy § 2253(c)(2) by establishing 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.

HN2 **Review, Antiterrorism & Effective Death Penalty Act**

Appendix A-1

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), if a state court adjudicated a habeas petitioner's claims on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim 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 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.S. § 2254(d) . Where AEDPA deference applies, this court, in the certificate of appealability (COA) context, must evaluate the district court's application of § 2254(d) to determine whether that resolution was debatable amongst jurists of reason.

HN3 **Reviewability, Forfeitures**

By failing to file specific objections to a magistrate judge's report and recommendation, a party forfeits further review of his claims by the district court and the appellate court as long as he was properly informed of the consequences of failing to object.

HN4 **Independent & Adequate State Grounds, Adequate & Independent Principle**

In deciding whether a habeas petitioner procedurally defaulted a federal claim in state court, a federal court must consider whether: (1) the petitioner failed to comply with a state procedural rule; (2) the state courts enforced the rule; and (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim. A procedural default can also result from a petitioner's failure to exhaust his federal claims in state court. When a petitioner did not fairly present his claims to the state courts and no remedy remains, his claims are considered to be procedurally defaulted. To overcome a procedural default, a petitioner must show cause for his failure to raise the claims and prejudice arising therefrom, or that failing to review the claims would result in a fundamental miscarriage of justice.

HN5 **Procedural Matters, Records on Appeal**

In Ohio, a prisoner must bring claims that are based on the original trial record in his direct appeal. If he fails to raise such a claim on direct appeal, it will be barred by res judicata in post-conviction proceedings. To avoid res judicata, the petitioner must show that his claim is based on evidence that was outside of the original record in his direct appeal proceedings.

HN6 **Criminal Process, Assistance of Counsel**

Appellate counsel's failure to raise an issue on appeal can serve as cause to excuse a procedural default if the error rises to the level of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, the petitioner must establish both: (1) that his trial counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. An attorney's performance is strongly presumed to be effective. To prevail on an ineffective-assistance claim in the appellate context, the petitioner must demonstrate that the issue omitted by counsel was clearly stronger than the issues that counsel did present, and a reasonable probability that he would have prevailed but for counsel's failure to raise the issue, Under the

AEDPA, a double layer of deference applies to ineffective-assistance claims: the petitioner must overcome the presumption that his attorney's performance was adequate, and he must demonstrate that the state court's application of was unreasonable.

HN7 **Defendant's Rights, Right to Testify**

Courts entertain a strong presumption that trial counsel adhered to the requirements of professional conduct and left the final decision about whether to testify with the client. To overcome this presumption, a defendant must present record evidence that he somehow alerted the trial court to his desire to testify.

HN8 **Criminal Process, Assistance of Counsel**

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of Counsel for his defense. U.S. Const. amend. VI . The Supreme Court has held that although the Sixth Amendment does not entitle an indigent criminal defendant to his counsel of choice, it does guarantee him a right to adequate representation.

HN9 **Independent & Adequate State Grounds, Adequate & Independent Principle**

Both rules res judicata and a time bar are considered adequate and independent state procedural grounds for procedural default purposes.

HN10 **Actual Innocence & Miscarriage of Justice, Exceptions**

The fundamental-miscarriage-of-justice exception to the procedural-default rule has been applied only when a habeas petitioner has demonstrated that he is actually innocent. For a claim of actual innocence to be credible, a defendant must 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.

Counsel: [*1] JOHN CODY, aka: Bobby Thompson, Petitioner - Appellant, Pro se, Mansfield, OH.

For TIM MCCONAHAY, Warden, Respondent - Appellee: Stephanie Lynn Watson, Office of the Attorney General, Columbus, OH.

Judges: Before: GIBBONS, Circuit Judge.

Opinion

ORDER

John Cody, an Ohio prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. This court construes Cody's timely notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2). Cody moves this court to proceed in forma pauperis on appeal.

The Ohio Court of Appeals summarized the factual background of Cody's case as follows:

This case arises from an investigation regarding the United States Naval Veteran's Association ("USNVA"), a charity organized and created by a person holding himself out to be Bobby Thompson. Through the investigation, it was discovered that the USNVA was a sham, fabricated by a person named John Donald Cody, who manipulated unsuspecting individuals across the United States to donate to this charity, unlawfully procuring millions of dollars.

In mid-2010, the state of Ohio began its investigation into the USNVA after a story was published in the St. [*2] Petersburg Times that the charity was fictitious. Through its investigation, the state revealed that Ohio residents had been solicited by various professional fundraisers contracted by USNVA to donate money to the USNVA. It was discovered that approximately $2 million was solicited on behalf of the USNVA from resident-donors in the state of Ohio.

State v. Cody ("*Cody I*"), 2015-Ohio-2261, 34 N.E.3d 189, 191 (Ohio Ct. App. 2015), *as amended nunc pro tunc*, (Aug. 18, 2015).

Cody was initially charged with several counts in two separate indictments. After he was arrested in Oregon in April 2012, a new indictment was issued, charging Cody with one count each of engaging in a pattern of corrupt activity pertaining to the criminal enterprise of the USNVA, complicity to commit theft, tampering with records, complicity to tamper with records, identity fraud, and possessing criminal tools; seven counts of complicity to commit money laundering; and eleven counts of identity fraud. *Id.* The two previous indictments were dismissed, and Cody proceeded to a jury trial on the final indictment. *Id.* At the close of evidence, the trial court granted Cody's motion

for a judgment of acquittal on the charge of possessing criminal tools. *Id.* The jury convicted Cody of the remaining twenty-three [*3] counts. *Id.* The trial court imposed an aggregate sentence of twenty-eight years' imprisonment. *Id.*

On appeal, the Ohio Court of Appeals vacated Cody's conviction on the eleven counts of identity fraud for lack of jurisdiction and sustained his third assignment of error, which challenged the trial court's order that he spend each Veterans Day in solitary confinement. *Id.* at 195-96. Cody's conviction was affirmed in all other respects. *Id.* The Ohio Supreme Court did not accept Cody's appeal for review. *State v. Cody*, 143 Ohio St. 3d 1501, 2015- Ohio 4468, 39 N.E.3d 1271 (Ohio 2015) (table).

In June 2014, while his direct appeal was pending, Cody filed a post-conviction petition in the trial court. The trial court denied the petition, and the Ohio Court of Appeals affirmed. *State v. Cody* ("*Cody II*"), No. 102213, 2015 Ohio 2764, 2015 WL 4133281, at *1 (Ohio Ct. App. July 9, 2015). At the same time that it denied review in Cody's direct appeal, the Ohio Supreme Court declined jurisdiction. *Cody*, 39 N.E.3d at 1271.

In June 2015, Cody filed an application to reopen his direct appeal, pursuant to Ohio Appellate Rule 26(B). The Ohio Court of Appeals denied Cody's application, *State v. Cody* ("*Cody III*"), No. 100797, 2017 Ohio 1543, 2017 WL 1507211, at *6 (Ohio Ct. App. Apr. 21, 2017), and the Ohio Supreme Court declined jurisdiction, *State v. Cody*, 150 Ohio St. 3d 1411, 2017- Ohio 6964, 78 N.E.3d 910 (Ohio 2017) (table).

In June and July 2018, Cody filed in the trial court a motion for leave to file a delayed motion for a new trial, an "In Limine Motion for New Trial/Request [*4] for R.C. 2953.21 et seq. Post-Conviction Relief," and a petition to vacate or set aside the judgment of conviction and sentence. The trial court denied each of Cody's filings in two separate orders. Cody then filed another petition to vacate the judgment and sentence, which the trial court denied. Cody appealed each of the trial court's orders, and the Ohio Court of Appeals consolidated the three appeals and affirmed the trial court's rulings. *State v. Cody* ("*Cody IV*"), Nos. 107595, 107607, 107664, 2019 Ohio 2824, 2019 WL 3046584, at *6 (Ohio Ct. App. July 11, 2019). The Ohio Supreme Court declined to accept jurisdiction. *State v. Cody*, 157 Ohio St. 3d 1443, 2019- Ohio 4211, 132 N.E.3d 716 (Ohio 2019) (table).

In July 2018, Cody filed a § 2254 petition in the district court. In his initial petition and in a subsequent amendment, Cody raised eighteen grounds for relief, only four of which are relevant to this appeal: (4) he was denied his right to testify at trial "by the trial court and/or by the . . . ineffectiveness of trial counsel," and appellate counsel was ineffective for failing to raise this issue on appeal; (6) the trial court's "no contact" order that resulted in him being placed in solitary confinement from March to December 2013 rendered him incompetent to stand trial or to plea bargain, caused him to relinquish his right to self-representation, contributed [*5] to his attempted suicide, "blocked his fundamental right[s] to access counsel of choice . . . and to access [the] courts," and prevented him from obtaining discovery, and appellate counsel was ineffective for failing to pursue this issue on appeal; (16) trial counsel failed to properly investigate and develop evidence to show that he had a "covert, classified intelligence affiliation with (a) the CIA[] and/or (b) the Bush 43 Office of the President"; and (17) trial counsel was ineffective for "denying [him] his desired defense strategy of CIA-affiliation, including denying [him] his desired right to self-testify at trial."

A magistrate judge issued a report and recommendation, finding that Cody's claims were either procedurally defaulted or lacking in merit and recommending that the petition be dismissed in part and denied in part. Cody filed specific objections to the magistrate judge's report and recommendation with respect to only the four claims listed above—claims four, six, sixteen, and seventeen. The district court conducted a de novo review of only the aspects of these claims addressed in Cody's objections and overruled all of them. The court therefore adopted the magistrate [*6] judge's report and recommendation and denied Cody's petition. The court also declined to issue a COA.

HN1 To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When the district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner can satisfy § 2253(c)(2) by establishing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

HN2 Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), if a state court adjudicated a petitioner's claims on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim resulted in "a decision that was contrary to, or involved an [*7] unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." or "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); *see Harrington v. Richter*, 562 U.S. 86, 100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Where AEDPA deference applies, this court, in the COA context, must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

HN3 By failing to file specific objections to a magistrate judge's report and recommendation, a party forfeits further review of his claims by the district court and this court "[a]s long as [he] was properly informed of the consequences of failing to object." *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *see Thomas v. Arn*, 474 U.S. 140, 142, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Cody, a former attorney, filed objections to the report and recommendation but only with respect to four claims. Cody made no objection to the magistrate judge's recommendations with respect to any of his remaining claims. To the extent Cody now seeks a COA on those claims for which he did not file specific objections, he has forfeited further review of those claims. While exceptional circumstances may warrant departure from the waiver rule in the interests of justice, [*8] *see Thomas*, 474 U.S. at 155; *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012), none is present in this case.

Claim Four—Denial of Right to Testify

The district court broke down Cody's fourth claim into four parts: (1) trial court error deprived him of his right to testify on his own behalf; (2) trial counsel's ineffectiveness deprived him of his right to counsel; (3) appellate counsel was ineffective for failing to raise the trial court's error on appeal; and (4) appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. The court concluded that the underlying claims—trial court error and trial counsel's ineffectiveness—were procedurally defaulted because Cody failed to raise them on direct appeal. It further concluded that Cody's related appellate counsel claims lacked merit and therefore could not excuse the procedural default of the underlying claims. Reasonable jurists would not disagree with the district court's resolution of these claims.

HN4 In deciding whether a habeas petitioner procedurally defaulted a federal claim in state court, a federal court must consider whether: "(1) the petitioner failed to comply with a state procedural rule; (2) the state courts enforced the rule; [and] (3) the state procedural [*9] rule is an adequate and independent state ground for denying review of a federal constitutional claim." *Jalowiec v. Bradshaw*, 657 F.3d 293, 302 (6th Cir. 2011). A procedural default can also result from a petitioner's failure to exhaust his federal claims in state court. When a petitioner did not fairly present his claims to the state courts and no remedy remains, his claims are considered to be procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996). To overcome a procedural default, a petitioner must show cause for his failure to raise the claims and prejudice arising therefrom, or that failing to review the claims would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

HN5 In Ohio, a prisoner must bring claims that are based on the original trial record in his direct appeal; if he fails to raise such a claim on direct appeal, it will be barred by res judicata in post-conviction proceedings. *See State v. Spaulding*, 2018- Ohio 3663, 119 N.E.3d 859, 868 (Ohio Ct. App. 2018). To avoid res judicata, the petitioner must show that his claim is based on evidence that was outside of the original record in his direct appeal proceedings. *See id.* at 868-69; *see also Wogenstahl v. Mitchell*, 668 F.3d 307, 340-41 (6th Cir. 2012).

Here, Cody's claims that trial court error and the ineffectiveness of his trial counsel deprived him of his right to testify on his own behalf were based on the trial-court record, and thus Ohio law required [*10] Cody to raise these claims in his direct appeal—even his claim of ineffective assistance, given that he had a new attorney on appeal. *See State v. Smith*, 125 Ohio App. 3d 342, 708 N.E.2d 739, 742 (Ohio Ct. App. 1997); *see also Moore v. Mitchell*, 708 F.3d 760, 778 (6th Cir. 2013). Because Cody was aware of the facts supporting these two claims no later than the conclusion of his trial, Ohio's one-petition rule bars him from raising them in a second or successive petition for post-conviction relief. *See* Ohio Rev. Code § 2953.23(A); *Landrum v. Mitchell*, 625 F.3d 905, 919 (6th Cir. 2010). Cody briefly suggested in his objections that the trial-counsel aspect of this claim may not be procedurally defaulted because it was based on evidence outside the trial court record, stating that "if any claim in any Ohio proceeding turns on de hors record evidence, such as an off-record defendant-counsel communication as to, e.g., the client's express desire to testify . . . there is no such res judicata . . . based bar." But Cody pointed to no specific evidence outside of the record that would support this claim.

To overcome the procedural default of his underlying claims, Cody argued that appellate counsel was ineffective for failing to raise these claims on direct appeal. *HN6* Appellate counsel's failure to raise an issue on appeal can serve as cause to excuse a procedural default if the error rises to the level [*11] of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488-89, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). In order to establish ineffective assistance of counsel, the petitioner must establish both (1) that his trial "counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An attorney's performance is strongly presumed to be effective. *Id.* at 690. To prevail on an ineffective-assistance claim in the appellate context, the petitioner must demonstrate that the issue omitted by counsel "was clearly stronger than the issues that counsel did present," *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009) (quoting *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)), and a reasonable probability that he would have prevailed but for counsel's failure to raise the issue, *Moore*, 708 F.3d at 776. Under the AEDPA, a double layer of deference applies to ineffective-assistance claims: the petitioner must overcome the *Strickland* presumption that his attorney's performance was adequate, and he must demonstrate that the state court's application of *Strickland* was unreasonable. *See Kelly v. Lazaroff*, 846 F.3d 819, 831-32 (6th Cir. 2017).

Turning first to Cody's claim that appellate counsel was ineffective [*12] for failing to raise a claim that trial court error deprived him of his right to testify on his own behalf, the state appellate court rejected this claim when it denied Cody's Rule 26(B) application. *See Cody III*, 2017 Ohio 1543, 2017 WL 1507211, at *3. After setting forth the *Strickland* standard applicable to ineffective-assistance claims and relevant evidence from the record, the court concluded that the "record does not support an argument that the trial court denied Cody's right to testify, and appellate counsel in the exercise of professional judgment could decline to raise it." *Id.*

Cody argued in the district court that it should evaluate this claim under the "modified AEDPA deference" standard, as described in *Vasquez v. Jones*, which this court applies only when "the state court adjudicated [a] claim but with little analysis on the substantive constitutional issue." 496 F.3d 564, 569 (6th Cir. 2007). But the district court properly rejected this argument, reasoning that, although its analysis was brief, the state appellate court denied the claim only after reciting the correct legal standard and carefully discussing the evidence. *Cf. Howard v. Bouchard*, 405 F.3d 459, 467 (6th Cir. 2005) (applying modified AEDPA deference where the state court disposed of a constitutional claim but failed to articulate its analysis).

Reasonable [*13] jurists would not disagree with the district court's conclusion that the state appellate court's rejection of this claim was not based on an unreasonable application of *Strickland* or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Review of the trial court record reveals that, at the close of the State's evidence, the court engaged in an extensive discussion with Cody about whether he would testify. During this exchange, Cody repeatedly refused to directly answer the court's question of whether he wished to testify. When Cody told the court that he could not answer the question without consulting his attorney, the court recessed for nearly forty-five minutes, during which Cody spoke with counsel. After the recess, counsel informed the court that he had discussed with Cody "his physical and mental capabilities to testify," especially with regard to cross-examination, and that Cody would not be taking the stand. Cody did not object or otherwise inform the court that counsel was mistaken or that he did, in fact, wish to testify. *See Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009). In such a situation, Cody's assent to the decision not to testify is presumed. *See id.*

During the discussion about whether Cody would testify, the trial court noted [*14] that, some days prior, Cody had been banging his head against the wall of his holding cell. The court noted that Cody was "looked at" by medical staff and that he refused medical treatment. Jail psychiatric staff also spoke to Cody and determined that there were not "any issues." Cody argued that appellate counsel was ineffective for failing to challenge the trial court's denial of his right to testify in light of the fact that it knew he had suffered a head injury. But Cody pointed to nothing in the record to demonstrate that the incident in the holding cell actually caused an injury that impacted his understanding of his right to testify and whether he should waive the right. As recited by the district court, the record gives no indication that he suffered any injury, let alone an injury that affected his ability to make decisions or understand the trial proceedings. Because Cody has failed to demonstrate that the trial court committed any error with respect to his right to testify on his own behalf, he cannot make a substantial showing that appellate counsel was ineffective for failing to raise this issue on appeal. *See Colev v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

Cody also argued that appellate counsel should have argued [*15] that trial counsel was ineffective for not calling him to testify on his own behalf. He argued that this claim was subject to de novo review by the district court because the state appellate court did not address it when denying his Rule 26(B) application. Without deciding the standard of review that should apply, the district court rejected the claim, concluding that it failed under either de novo review or AEDPA's deferential standard of review. Reasonable jurists could not disagree with this conclusion.

HN7 Courts entertain "a strong presumption that trial counsel adhered to the requirements of professional conduct and left the final decision about whether to testify with the client." *Hodge*, 579 F.3d at 639. "To overcome this presumption," a defendant must "present record evidence that he somehow alerted the trial court to his desire to testify." *Id.* As discussed, Cody never alerted the trial court that he wished to testify. In fact, he told the court that he could not make that decision without consulting counsel. And after Cody did so, counsel explained to the court that he spoke at length with him about his physical and mental ability to withstand cross-examination, and they ultimately determined that Cody should [*16] not testify. Cody gave no indication to the court that he disagreed with counsel. On this record, he has failed to overcome the presumption that counsel left the final decision with him. And thus he cannot make a substantial showing that appellate counsel was ineffective for failing to raise a non-meritorious challenge to trial counsel's effectiveness in this regard on direct appeal. *See Colev*, 706 F.3d at 752.

Having failed to make a substantial showing that appellate counsel was ineffective, Cody has failed to overcome the procedural default of his underlying claims that the trial court and trial counsel deprived him of his right to testify. Reasonable jurists would not disagree with the district court's denial of the fourth ground for relief.

Claim Six—Trial Court's "No-Contact Order"

In his § 2254 petition, Cody listed various ways that the trial court's "no contact" order deprived him of his constitutional rights. In his reply, however, Cody limited his claim to the denial of his right to access counsel of his choice. According to Cody, as a result of the trial court's order, he was placed in solitary confinement in the Cuyahoga County Jail "with an order prohibiting him from any contact with the outside world." [*17] Like his

claims concerning his right to testify, this claim was based on the trial court record and should have been raised on direct appeal. *See* Spaulding, 119 N.E.3d at 868. To the extent Cody argued that the claim was based on evidence outside the trial court record, he did not raise it in any state post-conviction petition and could not do so now because state law bars him from raising it in a second or successive petition for post-conviction relief. *See* Ohio Rev. Code § 2953.23(A); *Landrum*, 625 F.3d at 919. Reasonable jurists would therefore agree with the district court's determination that this claim was procedurally defaulted.

Cody argued that appellate counsel was ineffective for failing to raise this issue on direct appeal and that this failure of appellate counsel should excuse the procedural default. Despite Cody's insistence on de novo review of this claim, the district court determined that AEDPA deference was warranted. The court, however, ultimately determined that, even under a de novo standard of review, Cody failed to establish that appellate counsel was ineffective. Reasonable jurists would not disagree.

HN8 The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense." **[*18]** U.S. Const. amend. VI. The Supreme Court has held that although the Sixth Amendment does not entitle an indigent criminal defendant to his counsel of choice, it does guarantee him a right to adequate representation. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989). As the district court detailed in its order, Cody was deemed indigent throughout the criminal proceedings. Although there was a time that Cody was permitted to represent himself, he had court-appointed counsel at all times when he was represented. And in his Rule 26(B) application where he asserted that appellate counsel should have argued that he was denied the right to counsel of his choice, Cody maintained that he was indigent. Cody therefore was not entitled to counsel of his choice, and appellate counsel was not ineffective for failing to argue on appeal that he was denied this right. *See Coley*, 706 F.3d at 752.

Further, to the extent Cody argued that, even if indigent, he still had a right to attempt to retain private counsel and the court's no-contact order prevented him from doing so, Cody pointed to nothing in the record to show that he ever informed the trial court of his desire to retain private counsel. In the absence of any indication in the record that the trial court was aware that Cody wished to hire his own attorney, appellate **[*19]** counsel had no basis for pursuing the issue on appeal. On this record, reasonable jurists could not disagree with the district court's conclusion that Cody's ineffective-assistance-of-appellate-counsel claim could not overcome the procedural default of his claim that he was denied the right to counsel of his choice.

Claims Sixteen and Seventeen—Trial Counsel's Failure to Develop a "CIA Defense"

Both of these claims relate to trial counsel's alleged failure to pursue a defense that Cody had a "covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 Office of the President." Cody first raised these issues in his June 2014 post-conviction petition. On appeal from the trial court's denial of this petition, the state appellate court declined to review the claim as barred by the doctrine of res judicata because Cody could have raised the claim on direct appeal but failed to do so. *Cody II*, 2015 Ohio 2764, 2015 WL 4133281, at *4. Cody again raised these issues in his July 2018 petition for post-conviction review. On appeal from the denial of this petition, the Ohio Court of Appeals affirmed on the ground that the petition was untimely. *Cody IV*, 2019 Ohio 2824, 2019 WL 3046584, at *5-6.

To the extent the ineffective-assistance claims in ground sixteen and seventeen **[*20]** were raised in Cody's June 2014 post-conviction petition or in his July 2018 petition, they are procedurally defaulted. In both cases, the state appellate court relied on procedural rules—res judicata and a time bar—to deny review of the claims. ***HN9***

And both rules are considered adequate and independent state procedural grounds for procedural default purposes. *See Smith v. Warden, Toledo Corr. Inst.*, 780 F. App'x 208, 219 (6th Cir. 2019); *Hartman v. Bagley*, 492 F.3d 347, 357-58 (6th Cir. 2007). Because Cody failed to provide any viable explanation for his failure to raise these claims of ineffective-assistance earlier, the district court concluded that he failed to establish cause or prejudice to excuse the procedural default. Reasonable jurists would not debate the district court's denial of claims sixteen and seventeen as procedurally defaulted.

Actual Innocence

Finally, reasonable jurists would not disagree with the district court's determination that Cody failed to overcome the procedural default of his claims through a showing of actual innocence. ***HN10*** The fundamental-miscarriage-of-justice exception to the procedural-default rule "has been applied only when a habeas petitioner has demonstrated that he is actually innocent." *Hodges v. Colson*, 727 F.3d 517, 532 (6th Cir. 2013). "For a claim of actual innocence to be credible, a defendant must 'support his allegations **[*21]** 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.'" *Searcy v. Berghuis*, 549 F. App'x 357, 363 (6th Cir. 2013) (emphasis omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).

Cody argued that new evidence concerning his CIA affiliation established his innocence. The Ohio Court of Appeals summarized this evidence as follows:

(1) various statements purportedly made by the prosecutor that Cody claims show the state knew he was involved with the CIA; (2) Cody's 19-page affidavit; (3) Cody's curriculum vitae; (4) the CIA's response to Cody's Freedom of Information Act request dated January 29, 2018; (5) a 1973 redacted letter from a law firm based in Hawaii that purports to list the name "John Cody" as one of the firm's associates; (6) various transcripts and court filings; and (7) a letter from the Office of Government Information Services dated April 19, 2018, explaining the CIA's response to Cody's Freedom of Information Act request.

Cody IV, 2019 Ohio 2824, 2019 WL 3046584, at *5. As explained by the magistrate judge in the report and recommendation to deny Cody's petition, much of this evidence was not new because it concerned information known to Cody at the time of trial and none **[*22]** of it was exculpatory because it "d[id] not show that Cody was an undercover CIA agent, or . . . that his actions running the USNVA were excused by virtue of his alleged CIA affiliation such that . . . no reasonable juror would have convicted him of the charges had it known this information."

Accordingly, Cody's application for a COA is **DENIED** and his motion to proceed in forma pauperis is **DENIED** as moot.

No. 21-3462

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 07, 2022
DEBORAH S. HUNT, Clerk

JOHN CODY, aka Bobby Thompson,

Petitioner-Appellant,

v.

TIM MCCONAHAY, Warden,

Respondent-Appellee.

ORDER

Before: GIBBONS, Circuit Judge.

John Cody, an Ohio prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. This court construes Cody's timely notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2). Cody moves this court to proceed in forma pauperis on appeal.

The Ohio Court of Appeals summarized the factual background of Cody's case as follows:

> This case arises from an investigation regarding the United States Naval Veteran's Association ("USNVA"), a charity organized and created by a person holding himself out to be Bobby Thompson. Through the investigation, it was discovered that the USNVA was a sham, fabricated by a person named John Donald Cody, who manipulated unsuspecting individuals across the United States to donate to this charity, unlawfully procuring millions of dollars.
>
> In mid-2010, the state of Ohio began its investigation into the USNVA after a story was published in the St. Petersburg Times that the charity was fictitious. Through its investigation, the state revealed that Ohio residents had been solicited by various professional fundraisers contracted by USNVA to donate money to the USNVA. It was discovered that approximately $2 million was solicited on behalf of the USNVA from resident-donors in the state of Ohio.

State v. Cody ("*Cody I*"), 34 N.E.3d 189, 191 (Ohio Ct. App. 2015), *as amended nunc pro tunc*, (Aug. 18, 2015).

Cody was initially charged with several counts in two separate indictments. After he was arrested in Oregon in April 2012, a new indictment was issued, charging Cody with one count each of engaging in a pattern of corrupt activity pertaining to the criminal enterprise of the USNVA, complicity to commit theft, tampering with records, complicity to tamper with records, identity fraud, and possessing criminal tools; seven counts of complicity to commit money laundering; and eleven counts of identity fraud. *Id.* The two previous indictments were dismissed, and Cody proceeded to a jury trial on the final indictment. *Id.* At the close of evidence, the trial court granted Cody's motion for a judgment of acquittal on the charge of possessing criminal tools. *Id.* The jury convicted Cody of the remaining twenty-three counts. *Id.* The trial court imposed an aggregate sentence of twenty-eight years' imprisonment. *Id.*

On appeal, the Ohio Court of Appeals vacated Cody's conviction on the eleven counts of identity fraud for lack of jurisdiction and sustained his third assignment of error, which challenged the trial court's order that he spend each Veterans Day in solitary confinement. *Id.* at 195-96. Cody's conviction was affirmed in all other respects. *Id.* The Ohio Supreme Court did not accept Cody's appeal for review. *State v. Cody*, 39 N.E.3d 1271 (Ohio 2015) (table).

In June 2014, while his direct appeal was pending, Cody filed a post-conviction petition in the trial court. The trial court denied the petition, and the Ohio Court of Appeals affirmed. *State v. Cody* ("*Cody II*"), No. 102213, 2015 WL 4133281, at *1 (Ohio Ct. App. July 9, 2015). At the same time that it denied review in Cody's direct appeal, the Ohio Supreme Court declined jurisdiction. *Cody*, 39 N.E.3d at 1271.

In June 2015, Cody filed an application to reopen his direct appeal, pursuant to Ohio Appellate Rule 26(B). The Ohio Court of Appeals denied Cody's application, *State v. Cody* ("*Cody III*"), No. 100797, 2017 WL 1507211, at *6 (Ohio Ct. App. Apr. 21, 2017), and the Ohio Supreme Court declined jurisdiction, *State v. Cody*, 78 N.E.3d 910 (Ohio 2017) (table).

In June and July 2018, Cody filed in the trial court a motion for leave to file a delayed motion for a new trial, an "In Limine Motion for New Trial/Request for R.C. 2953.21 et seq. Post-Conviction Relief," and a petition to vacate or set aside the judgment of conviction and sentence. The trial court denied each of Cody's filings in two separate orders. Cody then filed another petition to vacate the judgment and sentence, which the trial court denied. Cody appealed each of the trial court's orders, and the Ohio Court of Appeals consolidated the three appeals and affirmed the trial court's rulings. *State v. Cody* ("*Cody IV*"), Nos. 107595, 107607, 107664, 2019 WL 3046584, at *6 (Ohio Ct. App. July 11, 2019). The Ohio Supreme Court declined to accept jurisdiction. *State v. Cody*, 132 N.E.3d 716 (Ohio 2019) (table).

In July 2018, Cody filed a § 2254 petition in the district court. In his initial petition and in a subsequent amendment, Cody raised eighteen grounds for relief, only four of which are relevant to this appeal: (4) he was denied his right to testify at trial "by the trial court and/or by the . . . ineffectiveness of trial counsel," and appellate counsel was ineffective for failing to raise this issue on appeal; (6) the trial court's "no contact" order that resulted in him being placed in solitary confinement from March to December 2013 rendered him incompetent to stand trial or to plea bargain, caused him to relinquish his right to self-representation, contributed to his attempted suicide, "blocked his fundamental right[s] to access counsel of choice . . . and to access [the] courts," and prevented him from obtaining discovery, and appellate counsel was ineffective for failing to pursue this issue on appeal; (16) trial counsel failed to properly investigate and develop evidence to show that he had a "covert, classified intelligence affiliation with (a) the CIA[] and/or (b) the Bush 43 Office of the President"; and (17) trial counsel was ineffective for "denying [him] his desired defense strategy of CIA-affiliation, including denying [him] his desired right to self-testify at trial."

A magistrate judge issued a report and recommendation, finding that Cody's claims were either procedurally defaulted or lacking in merit and recommending that the petition be dismissed in part and denied in part. Cody filed specific objections to the magistrate judge's report and recommendation with respect to only the four claims listed above—claims four, six, sixteen, and

seventeen. The district court conducted a de novo review of only the aspects of these claims addressed in Cody's objections and overruled all of them. The court therefore adopted the magistrate judge's report and recommendation and denied Cody's petition. The court also declined to issue a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner can satisfy § 2253(c)(2) by establishing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), if a state court adjudicated a petitioner's claims on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim 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 "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); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). Where AEDPA deference applies, this court, in the COA context, must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

By failing to file specific objections to a magistrate judge's report and recommendation, a party forfeits further review of his claims by the district court and this court "[a]s long as [he] was properly informed of the consequences of failing to object." *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *see Thomas v. Arn*, 474 U.S. 140, 142 (1985). Cody, a former attorney, filed

objections to the report and recommendation but only with respect to four claims. Cody made no objection to the magistrate judge's recommendations with respect to any of his remaining claims. To the extent Cody now seeks a COA on those claims for which he did not file specific objections, he has forfeited further review of those claims. While exceptional circumstances may warrant departure from the waiver rule in the interests of justice, *see Thomas*, 474 U.S. at 155; *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012), none is present in this case.

Claim Four—Denial of Right to Testify

The district court broke down Cody's fourth claim into four parts: (1) trial court error deprived him of his right to testify on his own behalf; (2) trial counsel's ineffectiveness deprived him of his right to counsel; (3) appellate counsel was ineffective for failing to raise the trial court's error on appeal; and (4) appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. The court concluded that the underlying claims—trial court error and trial counsel's ineffectiveness—were procedurally defaulted because Cody failed to raise them on direct appeal. It further concluded that Cody's related appellate counsel claims lacked merit and therefore could not excuse the procedural default of the underlying claims. Reasonable jurists would not disagree with the district court's resolution of these claims.

In deciding whether a habeas petitioner procedurally defaulted a federal claim in state court, a federal court must consider whether: "(1) the petitioner failed to comply with a state procedural rule; (2) the state courts enforced the rule; [and] (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim." *Jalowiec v. Bradshaw*, 657 F.3d 293, 302 (6th Cir. 2011). A procedural default can also result from a petitioner's failure to exhaust his federal claims in state court. When a petitioner did not fairly present his claims to the state courts and no remedy remains, his claims are considered to be procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). To overcome a procedural default, a petitioner must show cause for his failure to raise the claims and prejudice arising therefrom, or that failing to review the claims would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

In Ohio, a prisoner must bring claims that are based on the original trial record in his direct appeal; if he fails to raise such a claim on direct appeal, it will be barred by res judicata in post-conviction proceedings. *See State v. Spaulding*, 119 N.E.3d 859, 868 (Ohio Ct. App. 2018). To avoid res judicata, the petitioner must show that his claim is based on evidence that was outside of the original record in his direct appeal proceedings. *See id.* at 868-69; *see also Wogenstahl v. Mitchell*, 668 F.3d 307, 340-41 (6th Cir. 2012).

Here, Cody's claims that trial court error and the ineffectiveness of his trial counsel deprived him of his right to testify on his own behalf were based on the trial-court record, and thus Ohio law required Cody to raise these claims in his direct appeal—even his claim of ineffective assistance, given that he had a new attorney on appeal. *See State v. Smith*, 708 N.E.2d 739, 742 (Ohio Ct. App. 1997); *see also Moore v. Mitchell*, 708 F.3d 760, 778 (6th Cir. 2013). Because Cody was aware of the facts supporting these two claims no later than the conclusion of his trial, Ohio's one-petition rule bars him from raising them in a second or successive petition for post-conviction relief. *See* Ohio Rev. Code § 2953.23(A); *Landrum v. Mitchell*, 625 F.3d 905, 919 (6th Cir. 2010). Cody briefly suggested in his objections that the trial-counsel aspect of this claim may not be procedurally defaulted because it was based on evidence outside the trial court record, stating that "if any claim in any Ohio proceeding turns on de hors record evidence, such as an off-record defendant-counsel communication as to, e.g., the client's express desire to testify . . . there is no such res judicata . . . based bar." But Cody pointed to no specific evidence outside of the record that would support this claim.

To overcome the procedural default of his underlying claims, Cody argued that appellate counsel was ineffective for failing to raise these claims on direct appeal. Appellate counsel's failure to raise an issue on appeal can serve as cause to excuse a procedural default if the error rises to the level of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). In order to establish ineffective assistance of counsel, the petitioner must establish both (1) that his trial "counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An attorney's performance is strongly presumed to be effective. *Id.* at 690. To prevail on an ineffective-assistance claim in the appellate context, the petitioner must demonstrate that the issue omitted by counsel "was clearly stronger than the issues that counsel did present," *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)), and a reasonable probability that he would have prevailed but for counsel's failure to raise the issue, *Moore*, 708 F.3d at 776. Under the AEDPA, a double layer of deference applies to ineffective-assistance claims: the petitioner must overcome the *Strickland* presumption that his attorney's performance was adequate, and he must demonstrate that the state court's application of *Strickland* was unreasonable. *See Kelly v. Lazaroff*, 846 F.3d 819, 831-32 (6th Cir. 2017).

Turning first to Cody's claim that appellate counsel was ineffective for failing to raise a claim that trial court error deprived him of his right to testify on his own behalf, the state appellate court rejected this claim when it denied Cody's Rule 26(B) application. *See Cody III*, 2017 WL 1507211, at *3. After setting forth the *Strickland* standard applicable to ineffective-assistance claims and relevant evidence from the record, the court concluded that the "record does not support an argument that the trial court denied Cody's right to testify, and appellate counsel in the exercise of professional judgment could decline to raise it." *Id.*

Cody argued in the district court that it should evaluate this claim under the "modified AEDPA deference" standard, as described in *Vasquez v. Jones*, which this court applies only when "the state court adjudicated [a] claim but with little analysis on the substantive constitutional issue." 496 F.3d 564, 569 (6th Cir. 2007). But the district court properly rejected this argument, reasoning that, although its analysis was brief, the state appellate court denied the claim only after reciting the correct legal standard and carefully discussing the evidence. *Cf. Howard v. Bouchard*, 405 F.3d 459, 467 (6th Cir. 2005) (applying modified AEDPA deference where the state court disposed of a constitutional claim but failed to articulate its analysis).

Reasonable jurists would not disagree with the district court's conclusion that the state appellate court's rejection of this claim was not based on an unreasonable application of *Strickland* or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Review of the trial court record reveals that, at the close of the State's evidence, the court engaged in an extensive discussion with Cody about whether he would testify. During this exchange, Cody repeatedly refused to directly answer the court's question of whether he wished to testify. When Cody told the court that he could not answer the question without consulting his attorney, the court recessed for nearly forty-five minutes, during which Cody spoke with counsel. After the recess, counsel informed the court that he had discussed with Cody "his physical and mental capabilities to testify," especially with regard to cross-examination, and that Cody would not be taking the stand. Cody did not object or otherwise inform the court that counsel was mistaken or that he did, in fact, wish to testify. *See Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009). In such a situation, Cody's assent to the decision not to testify is presumed. *See id.*

During the discussion about whether Cody would testify, the trial court noted that, some days prior, Cody had been banging his head against the wall of his holding cell. The court noted that Cody was "looked at" by medical staff and that he refused medical treatment. Jail psychiatric staff also spoke to Cody and determined that there were not "any issues." Cody argued that appellate counsel was ineffective for failing to challenge the trial court's denial of his right to testify in light of the fact that it knew he had suffered a head injury. But Cody pointed to nothing in the record to demonstrate that the incident in the holding cell actually caused an injury that impacted his understanding of his right to testify and whether he should waive the right. As recited by the district court, the record gives no indication that he suffered any injury, let alone an injury that affected his ability to make decisions or understand the trial proceedings. Because Cody has failed to demonstrate that the trial court committed any error with respect to his right to testify on his own behalf, he cannot make a substantial showing that appellate counsel was ineffective for failing to raise this issue on appeal. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

Cody also argued that appellate counsel should have argued that trial counsel was ineffective for not calling him to testify on his own behalf. He argued that this claim was subject to de novo review by the district court because the state appellate court did not address it when denying his Rule 26(B) application. Without deciding the standard of review that should apply, the district court rejected the claim, concluding that it failed under either de novo review or AEDPA's deferential standard of review. Reasonable jurists could not disagree with this conclusion.

Courts entertain "a strong presumption that trial counsel adhered to the requirements of professional conduct and left the final decision about whether to testify with the client." *Hodge*, 579 F.3d at 639. "To overcome this presumption," a defendant must "present record evidence that he somehow alerted the trial court to his desire to testify." *Id.* As discussed, Cody never alerted the trial court that he wished to testify. In fact, he told the court that he could not make that decision without consulting counsel. And after Cody did so, counsel explained to the court that he spoke at length with him about his physical and mental ability to withstand cross-examination, and they ultimately determined that Cody should not testify. Cody gave no indication to the court that he disagreed with counsel. On this record, he has failed to overcome the presumption that counsel left the final decision with him. And thus he cannot make a substantial showing that appellate counsel was ineffective for failing to raise a non-meritorious challenge to trial counsel's effectiveness in this regard on direct appeal. *See Coley*, 706 F.3d at 752.

Having failed to make a substantial showing that appellate counsel was ineffective, Cody has failed to overcome the procedural default of his underlying claims that the trial court and trial counsel deprived him of his right to testify. Reasonable jurists would not disagree with the district court's denial of the fourth ground for relief.

Claim Six—Trial Court's "No-Contact Order"

In his § 2254 petition, Cody listed various ways that the trial court's "no contact" order deprived him of his constitutional rights. In his reply, however, Cody limited his claim to the denial of his right to access counsel of his choice. According to Cody, as a result of the trial court's

order, he was placed in solitary confinement in the Cuyahoga County Jail "with an order prohibiting him from any contact with the outside world." Like his claims concerning his right to testify, this claim was based on the trial court record and should have been raised on direct appeal. *See Spaulding*, 119 N.E.3d at 868. To the extent Cody argued that the claim was based on evidence outside the trial court record, he did not raise it in any state post-conviction petition and could not do so now because state law bars him from raising it in a second or successive petition for post-conviction relief. *See* Ohio Rev. Code § 2953.23(A); *Landrum*, 625 F.3d at 919. Reasonable jurists would therefore agree with the district court's determination that this claim was procedurally defaulted.

Cody argued that appellate counsel was ineffective for failing to raise this issue on direct appeal and that this failure of appellate counsel should excuse the procedural default. Despite Cody's insistence on de novo review of this claim, the district court determined that AEDPA deference was warranted. The court, however, ultimately determined that, even under a de novo standard of review, Cody failed to establish that appellate counsel was ineffective. Reasonable jurists would not disagree.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court has held that although the Sixth Amendment does not entitle an indigent criminal defendant to his counsel of choice, it does guarantee him a right to adequate representation. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989). As the district court detailed in its order, Cody was deemed indigent throughout the criminal proceedings. Although there was a time that Cody was permitted to represent himself, he had court-appointed counsel at all times when he was represented. And in his Rule 26(B) application where he asserted that appellate counsel should have argued that he was denied the right to counsel of his choice, Cody maintained that he was indigent. Cody therefore was not entitled to counsel of his choice, and appellate counsel was not ineffective for failing to argue on appeal that he was denied this right. *See Coley*, 706 F.3d at 752.

Further, to the extent Cody argued that, even if indigent, he still had a right to attempt to retain private counsel and the court's no-contact order prevented him from doing so, Cody pointed to nothing in the record to show that he ever informed the trial court of his desire to retain private counsel. In the absence of any indication in the record that the trial court was aware that Cody wished to hire his own attorney, appellate counsel had no basis for pursuing the issue on appeal. On this record, reasonable jurists could not disagree with the district court's conclusion that Cody's ineffective-assistance-of-appellate-counsel claim could not overcome the procedural default of his claim that he was denied the right to counsel of his choice.

Claims Sixteen and Seventeen—Trial Counsel's Failure to Develop a "CIA Defense"

Both of these claims relate to trial counsel's alleged failure to pursue a defense that Cody had a "covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 Office of the President." Cody first raised these issues in his June 2014 post-conviction petition. On appeal from the trial court's denial of this petition, the state appellate court declined to review the claim as barred by the doctrine of res judicata because Cody could have raised the claim on direct appeal but failed to do so. *Cody II*, 2015 WL 4133281, at *4. Cody again raised these issues in his July 2018 petition for post-conviction review. On appeal from the denial of this petition, the Ohio Court of Appeals affirmed on the ground that the petition was untimely. *Cody IV*, 2019 WL 3046584, at *5-6.

To the extent the ineffective-assistance claims in ground sixteen and seventeen were raised in Cody's June 2014 post-conviction petition or in his July 2018 petition, they are procedurally defaulted. In both cases, the state appellate court relied on procedural rules—res judicata and a time bar—to deny review of the claims. And both rules are considered adequate and independent state procedural grounds for procedural default purposes. *See Smith v. Warden, Toledo Corr. Inst.*, 780 F. App'x 208, 219 (6th Cir. 2019); *Hartman v. Bagley*, 492 F.3d 347, 357-58 (6th Cir. 2007). Because Cody failed to provide any viable explanation for his failure to raise these claims of ineffective-assistance earlier, the district court concluded that he failed to establish cause or

prejudice to excuse the procedural default. Reasonable jurists would not debate the district court's denial of claims sixteen and seventeen as procedurally defaulted.

Actual Innocence

Finally, reasonable jurists would not disagree with the district court's determination that Cody failed to overcome the procedural default of his claims through a showing of actual innocence. The fundamental-miscarriage-of-justice exception to the procedural-default rule "has been applied only when a habeas petitioner has demonstrated that he is actually innocent." *Hodges v. Colson*, 727 F.3d 517, 532 (6th Cir. 2013). "For a claim of actual innocence to be credible, a defendant must '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.'" *Searcy v. Berghuis*, 549 F. App'x 357, 363 (6th Cir. 2013) (emphasis omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

Cody argued that new evidence concerning his CIA affiliation established his innocence. The Ohio Court of Appeals summarized this evidence as follows:

> (1) various statements purportedly made by the prosecutor that Cody claims show the state knew he was involved with the CIA; (2) Cody's 19-page affidavit; (3) Cody's curriculum vitae; (4) the CIA's response to Cody's Freedom of Information Act request dated January 29, 2018; (5) a 1973 redacted letter from a law firm based in Hawaii that purports to list the name "John Cody" as one of the firm's associates; (6) various transcripts and court filings; and (7) a letter from the Office of Government Information Services dated April 19, 2018, explaining the CIA's response to Cody's Freedom of Information Act request.

Cody IV, 2019 WL 3046584, at *5. As explained by the magistrate judge in the report and recommendation to deny Cody's petition, much of this evidence was not new because it concerned information known to Cody at the time of trial and none of it was exculpatory because it "d[id] not show that Cody was an undercover CIA agent, or . . . that his actions running the USNVA were excused by virtue of his alleged CIA affiliation such that . . . no reasonable juror would have convicted him of the charges had it known this information."

Accordingly, Cody's application for a COA is **DENIED** and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

B-1: Decision of United States District Court and

B-2 Report and Recommendations of the United States Magistrate Judge

Appendix B-1

Decision of United States District Court

Cody v. Sheldon, 2021 U.S. Dist. LEXIS 73493

United States District Court for the Northern District of Ohio

April 16, 2021, Decided; April 16, 2021, Filed

Case No. 1:18cv1787

Reporter
2021 U.S. Dist. LEXIS 73493 * | 2021 WL 1437557

John Cody, Also known as Bobby Thompson, Petitioner, -vs- Ed Sheldon, Warden, Respondent

Prior History: Cody v. Marquis, 2019 U.S. Dist. LEXIS 56519, 2019 WL 1455775 (N.D. Ohio, Apr. 2, 2019)

Core Terms

appellate counsel, trial court, state appellate court, defaulted, ineffective, direct appeal, state court, magistrate judge, Counts, ineffective assistance, trial counsel, state trial, merits, no contact, pro se, sentence, court's decision, fail to raise, post-conviction, Grounds, defense counsel, argues, deference, reasons, clearly established federal law, solitary confinement, appointed, vacation, proceedings, right to testify

Counsel: [*1] John Cody, also known as, Bobby Thompson, Petitioner, Pro se, Mansfield, OH.

For Ed Sheldon, originally named as, Dave Marquis, Respondent: Stephanie L. Watson, Office of the Attorney General - Criminal Justice Section, Columbus, OH.

Judges: PAMELA A. BARKER, UNITED STATES DISTRICT JUDGE. Magistrate Judge Kathleen Burke.

Opinion by: PAMELA A. BARKER

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the Report & Recommendation ("R&R") of Magistrate Judge Kathleen Burke (Doc. No. 65), which recommends that Petitioner John Cody's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be dismissed in part and denied in part. Petitioner has filed Objections to the R&R. (Doc. No. 74-1.) For the following reasons, Petitioner's Objections (Doc. No. 74-1) are OVERRULED, the Report & Recommendation (Doc. No. 65) is ADOPTED as set forth herein, and the Petition (Doc. No. 1) is DENIED.

I. Summary of Facts

The following is a brief summary of the facts describing Cody's state court conviction as summarized by the Ohio Court of Appeals:

App. B-1

[¶ 2] This case arises from an investigation regarding the United States Naval Veteran's Association ("USNVA"), a charity organized and created by a person holding himself out to be [*2] Bobby Thompson. Through the investigation, it was discovered that the USNVA was a sham, fabricated by a person named John Donald Cody, who manipulated unsuspecting individuals across the United States to donate to this charity, unlawfully procuring millions of dollars.

[¶ 3] In mid-2010, the state of Ohio began its investigation into the USNVA after a story was published in the St. Petersburg Times that the charity was fictitious. Through its investigation, the state revealed that Ohio residents had been solicited by various professional fundraisers contracted by USNVA to donate money to the USNVA. It was discovered that approximately $2 million was solicited on behalf of the USNVA from resident-donors in the state of Ohio.

[¶ 4] As a result of the investigation, on October 13, 2010, Appellant was indicted in Cuyahoga C.P. No. CR-10-543025 on charges of engaging in a pattern of corrupt activity involving the USNVA, money laundering, and aggravated theft. In December 2010, another indictment was issued against Appellant in Cuyahoga C.P. No. CR-10-545577 on 22 additional charges, including engaging in a pattern of corrupt activity, aggravated theft, money laundering, tampering with records, [*3] and identity fraud.

[¶ 5] A warrant was subsequently issued for Appellant's arrest. In April 2012, Appellant was finally apprehended in the state of Oregon.

State v. Cody, 2015- Ohio 2261, 34 N.E.3d 189, 191 (Ohio App. 8th Dist. 2015).**1**

II. Relevant Procedural History2

A. Trial Court Proceedings

In May 2012, Cody was arraigned, assigned counsel, and pleaded not guilty in Cuyahoga County Court of Common Pleas Case Nos. CR-10-543025 and CR-10-545577. (Doc. 42-1, Exhs. 5, 6.) On July 12, 2012, in Case No. CR-10-545577, the state trial court referred Cody to the court's psychiatric clinic for an evaluation. (Doc. 42-1, Exh. 7.)

On July 25, 2012, Cody was indicted by the Cuyahoga County Grand Jury in a superseding indictment on the following twenty-four (24) counts: (1) one count of engaging in a pattern of corrupt activity (Ohio Rev. Code § 2923.32(A)(1)) (Count 1); (2) one count of complicity to theft (Ohio Rev. Code § 2913.02(A)(3)) (Count 2); (3) seven counts of complicity to money laundering (Ohio Rev. Code § 1315.55(A)(1)) (Counts 3-9); (4) one count of tampering with records (Ohio Rev. Code § 2913.42(A)(2)) (Count 10); (5) one count of complicity to tampering with evidence (Ohio Rev Code § 2913.42(A)(2)) (Count 11); (6) twelve counts of identity fraud (Ohio Rev. Code § 2913.49(B)) (Counts 12-23); and (7) one count of possession of criminal tools (Ohio Rev. Code § 2923.24) (Count 24). (Doc. 42-1, Exh. 9.) This case was assigned Cuyahoga County Court of Common [*4] Pleas Case No. 12-CR-565050. (*Id.*) Cody, through counsel, entered a plea of not guilty. (Doc. 42-1, Exh. 10.)

The previous indictments issued in Case Nos. CR-10-543025 and CR-10-545577 were subsequently dismissed and the State proceeded on the charges in Case No. CR-12-565050. (Doc. 42-1, Exhs. 15, 16.) On August 21, 2012, the parties stipulated to the competency reports that had been prepared as part of Cody's psychiatric evaluation in Case No. CR-10-545577. (Doc. 42-1, Exh. 11.)

On January 30, 2013, Cody filed a waiver of attorney and sought to represent himself. (Doc. 42-1, Exh. 18.) After a hearing, the state trial court permitted Cody to proceed *pro se* and appointed his then-counsel, Joseph Patituce, as advisory counsel. *See* Doc. 42-1, Exh.19; Doc. 43-1 at Tr. 125-145 (Tr. Vol. 1).

On August 26, 2013, a month before trial, Cody, on the record, relinquished his position as *pro se* counsel and Mr. Patituce was assigned as counsel of record. *See* Doc. 42-1, Exh. 34; Doc. 43-2 at Tr. 493 (Tr. Vol. 2). Defense

counsel then filed a motion to continue trial, which the State opposed. (Doc. 42-1, Exhs 35, 36.) The state trial court denied Cody's motion for a continuance. (Doc. 42-1, Exh. 37.) [*5]

On September 30, 2013, the matter proceeded to a jury trial. (Doc. No. 43-1.) After a three-week trial, Cody was found guilty of Counts 1-23 as charged in the superseding indictment. (Doc. No. 42-1, Exh. 40.) Count 24 (possession of criminal tools) was dismissed by the state trial court. (*Id.*)

On December 10, 2013, Cody, through counsel, filed a motion for a new trial, arguing that the jury improperly considered the fact that he did not testify. (Doc. 42-1, Exh. 41.) On December 16, 2013, the state trial court denied Cody's motion. (Doc. 43-22 at Tr. 4534-4535 (Tr. Vol. 22)). The state trial court proceeded to sentencing and ordered Cody to serve ten years on Count 1; eight years on Count 2 to run consecutively with Count 1; 24 months on each of Counts 3-9, served concurrently to each other but consecutively to Counts 1 and 2; 24 months on Counts 10-11, served concurrently to each other but consecutively to Counts 1, 2 and 3-9; five years on Count 12, served consecutively with Counts 1, 2, 3-9 and 10-11; and 12 months on Counts 13-23, served concurrently to each other but consecutively to Counts 1, 2, 3-9, 10-11 and 12, for an aggregate sentence of 28 years in prison. (Doc. No. 42-1, [*6] Exh. 43.) In addition, the state trial court ordered Cody to spend every Veteran's Day in solitary confinement. (*Id.*)

B. Direct Appeal

In December 2013, Cody, through new counsel, filed a timely appeal of his convictions and sentence in the state appellate court, in which he raised the following three grounds for relief:

1. The trial court erred, and violated due process, when it entered convictions for eleven counts of identity fraud for which it did not have jurisdiction. (Fifth and Fourteenth Amendments, United States Constitution; Sections 10 and 16, Article I, Ohio Constitution. R.C.2901.11. December 17, 2013 Journal Entry of Sentence).

2. The trial court violated the Appellant's rights to due process and a fair trial when it allowed the admission of irrelevant and overly prejudicial testimony and documentary evidence referencing a potential future charitable organization Appellant was establishing. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution; Evid.R. 402; 403 (Tr. at 1215-1217; 1965-1967; 2223-2243; 3841-3861; 3711-3716; 3832-3858; Exh. 26-1).

3. The trial court erred when it imposed a day of solitary confinement on each Veteran's Day (Tr. at 4550; Dec. 16, 2013 Journal Entry).

(Doc. 42-1, Exhs. 44, 45.)

On June 11, 2015, the state appellate court sustained Cody's first ground for relief, finding that the State of Ohio [*7] did not have jurisdiction over the 11 counts of identity fraud contained in Counts 13 through 23 of the indictment. *State v. Cody*, 34 N.E.3d at 191-196. The court vacated Cody's convictions on those counts and remanded for "a new judgment entry of conviction to reflect that Counts 13 through 23 are vacated, including [Cody's] 12-month total sentence imposed for these offenses." *Id.* at 196. In addition, the state appellate court agreed with Cody's third ground for relief and ordered the state trial court to vacate the imposition of solitary confinement on Veteran's Day. *Id.* In all other respects, Cody's convictions and sentence were affirmed. *Id.*

Proceeding *pro se*, Cody timely appealed to the Supreme Court of Ohio. In his Memorandum in Support of Jurisdiction, he raised the following propositions of law:

1. The Court of Appeals Lacked Jurisdiction to make any hypothetical ruling, or even to address the subject at all, on any Evid. R. 401-404(B) issues; and the fact evidence came in as relevant to dismissed Counts 13-24 [identity fraud

(others) and Possession of Criminal Tools] required jurisdictional remand to the Common Pleas Court for retrial as to how that evidence was to come in, or if it should come in at all.

2. Where an Appellate [*8] Court creates a new Evid. R. 101, 105, 401-404(B) issue which stems from a preliminary holding or finding, a criminal defendant may retain a constitutional right to trial on such issue(s) by a common pleas court and jury, under the 6th and 14th Amendments to the United States Constitution, and Art. I, §§5 and 10 of the Ohio Constitution.

3. The Trial Court Lacked Subject Matter Jurisdiction to Proceed on CR-12-565050 A, At All, because the entire indictment was void at the moment of its presentment by the Grand Jury.

4. If the Appellate Court had jurisdiction to decide the hypothetical evidentiary issues it did in Section III of its Opinion, the Harmless Error Standard, not the Plain Error Standard, should have applied, and the case remanded for new trial.

4(A). Assuming the Appellate Court had authority to rule on the 403/404(B) issues raised, the introduction of that evidence amounted to character assassination of the Defendant unfairly prejudicing a trial against him, and therefore new trial was mandated.

(Doc. 42-1, Exh. 54) (as in original). The Supreme Court of Ohio declined jurisdiction on October 28, 2015. (Doc. No. 42-1, Exh. 56.)

C. Remand from Appellate Court

On remand from the state appellate court, the state trial court issued a journal [*9] entry on December 7, 2015, vacating Counts 13-23 and the concurrent 12-month aggregate sentence for those counts. (Doc. 42-1, Exh. 59.)

D. Post-Conviction Filings

In June 2014, while his direct appeal was pending, Cody filed his first *pro se* petition for postconviction relief in the state trial court. (Doc. No. 42-1, Exh. 60.) Therein, he raised the following five claims:

1. Ineffective Assistance of Defense Counsel Mr. Patituce - Denial of 6th/14th Amendment Rights, U.S. Const.; Sec. 10, Art. I, Ohio Const. Rights.

2. Lack of territorial jurisdiction and venue on Counts 3-9 (Money Laundering) and Counts 13-23 (Identity Fraud), as required by the federal and Ohio constitutional fair trial and due process mandates, and the Ohio jurisdictional/venue statutes (2901.11/2901.12) (5th/14th/6th Amend. U.S. Const; Sec 16, Art I, Sec. 5, Art. I, Ohio Const. - Right of Due Process, Right to Fair Trial.

3. Lack of State provided required discovery (off the record, outside the record) relating to Petitioner's Notice of [CIA] Defense:3 in violation of *Brady v. Maryland*

4. Denial of Due Process Rights (5th/Fourteenth Amends. U.S. Const.; Sec. 16, Art. I), Denial of Right to U.S. Const; 5 Art. I Ohio Excessive Fines/Cruel and Unusual Const. Sec. 9, Art. I Ohio Const.) conditions imposed on Defendant pre-trial while in custody by agents of the State dehors [*10] record, and trial counsel's ineffectiveness in not raising these issues sufficiently with the Court. Also claim's constitutional basis includes violations of 14th Amend., U.S. Const. and Ohio Const. prescriptions for Equal Protection of the Law.

5. Violation of Due Process Clauses (5th/14th Amendments, U.S. Const. and Ohio Const. prescriptions for Equal Protection of Amendments, U.S. Const., Sec. 16 Art. I, Ohio Const.), because the Attorney General's Office brought and maintained the prosecution for reasons forbidden by the U.S. and Ohio Constitutions, to wit: prosecutorial misconduct involving (a) Vindictive Prosecution, (b) Selective Prosecution, *U.S. v. Armstrong*, 517 U.S. 456, 463 (1996), 116 S. Ct. 1480, 134 L. Ed. 2d 687, *U.S. v. Lupton*, 2008 U.S. Dist. LEXIS 87217 (Ea. Dist. Wis.); prosecutorial misconduct (suppression of exculpatory Brady material....

(*Id.*) (as in original). In October 2014, the state trial court denied Cody's petition. (Doc. 42-2, Exh. 65.)

Cody filed a timely appeal, in which he raised nine (9) assignments of error.**4** (Doc. No. 42-2, Exhs. 66, 67.) On July 9, 2015, the state appellate court overruled Cody's assignments of error and affirmed the judgment of the trial court. *See State v. Cody*, 2015 Ohio 2764, 2015 WL 4133281 (Ohio App. 8th Dist. July 9, 2015). Cody appealed to the Supreme Court of Ohio, which declined his discretionary appeal. *See State v. Cody*, 143 Ohio St.3d 1501, 2015-Ohio 4468, 39 N.E.3d 1271 (2015). He also filed a petition for a writ of certiorari in the Supreme Court of the United States, which was denied. *Thompson* **[*11]** *v. Ohio*, 578 U.S. ----, 136 S.Ct. 2023, 195 L.Ed.2d 228 (2016).

Meanwhile, in June 2015, Cody filed a *pro se* Notice of Intent to File Application to Reopen Direct Appeal pursuant to Ohio App. R. 26(B). (Doc. No. 42-3; Exh. 74.) In his Application, he raised the following fourteen (14) grounds for relief:

1. Appellate Counsel failed to argue the State suppressed outcome determinative required *Brady* disclosures, related due process violations, and the forced ineffectiveness of trial counsel.

2. Appellate Counsel failed to argue it was error for the trial court to deny Defendant any witnesses at trial in violation of the 5th Amendment's right to equal protection, the 6th Amendment's right to compulsory process, and the 14th Amendment's right to due process of law.

3. Appellate Counsel failed to argue automatic reversal was required because the Defendant was forced to stand trial while incompetent, violating the standards of *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966) and *State v. Were*, 94 Ohio St. 3d 173, 2002- Ohio 481, 761 N.E.2d 591 (2002).

4. Appellate Counsel failed to argue that the trial court's order (JE 3.19.2013) placing the Defendant, after he had been appointed counsel *pro se*, and through 12.16.2013, in solitary "no contact" confinement in the Cuyahoga County jail pre-trial, and other court and jail imposed condictions [sic] pertinent to that confinement, exacerbated the Defendant's mental **[*12]** state of dysfunctional incompetence to stand trial, in violation of the Constitution's prohibition against cruel and unusual punishment, because that placement and those condictions [sic] met that standard and the trial court had a penchant for punishing the defendant with solitary confinement [see, Sentencing order, JE 12.17.2013; this Court's holding that portion of the sentence outside the boundaries of Ohio permissible sentences, direct appeal, *State v. Thompson* (caption as retained by Ohio Supreme Court 2015-Ohio-4468), 2015-Ohio 2261]; *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). The trial court's solitary "no contact" order bore no stated rationale; it had no purpose and/or was overly punitive or was an exaggerated response to a fictional or perceived concern.

5. Appellate counsel failed to argue Defendant was denied his right to testify on his own behalf under the 6th and 14th Amendments U.S. Constitution, pursuant to his holdings of *Sheens v. Haskis*, 4 Fed. Appx. 236 (6th Cir., 2001), and/or to argue trial counsel's ineffectiveness related thereto.

6. Appellate Counsel failed to argue the requirements of *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) and *State v. Smith*, 2012-Ohio-5420 (Cuyahoga Cty. 2012) were not met in the appointment of Defendant as counsel *pro se* or, in the alternative, if Defendant were effectively appointed, he was forced involuntarily and unintelligently to relinquish that appointment in violation of due process. **[*13]**

7. Appellate counsel failed to argue that the trial court's failure to rule on pre-trial motions in CR-12-565050A denied the Defendant his right to a fair trial and due process of law, pursuant to *U.S v. Ruiz*, 2536 U.S. 622

(2002) *et. al* because the defendant prosecution when they make legitimate requests by motion sufficiently in advance of trial requesting ruling on fundamental questions as to how the trial is to proceed, and its parameters, are entitled to court guidance in preparation where one side of the case alone, took 6 weeks of evidence presentation.

8. Appellate counsel failed to argue Count 12 should be dismissed for insufficiency of the evidence, judgment contrary to the weight of the evidence and lack of subject matter jurisdiction under *Stassheim v. Daily*, 331 U.S. 280 (1911).

9. Appellate counsel failed to argue that the tried indictment should have been dismissed for denial of Quick and Speedy Trial, a violation of the Defendant's due process rights pursuant to the 6th and 14th Amendments, Article I §10 of the Ohio Constitution; *State v. Sloane*, 2009-Ohio App. LEXIS 1022 (Mahoning Cty., 2009); and *State v. Johnson*, 2013-Ohio-856 (Butler Cty., 2013). The mental competency examination ordered for CR-10-545577A did not carry over, and could not have carried over, into CR-12-565050A because the subject matter of the examination as to the charges was [*14] fundamentally different for the two cases, and because the trial court could not have intended for such a carryover into a case which did not exist at the time of the order.

10. Appellate counsel failed to argue that, if the trial court's order for a mental competency examination did not carry over from 10-545577A to 12-565050-A, then Defendant's due process rights to a competency exam and R.C. § 2945.371(G) finding in 12-565050A were not met.

11. Appellate counsel failed to argue evidence of Defendant's protected medical and dental information at trial should have been stricken.

12. Appellate counsel failed to argue it was contrary to Ohio law on allied offenses not to run the sentences on Count 2 with Counts 3-9 as concurrent.

13. Appellate counsel failed to argue that a superfine and costs imposed on the Defendant were contrary to law and void *per se.*

14. Appellate counsel failed to argue that the trial court's sentence was contrary to Ohio law, and to the equal protection and due process clauses of both Constitutions because it failed to make a singular review of consistency and proportionality with the Co-Defendant's sentence. Alternatively, if the underlying argument is rejected, or not heard on Re-Opening causing Blanca [*15] Contreras' cases are not part of the record herein, thus causing Appellant to lose this claim, Appellate counsel, by not moving for inclusion, caused Appellant to suffer the prejudice described in the supporting Affidavit.

(Doc. 42-3, Exh. 75.) (as in original). The state appellate court denied Cody's 26(B) Application on the merits on April 21, 2017. *See State v. Cody*, 2017 Ohio 1543, 2017 WL 1507211 (Ohio App. 8th Dist. April 21, 2017). Cody appealed, and the Supreme Court of Ohio thereafter declined jurisdiction on July 26, 2017. (Doc. No. 42-3, Exhs. 78, 81.)

Nearly a year later, on June 13, 2018, Cody filed, in the state trial court, a *pro se* motion for leave to file a delayed motion for new trial. (Doc. 42-3, Exh. 83.) Therein, he argued that he was unavoidably prevented from discovering evidence of prosecutorial misconduct and evidence of an official CIA document indicating that Cody had a classified affiliation with the CIA. (*Id.*) He simultaneously filed a pleading titled "*In Limine* Motion for New Trial/Request for R.C. 2953.21 et seq. Post-Conviction Relief." (Doc. 42-3, Exh. 84.)

On July 5, 2018, Cody filed a *pro se* "Petition to Vacate or Set Aside Judgment of Conviction or Sentence (hereinafter 'PCRP')" pursuant to Ohio Rev. Code § 2953.21, again arguing that he was unavoidably prevented from discovering [*16] evidence disclosing his alleged CIA classified affiliation because of prosecutorial misconduct in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). (Doc. 42-3, Exh. 87.) He also asserted a violation of *McCoy v. Louisiana*, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018), arguing that his trial attorney

interfered with his autonomous right to pursue his chosen "CIA defense" strategy. (*Id.*) In orders issued on July 30, 2018, the trial court denied all three filings. (Doc. 42-3, Exh. 88.)

On August 6, 2018, Cody filed a "Petition to Vacate Judgment of Conviction and Sentence made 12.16.2013 ('PCRP3')," in which he argued that his sentence was void because the trial court did not follow mandatory sentencing requirements under Ohio law. (Doc. 42-3, Exh. 89.) On August 14, 2018, the trial court denied Cody's petition. (Doc. 42-3, Exh. 90.)

Cody appealed the trial court's rulings. (Doc. No. 42-3, Exh. 91.) The state appellate court subsequently consolidated his three appeals. (Doc. No. 42-3, Exh. 92.) In his merits brief, Cody raised fourteen assignments of error, which are set forth in full in the Magistrate Judge's Report & Recommendation and will not be repeated herein. (Doc. No. 42-3, Exh. 93.)

On July 11, 2019, the state appellate court issued a decision affirming the trial court's rulings. [*17] *See State v. Cody*, 2019 Ohio 2824, 2019 WL 3046584 (Ohio App. 8th Dist. July 11, 2019). Finding Cody's assignments of error difficult to decipher, the state appellate court construed his arguments as raising the following two assignments of error:

1. Cody argues that he was not properly informed of his sentence on Count 1, engaging in a pattern of corrupt activity.

2. Cody argues that there is "new evidence" that is both "material" and "outcome determinative" and he should be granted a new trial and postconviction relief.

Id. The state appellate court rejected the first assignment of error as barred by the doctrines of law of the case and *res judicata*, and rejected the second assignment of error because "[n]one of the documents attached to Cody's [petition] clearly and convincingly demonstrate that he was unavoidably prevented from discovering the evidence on which he relies." *Id.* at * 6. Cody appealed to the Supreme Court of Ohio, which declined to accept jurisdiction pursuant to S. Ct. Prac. R. 7.08(B)(4).

Meanwhile, on April 10, 2019, Cody filed a *pro se* Petition to Vacate or Set Aside Judgment of Sentence in the state trial court on the basis of the United States Supreme Court's decision in *Timbs v. Indiana*, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019). (Doc. No. 42-4, Exh. 97.) The state trial court denied the Petition on April 15, [*18] 2019. (Doc. No. 42-4, Exh. 98.) The state appellate court affirmed on September 24, 2020. *See State v. Cody*, 2020-Ohio-4566, 2020 WL 5667344 (Ohio App. 8th Dist. Sept. 24, 2020). It does not appear that Cody appealed this decision to the Supreme Court of Ohio.

E. Federal Court Proceedings

On July 24, 2018,5 Cody filed a *pro se* Petition for Writ of Habeas Corpus in this Court. (Doc. No. 1.) Therein, he asserts the following grounds for relief:

Ground One: Where subject matter jurisdiction of the trial court was found not to exist on 12 out of 24 counts of Cody's indictment, the due process clauses and fair trial concepts of the United States Constitution entitled the defendant to new trial on the remaining convicted-upon counts without the jury considering evidence upon the dismissed counts, if at all, with the taint of a criminal conviction attached to each, and such consideration having taken place, not in the context of res gestae, but only in the context of relevance to criminal guilt as charged on those dismissed counts, on the ground that, under the circumstances of Cody's case, and defense he forwent involuntarily, (but in part) because of that consideration, he was unduly prejudiced by the circumstances of the presentation of the evidence on Counts 13-24 at trial.

Ground Two: Cody's [*19] prerogative pursuant to the 6th Amendment to decide upon the objective of his defense was violated by the activities of the prosecution, the trial court, and/or trial counsel Patituce, or one or more of them acting in complicity with another, or one or more than one other, requiring vacation of the 12.16.2013 judgment without the necessity of Cody showing prejudice.

Ground Three: In violation of the 6th Amendment and the 14th Amendment's right to due process of law, of the 5th Amendment's right to compulsory process, the trial court denied the Defendant any of his 'CIA defense' witnesses at trial by failing to provide the Defendant with pro se requested defense witnesses to be served with subpoenas; by quashing all pro se defense expert witnesses; by forcing the Defendant, through the above, and by the pressures of solitary confinement, to accept appointed counsel who was refusing, as a matter of trial strategy contrary to the will of the Defendant, to pursue the CIA defenses, including demanding these witnesses; and Appellate Counsel failed to raise or ague the above in violation of his Strickland responsibilities.

Ground Four: The Defendant was denied his right under the 6th and 14th Amendment to the U.S. Constitution to testify on his own behalf at trial by the trial court and/or [*20] by the forced or unforced ineffectiveness of trial counsel related thereto, pursuant to [clearly established federal law as explained by] *Sheens v. Haskins*, 4 Fed. Appx. 236 6th Cir. 2001) et al., and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Five: Automatic reversal is required because Defendant's due process and equal protection rights pursuant to the U.S. Constitution were violated because a satisfactory colloquy and examination to be pro se counsel pursuant to the ... requirements of *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) was not held prior to the appointment by the trial court of the Defendant as counsel pro re; or, in the alternative, if Defendant were effectively appointed counsel, he relinquished involuntarily and unintelligently that appointment on 8.26.2013 in violation of those same rights to an appointed counsel who was refusing at trial to aggressively pursue Defendant's "CIA defense," because of prosecutorial statements that the facts of that defense lacked credibility, contrary to the will of the Defendant as to trial strategy; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Six: In violation of the Defendant's rights [*21] of due process of law under the 14th and 6th Amendments pursuant to [clearly established federal law as explained by] *Gibson v. Washoe*, 290 F. 3d 1175, 1188 n. 9 (9th Cir. 2002) and *Alberti v. Klevenhagen*, 790 F. 2d 1220, 1224 (5th Cir. 1986) et al., and/or in violation of his rights against cruel and unusual punishment under the 8th Amendment pursuant to *Bell v. Wolfish*, 441, U.S. 520 (1979) et al., the trial court's "no contact" order [JE 3.19.2013] placing the Defendant, after he had been appointed counsel pro se, in solitary confinement in the Cuyahoga County Jail pretrial through 12.16.2013, and other court and jail imposed conditions pretrial to that confinement, contributed to the causation of the Defendant's mental state of dysfunctional incompetence to stand trial; to plea bargain; and to his relinquishment of his right to self-representation on 8.26.2013; contributorily caused his attempted suicide; blocked his fundamental right to access counsel of choice pursuant to *Sullivan v. Louisiana, et al.*, and to access his courts pursuant to *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), et al., and to obtain discovery on his own behalf pursuant to [clearly established federal law as explained by] *D'Ambrosio v. Bagley*, 527 F. 3d 489, (6th Cir. 2008), et al.,. the 'no contact' order bore no stated rationale; it had no purpose and/or was overly punitive or was an exaggerated response to a fictional or perceived concern; and [*22] Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Seven: Automatic reversal and new trial were required because the Defendant was denied an incompetency continuance as ordered by the trial court, violating the due process and equal protection standards of *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), et al. Appellate Counsel failed to raise or argue the above in violation of his *Strickland* responsibilities.

Ground Eight: Defendant was never given a constitutionally mandated (pursuant to the due process and equal clauses of the U.S. Constitution) mental health and insanity examination, in Defendant's case No. CR-12-565040A, because he was never given such an examination tailored, on the insanity issue, to the times, facts and specific charges of 12-565050A, and no required finding was ever made; and Appellate Counsel failed to raise or argue the above in violation of his *Strickland* responsibilities.

Ground Nine: There was a lack of subject matter (territorial) jurisdiction and insufficiency of the evidence in violation of the due process of law clauses of the U.S. Constitution, on Count 12, Identity Fraud on Bobby Thompson of Washington State, because the Defendant never |*23| met any of the elements of the crime in Ohio other than the use of the generic name "Bobby Thompson" and that was insufficient to tie that use with an actual victim identified by the State as required; and Appellate Counsel failed to raise or argue the above in violation of his *Strickland* responsibilities.

Ground Ten: Trial Counsel Patituce provided numerous instances of I.A.C., pre-trial and at trial, and violation of the autonomous decision making required by Faretta and McCoy as to trial strategy, which can only be evidenced by the dehors record evidence provided by Cody's two PCRP trial court affidavits; and those instances require new trial under *Strickland*; or new trial under McCoy.

Ground Eleven: This claim is a lack of subject matter (territorial) jurisdiction for the Indictment Counts 3-9 (Money Laundering) of which Cody was convicted. Cody requests dismissal with prejudice of those counts. Subject matter jurisdiction is a fundamental 14th Amendment due process right. *Clendenning v. Newpage*, 2010 U.S. Dist. LEXIS 11289, HN 17 (S.D. Ohio, 2010). Lack of territorial jurisdiction is a structural error requiring dismissal with prejudice. *Strasshein v. Daily*, 221 U.S. 280 (1911) (requiring a sufficient territorial nexus with the actus reus of the crim[e]s for subject matter jurisdiction |*24| to apply); *U.S. v. Gatewood*, 173 F. 3d 983 (6th Cir. 1999). Ohio's long-arm territorial jurisdictional statutes must be strictly construed against the state of Ohio. *Clendenning, supra*, at HN 17; *State v. Human*, 381 N.E. 2d 969 (Oh. S. Ct. 1978), citing § 18, Art. IV, Ohio Constitution.

Ground Twelve: The State failed to disclose exculpatory material and information relating to Cody's CIA defense, and classified intelligence affiliation with the CIA and the Bush 43 office of the President, known personally to Mike DeWine, constituting (a) a Brady-Kyles violation; (b) prosecutorial misconduct involving (1) suppression with a bad intent; and (2) lying about the non-existence of the information so as to effectively intimidate defense counsel Patituce to sabotage Cody's CIA defense.

Ground Twelve (1): There was a violation of the due process clauses of the 14th and 6th Amendments because Mike DeWine, and his office of the Ohio attorney general, brought and maintained the prosecution for reasons proscribed by the Constitution, to wit, causes involving vindictive, and selective prosecution; and because prosecutorial misconduct occurred by reason of the prosecution's strategy of suppressing Cody's CIA defenses, and, more particularly, by affirmatively misrepresenting that Cody never had any affiliation with the CIA or any office of any president of the United States, with a purposive |*25| view toward intimidating, and which misrepresentations did intimidate, defense counsel Patituce in refusing Cody's chosen strategy of the CIA defense.

(Doc. 1-1, pp. 9-15) (as in original). After being granted leave to amend his petition, Cody raised the following five additional grounds for relief:

Ground Thirteen: *Brady* violations occurred in the denials to Cody at trial of exculpatory evidence showing he had a covert classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation ... of the CR-12-565050A judgment.

Ground Fourteen: Denial of Cody's right to counsel, and to the effective assistance of trial counsel (Patituce) for his defense occurred in the denial to Cody at trial of exculpatory evidence showing or tending to show Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to new trial, or a vacation of the CR-12-565050A trial judgment.

Ground Fifteen: Prosecutorial misconduct occurred in the suppression of exculpatory evidence showing, or tending to show, Cody had covert, classified intelligence |*26| affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050A trial judgment.

Ground Sixteen: Cody was denied at trial the effective assistance of counsel (Patituce) with his defense because Patituce failed to properly investigate and develop evidence showing, or tending to show, Cody has a covert,

classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050A trial judgment.

Ground Seventeen: *McCoy v. Louisiana* violations of Cody's autonomous 6th Amendment right to counsel; and his 6th Amendment right to effective assistance of counsel, in denying Cody his desired defense strategy of CIA-affiliation, including denying Cody his desired right to self-testify at trial, occurred; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050A trial judgment.

(Doc. 41 at pp. 1-2) (as in original).

The record reflects that, over the course of these federal proceedings, Cody filed numerous motions, including motions for stay and abeyance, a motion to amend complaint, two motions for amended [*27] order, a motion for provision of copies of court records, a motion for service of pleadings, a motion for relief from order, a motion to withdraw motion to amend petition, and a motion for appointment of counsel. (Doc. Nos. 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30.) In July 2019, Magistrate Judge Burke issued a series of Orders addressing Cody's many motions. She denied his motion for appointment of counsel and denied several of his other motions as premature. (Doc. No. 36, 37.) In addition, the Magistrate Judge found that Cody was a vexatious litigant and enjoined him from filing any new motions in this case with the exceptions of motions for leave to file, as directed in that Order. (Doc. No. 38.)

In August 2019, Respondent filed a Return of Writ along with the voluminous state court record. (Doc. Nos. 42, 43.) Cody filed his Traverse on December 9, 2019.6 (Doc. No. 57.)

On March 24, 2020, the Magistrate Judge issued a lengthy Report & Recommendation in which she recommended that Cody's Petition be dismissed in part and denied in part. (Doc. No. 65.) After receiving several extensions of time, Cody filed his Objections on August 26, 2020. (Doc. No. 74-1.) Respondent did not file [*28] a Response.

III. Standard of Review

When a petitioner objects to a magistrate judge's resolution of a dispositive matter, the district court reviews those objections *de novo*. Fed. R. Civ. P. 72(b)(3). Specifically, a district judge:

must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Id. "A party who files objections to a magistrate [judge]'s report in order to preserve the right to appeal must be mindful of the purpose of such objections: to provide the district court 'with the opportunity to consider the specific contentions of the parties and to correct any errors immediately.'" *Jones v. Moore*, 2006 U.S. Dist. LEXIS 97510, 2006 WL 903199 at * 7 (N.D. Ohio April 7, 2006) (citing *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981)).

IV. Legal Standards regarding AEDPA Petitions

A. Standard of Review for Claims Reviewed on the Merits

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 337, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The relevant provisions of AEDPA state:

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 [*29] 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; 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).

Clearly established federal law is to be determined by the holdings (as opposed to the dicta) of the United States Supreme Court. *See Parker v. Matthews*, 567 U.S. 37, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012); *Renico v Lett*, 559 U.S. 766, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Shimel v. Warren*, 838 F.3d 685, 695 (6th Cir. 2016); *Ruimveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir. 2005). Moreover, the Supreme Court has indicated that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court." *Parker*, 567 U.S. at 48-49. *See also Lopez v. Smith*, 574 U.S. 1, 4, 135 S. Ct. 1, 190 L. Ed. 2d 1 (2014) (per curiam) ("Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'") (quoting *Marshall v. Rodgers*, 569 U.S. 58, 133 S. Ct. 1446, 185 L. Ed. 2d 540 (2013)).

A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set [*30] of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. at 413. *See also Carter v. Bogan*, 900 F.3d 754, 767 (6th Cir. 2018). By contrast, a state court's decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id. See also Shimel*, 838 F.3d at 695. However, a federal district court may not find a state court's decision unreasonable "simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. at 411. Rather, a federal district court must determine whether the state court's decision constituted an objectively unreasonable application of federal law. *Id.* at 410-12. "This standard generally requires that federal courts defer to state-court decisions." *Strickland v. Pitcher*, 162 Fed. Appx. 511, 516 (6th Cir. 2006) (citing *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

In *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the Supreme Court held that as long as "fairminded jurists could disagree on the correctness of the state court's decision," relief is precluded under the AEDPA. *Id.* at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not "treat[ ] the reasonableness question as a test of its confidence in the [*31] result it would reach under *de novo* review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 785. The Court noted that Section 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Id.* (internal quotation marks omitted). Therefore, a petitioner "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. This is a very high standard, which the Supreme Court readily acknowledged. *Id.* at 786 ("If this standard is difficult to meet, that is because it is meant to be.")

B. Procedural Default

Federal courts will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or where failure to review the claim would result in a fundamental miscarriage of justice. *See Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006). A claim may become procedurally defaulted in two ways. *Id.* First, a petitioner may procedurally default a [*32] claim by failing to comply with state procedural rules in presenting his claim to the appropriate state court. *Id.; see also Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). If, due to 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.7 *Id.*

Second, a petitioner may also procedurally default a claim by failing to raise and pursue that claim through the state's "ordinary appellate review procedures." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, it is procedurally defaulted.8 *See Coleman v. Thompson*, 501 U.S. 722, 731-32, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Lundgren*, 440 F.3d at 763; *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013) ("a claim is procedurally defaulted where the petitioner failed to exhaust state court remedies, and the remedies are no longer available at the time the federal petition is filed because of a state procedural rule.")

Where a petitioner has procedurally defaulted claims, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the [*33] claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Demonstrating cause requires showing that an "objective factor external to the defense impeded counsel's efforts to comply" with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). *See also Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 830 (6th Cir. 2019). "Prejudice, for purposes of procedural default analysis, requires a showing that the default of the claim not merely created a possibility of prejudice to the defendant, but that it worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions." *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002) (citing *United States v. Frady*, 456 U.S. 152, 170-71, 102 S. Ct. 1584, 71 L. Ed. 2d 816(1982)). *See also Benke v. Houk*, 537 F.3d 618, 634 (6th Cir. 2008). The miscarriage of justice exception requires a prisoner to present new reliable evidence showing that he is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 321, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

V. Analysis

A. Grounds 1 - 3, 5, and 7 - 12

As an initial matter, the Court notes that Cody raises no objection to the Magistrate Judge's recommendation that Grounds 1 - 3, 5, and 7 - 15 be dismissed as procedurally defaulted and/or denied on the merits. *See* Doc. No. 65 at pp. 54-63; Doc. No. 74-1. As stated in the Advisory Committee Notes to Fed. R. Civ. P. 72, "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Moreover, [*34] in *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), the Court held, "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."

The Court has carefully reviewed the Report and Recommendation's discussion and analysis of Grounds 1 - 3, 5, and 7 - 15 and finds no clear error. (Doc. No. 65 at pp. 54-63.) Accordingly, and in the absence of any specific Objection as to these Grounds, the Court accepts the Magistrate Judge's recommendation that Grounds 1 - 3, 5, and 7 - 15 be denied.

B. Ground 4

In Ground 4, Cody asserts that he was "denied his right under the 6th and 14th Amendments to the U.S. Constitution to testify on his own behalf at trial by the trial court and/or by the forced or unforced ineffectiveness of trial counsel related thereto, pursuant to [clearly established federal law as explained by] *Skeens v. Haskins*, 4 Fed. Appx. 236 6th Cir. 2001) et al., and Appellate Counsel failed to raise or argue the above in violation of his *Strickland* responsibilities." (Doc. No. 1-1 at PageID# 18) (as in original).

In the Report & Recommendation, the Magistrate Judge finds that this Ground includes the following four claims: (1) denial of the right to testify due to [*35] trial court error; (2) denial of the right to testify due to the ineffectiveness of trial counsel; (3) ineffective assistance of appellate counsel for failure to raise trial court error based on the denial of the right to testify; and (4) ineffective assistance of appellate counsel for failure to raise ineffectiveness of trial counsel on this basis. (Doc. No. 65 at p. 28.) The Magistrate Judge concludes that the first two claims are procedurally defaulted because they are based on the trial court record and Cody did not present them on direct appeal. (*Id.*) The Magistrate Judge further finds that ineffective assistance of appellate counsel cannot be used as cause to excuse the default of these claims because the state appellate court considered and denied Cody's ineffective assistance of appellate counsel claims on the merits in the context of denying his 26(B) Application. (*Id.*) With regard to the merits of Cody's ineffective assistance of appellate counsel claims, the Magistrate Judge finds that the state appellate court's rejection of these claims is not contrary to or an unreasonable application of clearly established federal law. (*Id.* at pp. 29-40.)

As discussed in more detail below, Cody raises [*36] numerous Objections to the Magistrate Judge's analysis and conclusions. (Doc. No. 74-1 at pp. 1-10.)

The Court will first address Cody's ineffective assistance of appellate counsel claims, and then proceed to consider Cody's underlying claims that the trial court denied him his right to testify and that trial counsel was ineffective for failing to call him to testify on his own behalf.

1. Ineffective Assistance of Appellate Counsel

In order to establish ineffective assistance of counsel, a petitioner must demonstrate that his counsel's conduct was so below acceptable standards of representation that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner also must demonstrate that a trial counsel's performance prejudiced the petitioner's defense to such an extent that it rendered the proceeding unfair. *Id.* To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In other words, a counsel's deficient performance must have "caused the defendant to lose what he otherwise would probably have won" and it must have been "so manifestly [*37] ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Mere disagreements by a defendant with tactics or strategies employed by counsel are not enough to support a claim of ineffective assistance of counsel and there is a presumption that the challenged conduct of a petitioner's counsel was a matter of strategy. *Id.* at 689. *See also United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990).

The Supreme Court has held a defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Thus, the two-part test enunciated in *Strickland* is applicable to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). An appellant has no constitutional right, however, to have every non-frivolous issue raised on appeal, *Jones v. Barnes*, 463 U.S. 745, 750-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel, *Perry*, 908 F.2d at 59. "[O]nly when issues are clearly stronger than those presented, will the presumption

of effective assistance of [appellate] counsel be overcome." *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003) (internal quotation marks and citations omitted).

a. Failure to Argue [*38] on Direct Appeal that the Trial Court Denied Cody his Right to Testify

Cody first argues that both the Magistrate Judge and the state appellate court unreasonably rejected his ineffective assistance of appellate counsel claim based on counsel's failure to argue on direct appeal that the trial court denied him his right to testify. (Doc. No. 74-1.) For the following reasons, the Court disagrees.

After reciting the standard for evaluating ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the state appellate court considered and rejected this claim, as follows:

Cody also argues that he was denied his right to testify on his own behalf. When the state rested its case, the judge asked Cody directly whether he wished to testify; the judge noted that throughout the proceedings Cody indicated he wanted to testify. However, Cody refused to answer the judge's question directly. Instead, he whispered into his counsel's ear, after which counsel said that Cody wished to answer the charges against him. Again, the judge directly asked Cody if he wanted to testify, and again he whispered into his attorney's ear and did not answer the judge directly. After taking a break to allow Cody to better his appearance [*39] [fn 5] and to further consult with his attorney, Cody's lawyer said that it was his understanding that Cody would not be taking the stand. Cody did not object to these proceedings. (Tr. 4314-4322.) This record does not support an argument that the trial court denied Cody's right to testify, and appellate counsel in the exercise of professional judgment could decline to raise it.

FN 5 -- The record indicates that Cody appeared disheveled that day in court. *State v. Cody*, 2017-Ohio-1543, 2017 WL 1507211 at * 3.

Before reviewing the substance of the state appellate court's decision, the Court must first determine the proper standard of review. If the state appellate court adjudicated Cody's claim "on the merits," the Court applies deference under the AEDPA and may grant relief only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable application of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1) & (2). *See Smith v. Cook*, 956 F.3d 377, 385-386 (6th Cir. 2020). If the state court did not evaluate the merits of Cody's claim, the Court reviews that claim *de novo*. *Id. See also Rice v. White*, 660 F.3d 242, 252 (6th Cir. 2011) (citing *Hill v. Mitchell*, 400 F.3d 308, 313 (6th Cir. 2005)).

For the following reasons, the Court finds that the state appellate court adjudicated this claim on the merits and, [*40] therefore, its decision is entitled to deference under the AEDPA. The state appellate court properly recited the governing standard of review for ineffective assistance of counsel claims set forth in *Strickland, supra*, and expressly acknowledged Cody's claim that his appellate counsel was ineffective for failing to argue, on direct appeal, that the trial court denied Cody his right to testify on his own behalf. *See Cody*, 2017-Ohio-1543, 2017 WL 1507211 at * 1, 3. The state appellate court then evaluated the record evidence and rejected Cody's claim, finding that "[t]his record does not support an argument that the trial court denied Cody's right to testify, and appellate counsel in the exercise of professional judgment could decline to raise it." *2017-Ohio-1543, [WL]* at * 3. Although the state appellate court's analysis is somewhat brief, the Court finds it is sufficient to constitute an "adjudication on the merits" for purposes of review under § 2254(d)(1).

Citing *Davie v. Mitchell*, 547 F.3d 297, 315 (6th Cir. 2008), Cody argues that this Court should apply "modified AEDPA deference" because the state appellate court's adjudication of the claim contained little analysis. In *Davie*, the Sixth Circuit found that, where a state court "'adjudicated the claim but with little analysis on the substantive constitutional issue,' . . . we apply [*41] modified AEDPA deference." *Davie*, 547 F.3d at 315 (quoting *Vasquez v. Jones*, 496 F.3d 564, 569 (6th Cir. 2007)). "Under that standard, we conduct a 'careful' and 'independent' review of the record and applicable law but cannot reverse 'unless the state court's decision is contrary to or an unreasonable application of federal law.'" *Id.*

The Court rejects Cody's argument for several reasons. First, it is not entirely clear that *Davie* remains good law after the United States Supreme Court's decision in *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Indeed, the Sixth Circuit recognized this in an unpublished decision, when it rejected a habeas petitioner's argument that "modified AEDPA deference" applied:

In *Harrington*, however, the Court made it clear that AEDPA's highly deferential review applies to the result of the state court decision, irrespective of whether the state court decision includes citation to Supreme Court cases or any reasoning at all. *Harrington*, 131 S.Ct. at 784. **Consequently, since *Harrington*, the notion of "modified AEDPA deference" lacks continuing vitality.** *See Jackson v. Smith*, 745 F.3d 206, 209-10 (6th Cir. 2014); *Piscopo v. Michigan*, 479 Fed. Appx. 698, 703-04 (6th Cir. 2012); *Smith v. Coleman*, 453 Fed. Appx. 625, 627 (6th Cir. 2011). *See also Treesh v. Bagley*, 612 F.3d 424, 429 (6th Cir.2010) (consistent with *Harrington*).

Williams v. Curtin, 613 Fed. Appx. 461, fn 1 (6th Cir. 2015) (emphasis added).**9**

Second, even if the "modified AEDPA deference" standard is still viable after *Harrington*, the Court is not convinced that the state appellate court's analysis herein was [*42] so minimal as to warrant application of that standard. As discussed above, although the state appellate court's analysis was brief, that court properly recited the governing legal standard, carefully discussed the evidence, and concluded that appellate counsel was not deficient for failing to argue on direct appeal that the trial court denied Cody his right to testify. Under these circumstances, the Court finds that the state appellate court's analysis was not so lacking as to warrant application of the "modified AEDPA deference" standard.**10**

Accordingly, the Court rejects Cody's argument that "modified AEDPA deference" applies. The Court will apply full AEDPA deference to the state appellate courts' resolution of this particular claim. Thus, the proper inquiry is whether the state appellate court's disposition of Cody's ineffective assistance of appellate counsel claim was an unreasonable application of clearly established federal law (28 U.S.C. § 2254(d)(1)); or 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)(2)). For the following reasons, the Court finds that it was not.

The record reflects that, at the conclusion of the State's [*43] case, the trial court engaged in the following colloquy with defense counsel and Cody:

THE COURT: .... And so I know there has been some conversations -- Mr. Patituce has indicated that you were wanting to testify. Certainly, I think you appreciate you have a Constitutional right to not testify. And have you had an opportunity to reach a conclusion as to whether or not you wish to testify?

(Thereupon, the defendant conferred with counsel off the record.)

MR. PATITUCE: Can we approach, your Honor?

THE COURT: Well, let's just hold on a second. Mr. [Cody], I think it's a fairly straightforward question. We can address some of the other issues, such as your appearance in court here today. What's your desire, sir? Do you intend on taking the stand and testifying in your own behalf, or not?

MR. PATITUCE: Your Honor, my client indicates he wishes to answer to his Complaint.

THE COURT: Well, and certainly I appreciate that, Mr. [Cody], but in any regard, I'm going to hear it from you as to what your intentions are so it's on the record and there can't be no mistake, because if there is a need for a reviewing court, that there's a clear intention on your behalf as to either to exercise your Constitutional [*44] right to remain silent, or if you would like to testify. So what would you like to do?

(Thereupon, the Defendant conferred with counsel Mr. Patituce off the record.)

MR. PATITUCE: Your Honor, he is reiterating to me the same. He wishes to answer to all the charges.

THE COURT: Mr. [Cody], we can — it's a simple question, sir. I'm asking you, do you wish to testify, or not; yes or no? Mr. [Cody]? Mr. [Cody]? You don't need to whisper in Mr. Patituce's ear. You can look right at me and say the word yes or no. Would you like to testify on your own behalf, or not; yes or no.

(No response.)

THE COURT: Well, Mr. [Cody], I can perhaps infer from your silence that you do not wish to testify, as is your Constitutional right to remain silent and proceed accordingly, if that's what you'd like to do.

Now we can address a couple other issues, such as your appearance in court here today.**11** And if you would like to testify on your own behalf, I'm happy to give you some time, if you so desire, to, for example, fix your hair, finish buttoning up your shirt, put a tie on, if that's what you choose to do. If you choose not to do all those things and appear in front of the jury in such a manner, that's fine as |*45| well and I'll simply give the jury an instruction that they're not to make any determination as to your guilt or innocence based upon your appearance in court here today. So having said that, what would you like to do?

THE DEFENDANT: I would like to put myself in physical appearance state, I think is reasonable.

THE COURT: All right.

THE DEFENDANT: Have my hair combed, have it washed, with my spectacles returned to me. I feel that is a reasonable request —

THE COURT: All right.

THE DEFENDANT: -- under the circumstances.

THE COURT: I don't necessarily disagree with you. Having done those things, and I'll provide you with a reasonable period of time for which to accomplish those, **what is your intention with respect to testifying on your own behalf?**

THE DEFENDANT: I can't answer that question without consulting with my attorney.

THE COURT: Go ahead, Mr. Patituce, take a few moments if you would like to.

(Pause.)

MR. PATITUCE: Your Honor, can we step aside maybe two seconds?

[Thereafter the trial court recessed for almost 40 minutes and returned on the record]

***

THE COURT: All right. We're back on the record. . . And a couple of things I wanted to make a record of. It was brought to my attention |*46| just by way of history, it was brought to my attention at the end of Tuesday's session, there was an incident that occurred in the holding facility where Mr. [Cody] as I understand it, was banging his head against the wall. The deputies took him down. It is further my understanding that he was looked at, if you will, by the jail medical staff, and I was advised he refused medical attention. Additionally, he was spoken to by the jail, what I'll characterize as I understand the jail psychiatric staff, and there wasn't [sic] any issues that they determined. *** Additionally, we have been advised that Mr. [Cody] is not taking any type of medication. And from my own

experience, having sat through the last six or so weeks of this trial, as well as my dealings with Mr. [Cody] when he was representing himself in court, I certainly didn't make any observations that would give me any cause to believe that there was any mental health issues that needed to be dealt with at this time.

Having said that, before we broke, before this most recent recess, I made an inquiry from Mr. [Cody] as to whether or not he wished to take the stand in his own defense. **And I believe the record would accurately reflect |*47| that there was some difficulty in getting an answer from him. So let me ask it this way, Mr. Patituce, have you had conversations with Mister -- with your client relative to his Constitutional right to either testify or not testify on his own behalf?**

MR. PATITUCE: I have, your Honor.

THE COURT: And do you feel that he has an adequate understanding of the nature of the -- not the nature of the case, but the nature of whether or not he chooses to testify, or not?

MR. PATITUCE: Your Honor, I do, as we discussed his physical and mental capabilities to testify, I explained his rights and possibilities to testify, and I do believe he will not be taking the stand, your Honor.

THE COURT: All right. And you indicated his physical and mental abilities. You [are] just referring to the prospect, if you will, being cross-examined by, I'll say perhaps a seasoned prosecutor?

MR. PATITUCE: Your Honor, I certainly believe that direct will be difficult, but I do believe that he would not be able to survive the prospects of a seasoned prosecutor such as Brad Tammaro, or seasoned Attorney General Brad Tammaro cross-examining him.

THE COURT: All right. And so is it your intention to rest at this point in time, |*48| subject to the admission of any evidence, items of evidence that you wish to present?

MR. PATITUCE: Along with renewal of the [Rule 29] motion.

(Doc. 43-21 at PageID#s 8037-8045) (Tr. Vol. 21) (emphasis added).

The Court agrees with the Magistrate Judge that the state appellate court's decision was neither an unreasonable determination of the facts nor contrary to, or an unreasonable application of, clearly established federal law. As the state appellate court noted, although defense counsel stated that Cody "wish[ed] to answer" the charges against him, Cody repeatedly refused to answer the trial court's direct questions as to whether he wanted to testify and indicated that "I can't answer that question without talking to my attorney." (Doc. 43-21, at PageID# 8041) (Tr. Vol. 21). The trial court then took a forty-minute recess to allow Cody to improve his appearance and consult with his attorney. (*Id.* at PageID#s 8041-8045.) During this recess, defense counsel had the opportunity to discuss (and did discuss) with Cody the issue of whether or not he would testify. After these discussions, defense counsel assured the trial court that Cody had an adequate understanding of the issue and, further, |*49| that Cody had declined to testify due to counsel's concerns regarding Cody's physical and mental capability to withstand cross-examination. (*Id.*) Notably, the record reflects that, when defense counsel explained this to the trial court, Cody did not raise any objection or otherwise inform that trial court that he did, in fact, want to testify. (*Id.*)

Under these circumstances, the Court finds that it was not unreasonable for the state appellate court to conclude that appellate counsel was not ineffective for declining to argue, on direct appeal, that the trial court improperly denied Cody his right to testify. *See Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009) ("[A] defendant must alert the trial court that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct.")

In addition, the Court rejects Cody's argument that it was ineffective for appellate counsel not to raise this issue in light of the fact that the trial court was aware that Cody had head injuries at the time. As set forth *supra*, the trial court acknowledged that, several [*50] days prior, Cody had been found banging his head against the wall in his holding cell. (Doc. 43-21, at PageID#s 8043-8045.) The trial court considered this fact when addressing the issue of whether Cody wanted to testify. Specifically, the trial court explained that the jail medical and psychiatric staff had not noted any concerns regarding Cody's physical and/or mental health after this incident and, further, that the trial court's own observations of Cody during pre-trial and trial proceedings did not cause the court to believe that were "any mental health issues that needed to be dealt with at this time."**12** (*Id.* at PageID# 8044.) Moreover, the trial court specifically asked defense counsel whether Cody had "an adequate understanding of the nature of whether or not he chooses to testify." (*Id.* at PageID# 8044-8045.) Defense counsel replied that Cody did, in fact, understand this issue and that he would not be testifying. (*Id.*) Cody did not object. (*Id.*) In light of the above, the Court rejects Cody's argument that the state appellate court unreasonably concluded that appellate counsel was ineffective for failing to raise this issue on appeal.**13**

As the Sixth Circuit has explained, [*51] the "'[a]ppellate counsel need not raise every non-frivolous claim on direct appeal.'" *Sanders v. Curtin*, 529 Fed. Appx. 506, 521 (6th Cir. 2013). Indeed, "[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). *See also Hand v. Houk*, 871 F.3d 390, 410 (6th Cir. 2017). Here, appellate counsel raised three issues on direct appeal, two of which were successful and resulted in the vacation of Cody's conviction on eleven counts of identity fraud and his sentence to solitary confinement on Veteran's Day. Given the number and strength of the other claims Cody raised on direct appeal, it was not unreasonable for the state appellate court to conclude that appellate counsel was not ineffective for deciding that this particular claim was not strong enough to raise on direct appeal.**14**

Accordingly, Cody's Objections are overruled and this claim is denied.

b. Failure to Argue on Direct Appeal that Trial Counsel was Ineffective for Failing to Call Cody to Testify

Cody also raises an ineffective assistance of counsel claim based on appellate counsel's failure to argue, on direct appeal, that trial counsel was ineffective for failing to call him to testify. Cody argues that the state appellate court [*52] ignored this portion of his claim and, therefore, it should be reviewed *de novo*. Relying on *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) and *Johnson v. Williams*, 568 U.S. 289, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013), the Magistrate Judge concluded that AEDPA deference applies because the state appellate court "found that Cody's right to testify was not violated, whether Cody alleged it was the trial court or counsel who violated it." (Doc. No. 65 at p. 38.) The Magistrate Judge then determined that it was not unreasonable for the state appellate court to conclude that appellate counsel was not ineffective for failing to raise this claim on direct appeal. (*Id.* at pp. 38-40.)

In his Objections, Cody insists that the state appellate court ignored this claim and argues that the Magistrate Judge erred in failing to review it *de novo*. (Doc. No. 74-1.) The Court agrees with Cody that, while the state appellate court clearly addressed Cody's claim that appellate counsel was ineffective for failing to argue that the *trial court* erred in denying him his right to testify, it did not specifically address Cody's separate claim that appellate counsel was ineffective for failing to argue that *defense counsel* was ineffective for failing to call Cody to testify at trial. The Court must, then, determine the appropriate standard of [*53] review under these circumstances.

Both the Supreme Court and the Sixth Circuit have provided guidance regarding whether federal habeas courts should consider a claim to be "adjudicated on the merits" when the state courts have not directly addressed it. The Sixth Circuit recently summarized the law on this issue, as follows:

Under AEDPA, this Court must give significant deference to a state court's decision when it rejects a petitioner's claim "on the merits." 28 U.S.C. § 2254(d); *accord, e.g., Jordan*, 675 F.3d at 592-93. But how do we know if a

decision is "on the merits"? While this would be easy if the state habeas court provided a detailed, reasoned opinion, rarely are federal courts so lucky.

To address this dilemma, the Supreme Court created a presumption that § 2254(d) applies, even when there is no reasoned state court opinion. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99, 131 S.Ct. 770; *see also id.* at 98, 131 S.Ct. 770 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was [*54] no reasonable basis for the state court to deny relief."). Thus, unless there is good reason for a federal court to think a state court's decision was not on the merits, the federal court must assume that it was on the merits and apply § 2254(d).

That said, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 99-100, 131 S.Ct. 770; *see also Johnson v. Williams*, 568 U.S. 289, 302, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) ("Thus, while the *Richter* presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable."). For example, short denials without opinion are most commonly seen in state appellate courts. *See, e.g., Wilson v. Sellers*, ___ U.S. ___, 138 S. Ct. 1188, 1192, 200 L.Ed.2d 530 (2018) ("For instance, the decision may consist of a one-word order, such as 'affirmed' or 'denied.' "). In such a case, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Id.; accord Ylst v. Nunnemaker*, 501 U.S. 797, 805-06, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

Even when there is no earlier decision that the Court can "look through" to, it is still possible for the *Richter* presumption to fall. In assessing such a challenge to the presumption, this Court considers, among other things, "the language used by the state court in its discussion of the claim [*55] at issue and the context of that discussion when the state court's opinion is 'read as a whole.'" *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 460 (6th Cir. 2015) (per curiam) (quoting *McCarley v. Kelly*, 759 F.3d 535, 543-44 (6th Cir. 2014), vacated on other grounds, ___ U.S. ___, 135 S. Ct. 2887, 192 L.Ed.2d 924 (2015) (mem.)).

Stermer v. Warren, 959 F.3d 704, 722-723 (6th Cir. 2020). For example, a court in a state that interprets a parallel state and federal constitutional provision identically may decide that a discussion of the state claim adequately disposes of the duplicative federal claim. *Johnson*, 568 U.S. at 298-299. Similarly, state courts have discretion to decide that a "fleeting reference to a provision of the Federal Constitution" does not merit its attention, or that a claim may simply be "too insubstantial to merit discussion." *Id.* at 299. *See also Brown v. Romanowski*, 845 F.3d 703, 711 (6th Cir. 2017).

While the *Richter/Johnson* presumption is not irrebuttable, it is a "strong one that may be rebutted only in unusual circumstances," *Johnson*, 568 U.S. at 302, such as "when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 562 U.S. at 99. One example of when the presumption may be rebutted occurs when a state court rejects a federal claim "as a result of sheer inadvertence." *Johnson*, 568 U.S. at 303. *See also Brown*, 845 F.3d at 711.

Here, the state appellate court was the first court to consider Cody's 26(B) Application and, therefore, there is no earlier state court decision to which this Court can "look through" for a reasoned [*56] rationale. In the R&R, the Magistrate Judge examined the wording and context of the state appellate court's decision to conclude that it necessarily encompassed a decision on the merits with respect to Cody's claim that appellate counsel should have argued ineffective assistance of trial counsel based on trial counsel's failure to call Cody to testify. Cody disagrees, asserting that the determination of whether appellate counsel should have raised claims based on trial court error versus ineffectiveness of trial counsel are distinct and involve different analyses. Cody suggests that the state appellate court simply overlooked his ineffective assistance of appellate counsel claim based on the failure to raise ineffective assistance of trial counsel and, therefore, the *Johnson* presumption is rebutted and *de novo* review applies.

The Court need not decide this issue. Even under a *de novo* review, the Court finds that appellate counsel was not ineffective for failing to argue that trial counsel was ineffective based on the failure to call Cody to testify. Based on the trial transcript, it appears that defense counsel advised Cody not to testify because of concerns that Cody would not hold [*57] up well under cross-examination by the prosecution. When a tactical decision is made by an attorney that a defendant should not testify, the defendant's assent is presumed. *Gonzales v. Elo*, 233 F.3d 348, 357 (6th Cir. 2000). A federal court sitting in habeas review of a state court conviction should have "a strong presumption that trial counsel adhered to the requirements of professional conduct and left the final decision about whether to testify with the client." *Hodge*, 579 F. 3d at 639 (internal citation omitted). To overcome this presumption, a habeas petitioner must present record evidence that he somehow alerted the trial court to his or her desire to testify. *Id.*

As discussed above, the trial transcript reflects that (1) Cody expressed a wish to consult with his counsel about whether he wanted to testify; (2) the state court recessed to allow Cody and defense counsel the opportunity to speak about this issue; (3) defense counsel subsequently advised the trial court that Cody would not testify; and (4) Cody did not object or otherwise engage in any behavior that would alert the trial court that he disagreed. (Doc. No. 43-21 at PageID#s 8037-8045.) Because the record is void of any indication that, after the recess, Cody alerted the trial court that [*58] he wanted to testify, the Court finds that Cody has not overcome the presumption that he willingly agreed to counsel's advice not to testify or that his counsel rendered ineffective assistance of counsel. *Gonzales*, 233 F. 3d at 357. Thus, the Court finds that appellate counsel was not ineffective for deciding not to assert ineffective assistance of trial counsel on this basis.

Accordingly, even under *de novo* review, Cody's ineffective assistance of appellate counsel claim is without merit and denied.**15**

2. Underlying Claims-- Denial of Right to Testify at Trial and Ineffective Assistance of Trial Counsel based on the decision not to call Cody to Testify at Trial

In addition to raising claims of ineffective assistance of appellate counsel, Ground 4 also asserts the underlying claims that Cody was denied his constitutional right to testify on his own behalf at trial by the state trial court and/or by the "forced or unforced ineffectiveness of trial counsel." (Doc. No. 1-1 at PageID# 18.) The Magistrate Judge found that both of these underlying claims are procedurally defaulted because they are based on the trial court record, Cody did not present them on direct appeal, and the state appellate court denied Cody's request [*59] to reopen his direct appeal under App. R. 26(B). (Doc. No. 65 at pp. 28-29.) The Magistrate Judge found that Cody could not establish either cause or prejudice to excuse the default and, further, that he was not able to show that he is actually innocent. (*Id.* at pp. 28-29, 49-51.) Cody raises numerous Objections to each of these findings. (Doc. No. 74-1.)

The Court agrees with the Magistrate Judge that Cody's underlying claims are procedurally defaulted. With regard to Cody's claim that the state trial court improperly denied him his right to testify, this claim is based on the trial court record and, therefore, could have been raised on direct appeal. Cody, however, failed to raise this claim on direct appeal and the state appellate court refused to reopen his direct appeal to assert it, thereby imposing a procedural bar. *See Davie*, 547 F.3d at 312. Thus, the Court finds that this claim is procedurally defaulted. Likewise, to the extent Cody's ineffective assistance of trial counsel claim is based on the trial court record, it is procedurally defaulted for the same reason, i.e., Cody failed to raise it on direct appeal and the state appellate court refused to reopen his direct appeal to allow him to assert it.

In his Objections, [*60] Cody suggests that his ineffective assistance of trial counsel claim is not procedurally defaulted because it is based on evidence outside the trial record, "such as an off-record defendant-counsel communication as to, e.g., the client's express desire to testify." (Doc. No. 74-1 at PageID# 8676.) This argument is without merit. First, aside from this vague reference in his Objection, Cody does not identify any specific evidence outside the record that is relevant to this claim. Second, even if Cody properly raised this claim in his first post-conviction petition based on any such alleged evidence, the claim would nonetheless be procedurally defaulted because the state trial court denied the petition on the basis of *res judicata* and the state appellate court affirmed on

that basis. *See State v. Cody*, 2015 Ohio 2764, 2015 WL 4133281 at * 3-4. Thus, this claim is also procedurally defaulted.**16**

As noted *supra*, where a petitioner has procedurally defaulted claims, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. It is well established that ineffective assistance of appellate counsel may serve as "cause"]*61[for procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). However, in order for ineffective assistance of appellate counsel to serve as cause and prejudice to excuse a procedural default, a petitioner must also show that his claim of ineffective assistance of appellate counsel itself has merit. *See Lordi v. Ishee*, 384 F.3d 189, 194 (6th Cir.2004) (citing *Edwards*, 529 U.S. at 450-51); *Sulek v. Brunsman*, 2009 U.S. Dist. LEXIS 53160, 2009 WL 1935878 at * 7 (S.D. Ohio June 23, 2009).

Here, for all the reasons discussed above, the Court finds upon *de novo* review that Cody has not established that either of his ineffective assistance of appellate counsel claims have merit; i.e., that appellate counsel was ineffective for failing to raise the two underlying issues on direct appeal. Accordingly, the Court finds that ineffective assistance of appellate counsel may not serve as cause to excuse the default of his claims.**17** Finally, for the reasons set forth *infra* in Section V.E of this Opinion, the Court finds that Cody cannot demonstrate that the default of his claims should be excused on the grounds that "failure to consider the[m] . . . will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Accordingly, Ground Four of Cody's Petition is denied.

C. Ground Six

In Ground Six, Cody argues that the trial court violated his constitutional rights in numerous ways when it issued a "no contact" order]*62[in March 2013 that resulted in Cody's placement in solitary confinement through December 16, 2013. (Doc. No. 1-1 at PageID# 19.) Cody asserts that this order "contributed to the causation of [his] mental state of dysfunctional competence to stand trial; to plea bargain; and to his relinquishment of his right to self-representation on 8.26.2013; contributorily caused his attempted suicide; blocked his fundamental right to access counsel of his choice . . . and to access his courts . . .; and to obtain discovery on his own behalf." (*Id.*) (as in original). He further asserts that appellate counsel was ineffective for failing to raise these issues on direct appeal. (*Id.*)

In his Traverse, Cody limits his argument solely to that portion of Ground Six that alleges that the trial court's "no contact" order denied him his right to access counsel of his choice. (Doc. No. 57 at PageID# 8391-8395.) Thus, the Magistrate Judge confined her review solely to this aspect of this claim. (Doc. No. 65 at p. 43.) The Magistrate Judge concluded that Cody's underlying claim that he was denied the right of access to counsel of his choice was procedurally defaulted and, further, that Cody had failed to demonstrate]*63[either cause or prejudice to excuse the default. (*Id.* at p. 41-42.) Applying AEDPA deference, the Magistrate Judge then found that the state appellate court was reasonable in determining that Cody's appellate counsel was not ineffective for failing to raise this issue on direct appeal. (*Id.* at pp. 42-46.) Cody objects on numerous grounds, as discussed below. (Doc. No. 74-1.)

1. Ineffective Assistance of Appellate Counsel Claim Based on Failure to Argue on Direct Appeal that Cody had been Denied his Right to Access Counsel of his Choice

The Court first addresses Cody's ineffective assistance of appellate counsel claim. Cody raised a claim of ineffective assistance of appellate counsel based on the trial court's "no contact" order in his 26(B) Application. (Doc. No. 42-3, Exh. 75 at PageID#s 2806-2807, 2827-2829.) Therein, Cody argued, in relevant part, as follows:

1. On 3.19.2013., the trial court, *sua sponte*, issued the following JE: "Defendant is restricted to have no contact by phone, mail or social visits."

2. Defendant was thrown into solitary confinement in the Cuyahoga County Jail, into what is called 'administrative confinement' to distinguish it from 'disciplinary confinement.' ***

3. When he attempted to smuggle |*64| a request to an inmate's counsel to see him about potential representation, he was apprehended and placed in solitary confinement. He remained in solitary confinement through sentencing and transport to the Lorain Correctional Institute on 12.19.2013, a status he retained until 8.26.2013. This period included most of the pre-trial motion practice, and the plea-bargaining phase, of CR-12-565050A.

4. Appellant need not go beyond the face of the order in explaining it. He was permitted no contact with any other human being (except for the jail guards) . . . ., and other than advisory counsel Patituce through 8.26.2013 only during courtroom appearances. *** He had no access to any legal research material; no outgoing or incoming mail was permitted him other than correspondence with advisory counsel; no telephone calls were permitted him other than a series of non-accepted calls to advisory counsel; his indigency is of record; he had no access even to writing material, other than paper and pens . . .

****

7. As a result of this confinement, and during the period he was so confined, Defendant, at a minimum, suffered from extreme sensory paralysis, frequent bouts of vertigo, lack of desire to |*65| eat, uncommunicative depression, thoughts of brutality, and engaged himself in a daily battle to maintain psychological equilibrium for which he was, after trial began, prescribed the psychiatric control drug cylexa by jail mental health officials. These conditions exacerbated the incompetence defense counsel Patituce referred to in the latter's 8.24.2012 motion and contributed to his attempted suicide.

(Doc. No. 42-3, Exh. 75 at PageID#s 2827-2828) (internal citations omitted; spelling, grammar and punctuation as in original). Noticeably absent from the above is any argument that the trial court's "no contact" order denied Cody his right of access to counsel of his choice.

In addition to the above claim, Cody raised several assignments of error relating to his competency. The state appellate court evaluated and rejected Cody's competency-related assignments of error, including the claim set forth above, as follows:

{¶11} Cody's next assignment of error is that he was forced to stand trial while he was incompetent. The record in this case does not support that argument. On July 12, 2012, the trial judge referred Cody to the court psychiatric clinic to determine competency to stand trial. |*66| After the evaluation took place, defense counsel and the state stipulated to the competency report on August 21, 2012. Throughout the proceedings, Cody raised the issue of representing himself. Eventually, on January 30, 2013, after repeatedly and thoroughly reviewing the matter, the judge allowed Cody to represent himself with assigned counsel, Mr. Patituce, as advisory counsel. Cody then inundated the court with motions for discovery, dismissal, in limine, suppression, grand jury transcripts, and assistance, and with reply briefs to the state's opposition briefs. Cody also filed a mandamus action and an affidavit of disqualification of the trial judge. Cody then on August 26, 2013, stopped representing himself and accepted appointed counsel for trial, which commenced on September 30, 2013. Reviewing the transcripts of the pretrial hearings while Cody represented himself shows that his comments were thoughtful, pertinent, intelligent, and articulate. At the end of the trial, the judge noted that Cody played an active role in his defense, paying close attention to the evidence, taking notes, conferring with counsel, and providing information and suggestions for cross-examination. (Tr. |*67| 4513.) These are not the actions of an incompetent person. Thus, appellate counsel in the exercise of professional judgment could decide not to raise this argument.

{¶12} Cody further argues that the trial court placed him in solitary confinement, which further drove him insane and undercut his ability to represent himself. The docket shows that on March 19, 2013, the trial judge issued an order that "[d]efendant is restricted to have no contact by phone, mail or social visits." Cody describes the horrible

effect this had on him in his supporting affidavit. Nevertheless, it is understandable why appellate counsel would not raise this as an assignment of error. As explained above, the record does not support the proposition that Cody was going insane before trial, much less that his solitary confinement was causing it. Cody referred to his solitary confinement in his motions and at pretrials but did not dwell at length on the deleterious effect it was having on his mind. Thus, this proposition was better suited to the postconviction relief petition he filed; indeed, he raised this argument there, too. Finally, it is difficult to discern how the solitary confinement prejudiced the outcome [*68] of the trial or the appeal.

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{¶14} Cody's next assignment of error is difficult to discern. He argues that pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *State v. Smith*, 8th Dist. Cuyahoga No. 98093, 2012-Ohio-5420, the trial court erred in allowing him to represent himself or in the alternative deprived him of his right to self-representation by driving him insane through the solitary confinement order. To the extent that Cody argues that the trial court erred by allowing Cody to represent himself, the argument is ill-founded. The judge and Cody reviewed the risks of self-representation, and the judge finally granted Cody's motion. The record indicates that Cody received legal training at Harvard Law School and practiced criminal law outside of Ohio. The record also shows that while he represented himself, he resorted to multiple legal remedies, endeavored to reach a plea agreement, and conducted himself well during pretrials. To the extent that he argues that the trial court deprived him of his right to self-representation, the argument is not supported by the record. As discussed previously, the record does not show that Cody was going insane during the summer of 2013. Throughout the proceedings, Cody and the trial judge discussed self-representation, and on August [*69] 26, 2013, when the trial judge asked Cody if it was his intention to proceed *pro se* or to have Mr. Patituce resume primary representation, Cody replied: "Thank you, your honor. I wish to turn the case over to Mr. Patituce." (Tr. 493.) Accordingly, this assignment of error is ill-founded.

Cody, 2017-Ohio-1543, 2017 WL 1507211 at *3.

The Magistrate Judge concluded that, taken as a whole, the state appellate court's above analysis is adequate consideration of the specific claim at issue in Ground Six; i.e., the claim that the trial court's "no contact" order denied him his right of access to counsel of his choice. (Doc. No. 65 at p. 44.) Thus, the Magistrate Judge accorded AEDPA deference and determined that the state appellate court's implicit rejection of Cody's claim was not unreasonable. (*Id.* at pp. 44-46.) Cody objects, arguing that the state appellate court ignored the particular claim at issue herein and, therefore, this Court should conduct a *de novo* review. (Doc. No. 74-1 at PageIDs 8684-8697.)

For the following reasons, the Court finds that the state appellate court's decision is entitled to AEDPA deference. While the Court agrees with Cody that the state appellate court did not directly address his specific claim as it relates to the [*70] alleged denial of right of access to counsel of his choice, the Court finds that AEDPA deference nonetheless applies because Cody made only a passing reference to that particular claim in his 26(B) Application. As set forth above, in his Application, Cody's argument regarding the trial court's "no contact" order was focused almost exclusively on the effect of that order on his mental health. The only mention of the effect of the trial court's order on his denial of right to access to counsel is a single phrase in Cody's recitation of this assignment of error, in which he states (summarily) that "the trial court's 3.19.2013 order caused violations of the Defendant's fundamental rights (involving structural error) to access [to] counsel of choice." (Doc. No. 42-3, Exh. 75 at PageID# 2807.) In the argument section of his 26(B) Application, Cody did not mention or present any legal argument regarding this particular issue.

Under these circumstances, this Court presumes that the state appellate court adjudicated the claim on the merits. As discussed *supra*, the Supreme Court has held that, when a state court addresses some of the claims raised by a defendant but not a claim that is later [*71] raised in a federal habeas proceeding, a federal court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits. *See Johnson*, 568 U.S. at 298-299. Explaining the reasoning behind this presumption, the Supreme Court noted in *Johnson, supra*, that "it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference." *Id.* Rather, "a state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim." *Id.* In sum, just as "[f]ederal courts

of appeals refuse to take cognizance of arguments that are made in passing without proper development," the Supreme Court found, "[s]tate appellate courts are entitled to follow the same practice." *Id.*

Applying these principles here, the Court finds that Cody made only a "fleeting reference" to this particular claim in his 26(B) Application. Consistent with *Johnson*, this Court, therefore, presumes that the state appellate court was aware of Cody's claim and rejected it on the merits, despite the fact that it did not separately discuss and analyze it. The Court further finds that Cody has not set forth |*72| any basis to rebut this presumption. Accordingly, the Court applies AEDPA deference and will only grant habeas relief if the state appellate court's rejection of this claim is contrary to, or an unreasonable application, of clearly established federal law.

For the following reasons, the Court finds that it is not. The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel encompasses the right to counsel of choice, but that right is not absolute and "is circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). As the Supreme Court has explained, the right to counsel of choice is generally cognizable only to the extent defendant can retain counsel with private funds. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Id. See also Daniels v. Lafler*, 501 F.3d 735, 739 (6th Cir. 2007).

Here, the record reflects the following. The state trial court declared Cody indigent in May 2012 and appointed Mark Stanton as counsel. (Doc. No. 42-1, Exh. 5.) In July 2012, the state trial court granted Mr. Stanton's Motion to Withdraw and appointed Joseph Patituce as defense counsel. |*73| (Doc. No. 42-1, Exhs. 7, 10.) In November 2012, Cody filed a series of *pro se* motions for appointment of counsel. (Doc. No. 42-4, Exh. 101 at PageID# 3570.) In December 2012, Cody filed a writ of mandamus in the state appellate court, in which he sought to represent himself at trial. (Doc. No. 1-14 at PageID# 719.) In that filing, Cody again indicated that he was indigent. (*Id.* at PageID# 719) (stating "I have been found indigent in this case" and attaching an affidavit of indigency).

In January 2013, Cody filed a waiver of attorney in the state trial court, in which he sought to represent himself. (Doc. No. 42-1, Exh. 18.) That same month, the state trial court had numerous discussions with Cody on the record regarding his request to represent himself. *See* Doc. No. 43-1 at Tr. 93-98 (Jan. 14, 2013 proceeding); Doc. No. 43-1 at Tr. 106-120 (Jan. 23, 2013 proceeding); Doc. No. 43-1 at pp. 125-134 (Jan. 30, 2013 proceeding). At no time during these many proceedings did Cody ever indicate that he was not indigent and/or that he wished to attempt to retain counsel. (*Id.*) After careful consideration, the state trial court permitted Cody to proceed *pro se* and appointed Mr. Patituce as advisory |*74| counsel. (Doc. No. 42-1, Exh. 19; Doc. No. 43-1 at Tr. 125-145.)

On March 19, 2013, the trial court issued its "no contact" order, in which it stated that Cody was to have no contact by phone, mail, or social visits. (Doc. No. 42-4, Exh. 101 at PageID# 3559.) On April 11, 2013, Cody advised the trial court that he no longer wished to represent himself and asked that counsel be appointed. (Doc. No. 43-1 at Tr. 160.) The trial court denied Cody's request. (*Id.* at Tr. 164.) The trial court revisited this issue during a conference on April 22, 2013. At that time, however, Cody stated that "[t]here's no motion to withdraw at this point as *pro se* counsel before the Court." (Doc. No. 43-2 at Tr. 266.) Once again, Cody did not indicate, at any point during either of these April 2013 conferences, that he was not indigent or that he wished to attempt to retain counsel. Cody continued to represent himself until August 26, 2013, when he relinquished his position as *pro se* counsel and Mr. Patitutce was assigned as counsel of record. (Doc. No. 42-1, Exh. 34; Doc. No. 43-2 at Tr. 493.) Trial commenced on September 30, 2013. (Doc. No. 43-1.)

On direct appeal, Cody did not argue that the trial court |*75| improperly found him to be indigent nor did he argue that the trial court's "no contact" order denied him his right to access of counsel of choice. In his 26(B) Application, Cody maintained that he was, in fact, indigent. (Doc. No. 42-3, Exh. 75 at PageID# 2828) (noting that his "indigency is of record").

Based on the above, the Court finds that it was not unreasonable for the state appellate court to reject Cody's claim that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court's "no contact" order denied him his right to access to counsel of his choice. The record clearly reflects that the state trial court determined

that Cody was indigent and, on that basis, appointed counsel. Cody does not direct this Court's attention to any evidence that he was not, in fact, indigent. Nor does he direct this Court's attention to any evidence that he ever (1) objected to the determination of indigency; or (2) advised the trial court that he wanted to attempt to retain counsel. As noted above, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 548 U.S. at 151. *See also Daniels*, 501 F.3d at 739. In light of the above, the state appellate [*76] court's determination that appellate counsel was not ineffective for failing to raise this issue, is not contrary to, or an unreasonable application, of clearly established federal law.

In his Objections, Cody argues, at length, that "the primary dispositive error the R&R makes . . . is premising its analysis, without authority, on the assumption that a defendant, *sua sponte* 'declared' by a trial court financially qualified for appointed counsel, does not retain a right (while, in Cody's case, after *pro se* appointment) to obtain, or even to attempt to obtain, private counsel." (Doc. No. 74-1 at PageID# 8697.) Essentially, Cody argues that, even though he was determined to be "indigent," he still retained the constitutional right to attempt to obtain private counsel. He asserts that the trial court's "no contact" order unlawfully prevented him from doing so and that this constitutes "structural error," necessitating the granting of habeas relief. (*Id.* at PageID#s 8688-8697.)

The Court disagrees. Even assuming *arguendo* that there is such a right, it was not unreasonable for the state appellate court to find that appellate counsel was not ineffective for failing to raise this argument on [*77] direct appeal under the circumstances presented. As discussed at length above, despite the many pre-trial proceedings in which he appeared before the state trial court, Cody never indicated that he wanted to attempt to retain private counsel or that he was prevented from doing so by virtue of the "no contact" order. It was not unreasonable for the state appellate court to find that appellate counsel's failure to raise this issue on direct appeal did not constitute deficient performance resulting in prejudice.

Accordingly, Cody's ineffective assistance of counsel claim in Ground Six is without merit and denied.

2. Underlying Claim—Denial of Right to Access to Counsel of Choice

In addition to raising claims of ineffective assistance of appellate counsel, Ground 6 also asserts the underlying claim that the trial court's "no contact" order denied Cody his right to access to counsel of his choice. (Doc. No. 1-1 at PageID# 19.) The Magistrate Judge found that this underlying claim is procedurally defaulted. (Doc. No. 65 at pp. 41-42.) The Magistrate Judge found that Cody could not establish either cause or prejudice to excuse the default and, further, that he was not able to show that he is [*78] actually innocent. (*Id.*) Cody raises numerous Objections to each of these findings. (Doc. No. 74-1.)

The Court agrees with the Magistrate Judge that Cody's underlying claim is procedurally defaulted. To the extent this claim is based on the trial court record, Cody was required to raise it on direct appeal. Cody, however, failed to raise this claim on direct appeal and the state appellate court refused to reopen his direct appeal to assert it, thereby imposing a procedural bar. *See Davie*, 547 F.3d at 312. Thus, this claim is procedurally defaulted. To the extent Cody argues that this claim is based on evidence outside the record, it is unexhausted and procedurally defaulted because Cody failed to raise this specific claim in either of his post-conviction petitions and has not demonstrated that there is any vehicle under Ohio law for him to do so now. Accordingly, even if this claim could not have been raised on direct appeal because it is allegedly based on evidence outside the record, it is nonetheless barred because it is both unexhausted and procedurally defaulted.

Nor can Cody demonstrate cause or prejudice to excuse the default. As noted *supra*, in order for ineffective assistance of appellate counsel [*79] to serve as cause and prejudice to excuse a procedural default, a petitioner must also show that his claim of ineffective assistance of appellate counsel itself has merit. *See Lordi*, 384 F.3d at 194 (citing *Edwards*, 529 U.S. at 450-51); *Sulek*, 2009 U.S. Dist. LEXIS 53160, 2009 WL 1935878 at * 7. However, for all the reasons discussed above and even under *de novo* review, the Court finds that Cody has not established that his ineffective assistance of appellate counsel claim has merit, i.e., that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court's "no contact" order denied him his right to access to counsel of

his choice. Accordingly, the Court finds that ineffective assistance of appellate counsel may not serve as cause to excuse the default of this claim. Finally, for the reasons set forth *infra* in Section V.E of this Opinion, Cody cannot demonstrate that the default of this claim should be excused on the grounds that "failure to consider the[m] . . . will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Accordingly, Ground Six of Cody's Petition is denied.

D. Grounds Sixteen and Seventeen

In Ground 16, Cody argues that his trial counsel was ineffective for failing to properly investigate and develop evidence showing or tending to show that [*80] Cody had a covert, classified intelligence affiliation with the CIA and/or President George W. Bush. (Doc. 41 at p. 2.) Relatedly, in Ground 17, Cody argues that trial counsel was ineffective because counsel denied Cody his right to pursue his desired CIA affiliation defense strategy under *McCoy v. Louisiana*, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018). (*Id.*)

The Magistrate Judge determined that these grounds are procedurally defaulted because they were raised in Cody's post-conviction petitions, which were denied by the state courts on the basis of either *res judicata* and/or untimeliness. (Doc. No. 65 at p. 48, 52-54.) The Magistrate Judge found that Cody could not establish either cause or prejudice to excuse the default and, further, that he was not able to show that he is actually innocent. (*Id.*) Cody raises numerous Objections to each of these findings. (Doc. No. 74-1.)

For the following reasons, the Court agrees with the Magistrate Judge that Grounds 16 and 17 are procedurally defaulted. Cody first argued that his trial counsel was ineffective for failing to investigate and pursue evidence relating to his CIA defense in his June 2014 Petition for Post-Conviction Relief. (Doc. No. 42-1, Exh. 60 at PageID# 2228.) The state trial court denied [*81] this claim, noting that the only basis for Cody's Petition was his own self-serving, speculative affidavit. (Doc. No. 42-2, Exh. 65 at PageID# 2485-2486.) The trial court found that "Defendant-Petitioner provides no documentation from outside the record of this case to demonstrate any claim of ineffective assistance of counsel or to demonstrate why such claim is not capable of being presented in the direct appeal of his conviction." (*Id.*) Cody appealed, and the state appellate court affirmed as follows:

{¶ 17} In his first assignment of error, Cody argues that his trial counsel was ineffective because counsel (1) refused to pursue certain witnesses that would have established that Cody was working for the CIA; and (2) did not pursue a line of defense that Cody was medically incompetent to stand trial or assist in his defense due to beatings he received in jail.

{¶ 18} In its findings of fact and conclusions of law, the trial court found that the sole support for Cody's claims was contained in his own self-serving affidavits and he was unable to demonstrate that any facts existed from outside the record.

{¶ 19} Cody's claims that he received ineffective assistance of counsel because his [*82] trial attorney failed to pursue specific witnesses and present a certain line of defense are both claims that could have been brought on direct appeal. Although Cody argues that both of these claims would be proved by evidence outside the record, he does not show what the evidence would be. **Because Cody did not raise these issues on direct appeal, he has waived those claims and they are barred by *res judicata*.**

Cody, 2015 Ohio 2764, 2015 WL 4133281 at * 4 (emphasis added). Cody appealed to the Supreme Court of Ohio, which declined to accept jurisdiction. (Doc. No. 42-3, Exh. 73.)

Cody next argued ineffective assistance of trial counsel relating to his CIA Defense in his second Petition for Post-Conviction Relief, which was filed in the state trial court along with a Motion for New Trial in July 2018. (Doc. No. 42-3, Exh. 87 at PageID# 3159, 3163-3164.) The state trial court summarily denied Cody's Post-Conviction Petition

and Motion for New Trial. (Doc. No. 42-3, Exh. 88.) Cody appealed, and the state appellate court affirmed as follows:

{¶ 33} Cody submitted the following in support of his motions: (1) various statements purportedly made by the prosecutor that Cody claims show the state knew he was involved with the CIA; (2) Cody's [*83] 19-page affidavit; (3) Cody's curriculum vitae; (4) the CIA's response to Cody's Freedom of Information Act request dated January 29, 2018; (5) a 1973 redacted letter from a law firm based in Hawaii that purports to list the name "John Cody" as one of the firm's associates; (6) various transcripts and court filings; and (7) a letter from the Office of Government Information Services dated April 19, 2018, explaining the CIA's response to Cody's Freedom of Information Act request.

{¶ 34} We have reviewed Cody's motions and evidence in support of his motions. None of the documents attached to Cody's request for leave clearly and convincingly demonstrate that he was unavoidably prevented from discovering the evidence on which he relies; therefore, he was required to file his request for leave either within 120 days of the verdict (for a motion based on newly discovered evidence) or within 14 days of the verdict (for any of the other permissible reasons enumerated in Crim.R. 33(A)). **Cody's request for leave to file his motion for new trial is untimely under Crim.R. 33.**

{¶ 35} Cody's postconviction petition is likewise untimely. Cody has not shown that he was unavoidably prevented from discovering [*84] any purported new evidence.

{¶ 36} Therefore, the trial court's decision to deny the untimely Crim. R. 33 motion and postconviction petition are affirmed and the second assignment of error is overruled.

Cody, 2019-Ohio-2824, 2019 WL 3046584 at * 5-6 (emphasis added). Cody appealed to the Supreme Court of Ohio, which again declined to accept jurisdiction. *See State v. Cody*, 157 Ohio St.3d 1443, 2019- Ohio 4211, 132 N.E.3d 716 (2019).

Cody devotes much of his Objection to arguing that Grounds 16 and 17 "arise out of" or "stem from" his 2018 post-conviction petition rather than his 2014 post-conviction petition. This is immaterial, however, as either way, Grounds 16 and 17 are procedurally defaulted. In affirming the denial of Cody's 2014 post-conviction petition, the state appellate court expressly denied Cody's ineffective assistance of trial counsel claims based on the failure to pursue his CIA defense on the basis of *res judicata*. As such, the Court finds that Cody failed to comply with an applicable state procedural rule and the state court actually enforced the procedural bar, thus satisfying the first and second prongs of *Maupin, supra*. Further, as to the third prong of *Maupin*, "the Sixth Circuit has stated that *res judicata* 'is an actually enforced, adequate and independent state ground upon which the Ohio state [*85] courts consistently refuse to review the merits of a defendant's claims.'" *Collins v. Warden, Ross Correctional Inst.*, 2013 U.S. Dist. LEXIS 184939, 2014 WL 575727 at * 11 (N.D. Ohio Feb.11, 2014) (quoting *Powers v. Bobby*, 2008 U.S. Dist. LEXIS 90612, 2008 WL 4823134 (N.D. Ohio Nov. 3, 2008)). *See also Coleman v. Mitchell*, 268 F.3d 417, 427 (6th Cir. 2001); *Williams v. Bagley*, 380 F.3d 932, 966-67 (6th Cir.2004); *Jacobs v. Mohr*, 265 F.3d 407, 417 (6th Cir. 2001). Thus, to the extent Grounds 16 and/or 17 are raised in Cody's 2014 post-conviction petition, they are procedurally defaulted.

With regard to Cody's 2018 post-conviction petition and motion for new trial, the state appellate court expressly denied these filings on the grounds that they were untimely. Thus, the Court finds that Cody failed to comply with an applicable state procedural rule and the state court actually enforced the procedural bar, thus satisfying the first and second prongs of *Maupin, supra*. Further, as to the third prong of *Maupin*, the Sixth Circuit has found that the time bar in Ohio Rev. Code § 2953.21(A)(1) is considered an adequate and independent state-law ground that forecloses federal habeas review. *See Smith v. Warden, Toledo Corr. Inst.*, 780 Fed. Appx 208, 219 (6th Cir. 2019) (stating that "denying a postconviction motion or appeal based on untimeliness is an independent and adequate state procedural ground" under *Maupin*) (citing *Walker v. Martin*, 562 U.S. 307, 310-11, 131 S. Ct. 1120, 179 L. Ed. 2d 62 (2011); *Hartman v. Bagley*, 492 F.3d 347, 358 (6th Cir. 2007); *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004)). *See also Stojetz v. Ishee*, 892 F.3d 175, 204-05 (6th Cir. 2018). Thus, to the extent Grounds 16

and/or 17 are raised in Cody's 2018 post-conviction petition and/or motion for new trial, they are also procedurally defaulted.

Moreover, the Court agrees with the Magistrate Judge that Cody has failed to [*86] demonstrate either cause or prejudice to excuse the default.**18** Finally, for the reasons set forth *infra* in Section V.E of this Opinion, Cody cannot demonstrate that the default of this claim should be excused on the grounds that "failure to consider the[m] . . . will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Accordingly, Grounds Sixteen and Seventeen of Cody's Petition are denied.

E. Actual Innocence

With regard to Cody's claims that are procedurally defaulted, the Magistrate Judge concluded that Cody could not demonstrate that the default should be excused on the basis of "actual innocence." (Doc. No. 65 at pp. 49-52.) Cody raises numerous Objections to this conclusion. (Doc. No. 74-1 at PageID#s 8702 -8703.)

Because the cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice, the United States Supreme Court has recognized a narrow exception to the cause requirement where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Dretke v. Haley*, 541 U.S. 386, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004). *See also Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). This type of actual innocence claim, sometimes called gateway innocence, "does not by itself provide a basis for relief." [*87] *Schlup*, 513 U.S. at 315. In other words, the innocence showing 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.* (quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)). Thus, a petitioner's showing of a credible claim of innocence allows him to skirt a procedural defect in his claim so that a federal court may address his allegation of constitutional error. *Davis v. Bradshaw*, 900 F.3d 315, 326 (6th Cir. 2018).

"But this innocence gateway is a narrow one." *Davis*, 900 F.3d at 326. The Supreme Court has cautioned that it "should open only when a petition 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 non-harmless constitutional error." *McQuiggin v. Perkins*, 569 U.S. 383, 401, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) (citation and internal quotation marks omitted). Thus, the exception "applies to a severely confined category: cases in which new evidence shows it is more likely than not that no reasonable juror would have convicted [the petitioner]." *Id.* at 395 (alteration in original) (citation and internal quotation marks omitted); *see Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005).

For a petitioner to establish entitlement to the actual innocence exception, he must support his allegations of constitutional error [*88] with new, reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial. *Id. See also Davis*, 900 F.3d at 326; *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 427 (6th Cir. 2003). Absent new evidence of innocence, "even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 U.S. at 316.

The Magistrate Judge carefully considered each piece of Cody's allegedly "new" evidence and explained why such evidence either is not "new" or does not support Cody's claim of actual innocence. (Doc. No. 65 at pp. 50-52.) The Court has carefully reviewed both the R&R and the specific evidence cited therein and, upon *de novo* review, agrees with the Magistrate Judge's analysis and conclusion that "Cody does not persuasively explain how the evidence he cites shows that it would be more likely than not that no reasonable juror would have convicted him." (*Id.* at p. 51.)

Accordingly, the Court finds that Cody cannot demonstrate that the "actual innocence" exception applies to any of his procedurally defaulted Grounds for Relief.

VI. Conclusion

For the foregoing reasons, Petitioner's [*891] Objections (Doc. No. 74-1) are overruled, the Report & Recommendation (Doc. No. 65) is adopted as set forth herein, and the Petition (Doc. No. 1) is denied. In addition, Petitioner has not sufficiently demonstrated the need for an evidentiary hearing and his request for the same is denied. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ Pamela A. Barker

PAMELA A. BARKER

U. S. DISTRICT JUDGE

Date: April 16, 2021

Footnotes

- **1**
  In a subsequent opinion, the state appellate court further summarized the facts as follows: "Using professional fund-raisers, the USNVA collected millions of dollars, including approximately $2,000,000 from Ohioans. Cody deposited the money collected for the USNVA into various bank accounts. Then he and a codefendant withdrew money from the accounts, and the money could no longer be traced. During the relevant time, Cody moved around the country, including Florida and Oregon. When he was arrested in Oregon in April 2012, he had identification papers for multiple people and over $900,000 in cash." *State v. Cody*, 2017-Ohio-1543, 2017 WL 1507211 at * 1 (Ohio App. 8th Dist. Apr. 21, 2017).
- **2**

  The Court's recitation of the relevant procedural history is not intended to be exhaustive. Rather, the Court will set forth only that procedural history necessary to a resolution of the pending Objections.

- **3**
  Cody's reference to his "CIA Defense" is to his argument that, throughout the relevant time period, he was working for the Central Intelligence Agency ("CIA") and had been lawfully assigned various cover identities, including the ones relating to the identity fraud charges. *See, e.g, State v. Cody*, 2017-Ohio-1543, 2017 WL 1507211 at *2 (Ohio App. 8th Dist. April 21, 2017).
- **4**
  The state appellate court characterized Cody's nine assignments of error as follows: "(1) trial counsel was ineffective because counsel refused to pursue certain witnesses that would have established that Cody was working for the CIA; and did not pursue a line of defense that Cody was medically incompetent to stand trial or assist in his defense due to beatings he received in jail; (2) the trial court abused its discretion by denying his petition based on his argument that Counts 3-9 and 13-23 of the indictment should have been dismissed; (3) exculpatory evidence was withheld from him; (4) the trial court should have held a hearing on his claim that his sentence was discriminatory, disproportionate, and excessive; (5) the trial court erred

when it did not hold a hearing on his claims against the prosecutor; (6) the trial court erred in granting summary judgment in favor of the state; (7) the trial court erred in granting summary judgment to the state without holding an evidentiary hearing to determine Cody's credibility; and (8) and (9) the trial court erred in adopting the state's findings of fact and conclusions of law." *State v. Cody*, 2019-Ohio-2824, 2019 WL 3046584 at * 1 (Ohio App. 8th Dist. July 11, 2019). and the federal and Ohio Constitutions' Due Process clauses, (5th/14th Amends., U.S. Const.; Sec 16, Art I, Ohio Const.), and the Right to Effective Counsel, Compulsory Process (6th Amend. U.S., Const.; Sec. 10, Art. I, Ohio Const.) and Right to a Fair Trial (6th Amend., U.S. Const.; Sec. 5, Art. I, Ohio Const.)

- **5**

Under the mailbox rule, the filing date for a *pro se* petition is the date that a petitioner delivers it to prison authorities. *See Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988). While the Petition herein did not arrive at the Court for filing until August 2, 2018, Cody states that he placed it in the prison mailing system on July 24, 2018. (Doc. No. 1 at PageID# 7.) Thus, the Court will consider the Petition to be filed on July 24, 2018.

- **6**

Throughout the latter half of 2019, Cody filed numerous motions for leave to file certain motions, including motions for leave to file motions for stay and abeyance, an expanded record, to correct the record, and to make "intra-traverse incorporations." (Doc. Nos. 44, 45, 47, 49, 50, 51, 52, 53.) On September 12, 2019, the Magistrate Judge denied Cody's motions in a series of non-document orders. The Magistrate Judge did, however, allow Cody additional time to file his Traverse and stated that it "shall be no more than 55 pages long." *See* Non-Document Order dated September 12, 2019. In addition, the Magistrate Judge issued a Report & Recommendation that Cody's Supplemental Motion for Stay and Abeyance (Doc. 19) and Motion to Amend Complaint (Doc. 20) be denied. (Doc. No. 60.) Cody filed a series of Objections. (Doc. Nos. 54, 61.) On March 5, 2020, this Court issued a Memorandum Opinion & Order in which overruled Cody's various Objections. (Doc. No. 64.)

- **7**

In *Maupin*, the Sixth Circuit established a four-step analysis to determine whether a claim is procedurally defaulted. *Maupin*, 785 F.2d at 135. Under this test, the Court decides (1) whether the petitioner failed to comply with an applicable state procedural rule, (2) whether the state courts actually enforced the state procedural sanction, (3) whether the state procedural bar is an "independent and adequate" state ground on which the state can foreclose federal review, and (4) whether the petitioner has demonstrated "cause" and "prejudice." *Id.* at 138-39; *Barkley v. Konteh*, 240 F. Supp.2d 708 (N.D. Ohio 2002). "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).

- **8**

This second type of procedural default is often confused with exhaustion. Exhaustion and procedural default, however, are distinct concepts. AEDPA's exhaustion requirement only "refers to remedies still available at the time of the federal petition." *Engle*, 456 U.S. at 125 n. 28. Where state court remedies are no longer available to a petitioner because he failed to use them within the required time period, procedural default and not exhaustion bars federal court review. *Id.*

- **9**

The Court notes that one of the judges on the panel in *Williams* wrote a concurring opinion in which she noted the Sixth Circuit's "conflicting case law" on this issue. Specifically, Justice Stranch explained: "I acknowledge that our court has held, since the Supreme Court decided *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011), that modified AEDPA deference should no longer be applied. *Jackson v. Smith*, 745 F.3d 206, 209-10 (6th Cir.2014); *Piscopo v. Mich.*, 479 Fed. Appx. 698, 703-04 (6th Cir.2012); *Smith v. Coleman*, 453 Fed. Appx. 625, 627 (6th Cir.2011). Since *Harrington*, our court has also applied modified AEDPA deference in two published cases. *Peoples v. Lafler*, 734 F.3d 503,

516-17 (6th Cir.2013); *Moore v. Mitchell*, 708 F.3d 760, 795 (6th Cir.2013). Our conflicting case law leaves me unable to agree with the conclusion" that the modified AEDA deference standard lacks continuing vitality. *Williams*, 613 Fed. Appx. 461, concurring opinion.

- **10**

The Court finds that the state appellate court's recitation of the proper legal standard and subsequent analysis of the record evidence renders the instant case distinguishable from those in which the Sixth Circuit has applied the "modified AEDPA deference" standard. *See, e.g., Maldonado v. Wilson*, 416 F.3d 470, 476 (6th Cir. 2005) (applying modified AEDPA deference where the petitioner argued that the erroneous admission of a witness's prejudicial comment violated "both Ohio evidence law and the Due Process Clause," but the state appellate court "appeared to decide the issue solely on the basis of state evidence law."); *Howard v. Bouchard*, 405 F.3d 459, 467 (6th Cir.2005) (applying modified AEDPA deference where the state court of appeals, in response to a due process challenge and with no analysis, held that there was "no error" in the admission of identification testimony, and even if there were, it was "harmless beyond a reasonable doubt"); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (applying modified AEDPA deference where the state courts disposed of the constitutional issues without analysis, by summary order and denial of leave to appeal).

- **11**

The record indicates that Cody appeared disheveled that day in court. *State v. Cody*, 2017-Ohio-1543, 2017 WL 1507211 at *3, n. 5 (Ohio App. 8th Dist. April 21, 2017).

- **12**

The Court also notes the state trial court had previously referred Cody to the court's psychiatric clinic for an evaluation and, in August 2012, the parties stipulated to the competency reports that had been prepared as a result of that evaluation. (Doc. 42-1, Exhs. 7, 11.)

- **13**

Cody's reliance on *Ward v. Sternes*, 334 F.3d 696 (7th Cir. 2003) is misplaced. In *Ward*, the petitioner suffered from aphasia as a result of previous blunt head trauma. Testimony was introduced at trial that this condition "severely disrupted [Ward's] ability to think, reason, take in verbal information, and understand and use language to express his understanding." *Id.* at 705-706. In that case, the trial court asked Ward whether he wanted to testify, and Ward responded "I guess. I don't know." *Id.* at 700. The trial court accepted this, stating "that's the best we will ever do." *Id.* Ward did not testify and was found guilty of murder but mentally ill. *Id.* In his federal habeas petition, Ward asserted that he did not make a valid waiver of his fundamental constitutional right to testify. *Id.* at 701. The district court agreed and granted the petition. On appeal, the Seventh Circuit affirmed, finding that "there was an indication that Ward was prevented by his own mental deficiencies from exercising his fundamental right to testify, which then necessitated further inquiry from the court . . . And more than an equivocal, 'I guess, I don't know,' . . . was required to ensure an accused with severe brain damage was knowingly and intelligently waiving a fundamental right." *Id.* at 706. In the instant case, there is no evidence that Cody suffered from any mental or physical condition that severely disrupted his ability to think, reason or communicate. Nor did Cody equivocally respond to the trial court's questions as to whether he wanted to testify. Rather, Cody indicated that he wanted to discuss the issue with his counsel and, after a forty-minute recess, defense counsel stated that Cody would not testify. Cody did not object. Accordingly, *Ward* is clearly distinguishable.

- **14**

The Court further finds that, even if it were to apply "modified AEDPA deference," it would reach the same conclusion for all the reasons set forth above.

- **15**

  In his Objections, Cody also argues that appellate counsel was ineffective based on the failure to assign as error trial counsel's failure to call Cody to testify after promising the jury in opening arguments that Cody would testify on his own behalf. This Objection is overruled. As an initial matter, it does not appear that Cody asserted this particular claim in Ground Four of the instant habeas petition. Moreover, even if he had properly asserted this claim herein, Cody has not demonstrated that he raised this particular ineffective assistance of appellate counsel claim in his 26(B) Application and, thus, this claim would be procedurally defaulted.

- **16**

  In his Objections, Cody argues that the filing of his 26(B) Application preserved these underlying claims for habeas review. This Objection is without merit and overruled. It is well established that "bringing an ineffective assistance claim in state court based on counsel's failure to raise an underlying claim does not preserve the underlying claim for federal habeas review because the two claims are analytically distinct." *Davie*, 547 F.3d at 312. *See also Stojetz*, 389 F.Supp.2d at 898-99; *Wogenstahl v. Mitchell*, 668 F.3d 307, 343 (6th Cir. 2012); *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005); *Enyart v. Coleman*, 29 F. Supp.3d 1059, 1098 (N.D. Ohio 2014); *White v. Shewalter*, 2012 U.S. Dist. LEXIS 94123, 2012 WL 2711463 at *10 (N.D. Ohio March 14, 2012) report and recommendation adopted by 2012 U.S. Dist. LEXIS 94124, 2012 WL 2741551 (July 9, 2012).

- **17**

  In his Objections, Cody does not argue any other basis for finding either cause or prejudice to excuse the default of these claims.

- **18**

  Cody argues that the ineffective assistance of his trial counsel constitutes cause to excuse the default of ineffective assistance of trial counsel claims. Cody does not sufficiently explain this theory nor does he cite any relevant authority in support thereof. The Court, therefore, rejects this argument. In addition, the Court notes that Cody specifically states in his Objections that he "does not allege [ineffective assistance of appellate counsel] as an excuse for a procedural bar to 'Claim 16." (Doc. No. 74-1 at PageID# 8699.) To the extent Cody is arguing that ineffective assistance of appellate counsel constitutes cause to excuse the default of Ground 17, this argument is rejected. Cody did not present this claim in his 26(B) Application and, therefore, any such ineffective assistance of appellate counsel claim is procedurally defaulted. While ineffective assistance of appellate counsel may serve as "cause" to excuse a procedural default, it may only do so if the ineffective assistance of appellate counsel claim is not itself defaulted. *See Edwards*, 529 U.S. at 450-451; *Wogenstahl*, 668 F.3d at 321. Accordingly, Cody has failed to demonstrate cause to excuse the default of these claims.

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

John Cody,
Also known as
Bobby Thompson,

Petitioner,

-vs-

Warden Ed Sheldon,

Respondent

Case No. 1:18cv1787

JUDGE PAMELA A. BARKER

Magistrate Judge Kathleen Burke

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion and Order issued this date, Petitioner John Cody's Objections (Doc. No. 74-1) are overruled, the Report & Recommendation (Doc. No. 65) is adopted as set forth herein, and the Petition (Doc. No. 1) is denied. In addition, Petitioner has not sufficiently demonstrated the need for an evidentiary hearing and his request for the same is denied. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

s/Pamela A. Barker
PAMELA A. BARKER
U. S. DISTRICT JUDGE

Date: April 16, 2021

Appendix B-2

Report and Recommendation of the United States Magistrate Judge

Cody v. Sheldon, 2020 U.S. Dist. LEXIS 253954

United States District Court for the Northern District of Ohio, Eastern Division

March 24, 2020, Decided; March 24, 2020, Filed

CASE NO. 1:18CV1787

Reporter
2020 U.S. Dist. LEXIS 253954 * | 2020 WL 9460507

JOHN CODY, aka Bobby Thomson, Petitioner, v. ED SHELDON, Respondent.

Counsel: [*1] John Cody, Bobby Thompson, Petitioner, Pro se, Mansfield, OH.

John Cody, also known as, Petitioner, Pro se, Mansfield, OH.

For Ed Sheldon, Dave Marquis, Ed Sheldon, originally named as, Respondents: Stephanie L. Watson, Office of the Attorney General - Criminal Justice Section, Columbus, OH.

Judges: Kathleen B. Burke, United States Magistrate Judge. JUDGE PAMELA A. BARKER.

Opinion by: Kathleen B. Burke

Opinion

REPORT & RECOMMENDATION

Petitioner John Cody ("Petitioner" or "Cody") brings this habeas corpus action pursuant to 28 U.S.C. § 2254. Doc. 1. Cody is detained at the Mansfield Correctional Institution, having been found guilty by a Cuyahoga County, Ohio, Court of Common Pleas jury on 12 counts, including engaging in a pattern of corrupt activity, complicity to theft, complicity to money laundering, tampering with records, and identity fraud. *State v. Cody*, Case No. CR-12-565050-A (Cuyahoga Cty. Common Pleas Ct., filed December 17, 2013). The trial court merged the applicable counts and sentenced Cody to an aggregate prison term of 27 years.1 Doc. 42-1, p. 318 (Exhibit 43).

On August 2, 2018, Cody filed his Petition for Writ of Habeas Corpus setting forth thirteen grounds for relief. Doc. 1-1, pp. 9-15. In July 2019, with leave of Court, Cody alleged an additional five grounds for relief. Doc. 41. This matter has been referred [*2] to the undersigned Magistrate Judge for a Report and Recommendation pursuant to Local Rule 72.2. As set forth more fully below, Cody's grounds for relief are procedurally defaulted and/or fail on the merits. Thus, the undersigned recommends that his Petition for Writ of Habeas Corpus (Doc. 1) be **DISMISSED** in part and **DENIED** in part.2

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).

The following summary of underlying facts is taken from the opinion of the Cuyahoga County Court of Appeals, Eighth Appellate District of Ohio:

{¶ 2} This case arises from an investigation regarding the United States Naval Veteran's Association ("USNVA"), a charity organized and created by a person holding himself out to be Bobby Thompson. Through the investigation, it was discovered

that the USNVA was a sham, fabricated by a person named John Donald Cody, who manipulated unsuspecting individuals across the United States to donate to this charity, unlawfully procuring millions of dollars.

{¶ [*3] 3} In mid-2010, the state of Ohio began its investigation into the USNVA after a story was published in the St. Petersburg Times that the charity was fictitious. Through its investigation, the state revealed that Ohio residents had been solicited by various professional fundraisers contracted by USNVA to donate money to the USNVA. It was discovered that approximately $2 million was solicited on behalf of the USNVA from resident-donors in the state of Ohio.

{¶ 4} As a result of the investigation, on October 13, 2010, Appellant was indicted in Cuyahoga C.P. No. CR-10-543025 on charges of engaging in a pattern of corrupt activity involving the USNVA, money laundering, and aggravated theft. In December 2010, another indictment was issued against Appellant in Cuyahoga C.P. No. CR-10-545577 on 22 additional charges, including engaging in a pattern of corrupt activity, aggravated theft, money laundering, tampering with records, and identity fraud.

{¶ 5} A warrant was subsequently issued for Appellant's arrest. In April 2012, Appellant was finally apprehended in the state of Oregon. After Appellant was in custody in Ohio, a new indictment was issued against him in July 2012, Cuyahoga C.P. No. [*4] CR-12-565050. Appellant was charged with one count each of engaging in a pattern of corrupt activity pertaining to the criminal enterprise of the USNVA, complicity to commit theft, tampering with records, complicity to tamper with records, identity fraud (a felony of the second degree), and possessing criminal tools; and seven counts of complicity to commit money laundering, and 11 counts of identity fraud (felonies of the fifth degree). The previous indictments issued in Case Nos. CR-10-543025 and CR-10-545577 were dismissed and the surviving indictment in Case No. CR-12-565050 ultimately was tried before a jury that heard testimony from 47 witnesses and viewed over 200 exhibits.

{¶ 6} At the close of evidence, the court granted Appellant's renewed Crim.R. 29 motion for judgment of acquittal as it pertained to Count 24, possessing criminal tools. The court concluded that the state of Ohio lacked jurisdiction to pursue this charge because, although the criminal tools were found in Appellant's possession when he was arrested, they were located in the state of Oregon.

{¶ 7} The jury returned a guilty verdict on the 23 remaining counts. After considering merger, the trial court imposed a total sentence [*5] of 28 years in prison and ordered that Appellant spend every Veteran's Day in solitary confinement.

State v. Cody, 34 N.E.3d 189, 191 (Oh. Ct. App. 2015).

A. State Trial Court Proceedings

Upon his arrest, Cody was arraigned, assigned counsel, and pleaded not guilty in the two cases against him. Doc. 42-1, pp. 39, 40 (Exhibits 5, 6). On July 12, 2012, the trial court referred Cody to the court's psychiatric clinic for an evaluation. Doc. 42-1, pp. 41-42 (Exhibit 7).

On July 25, 2012, Cody was indicted by the Cuyahoga County Grand Jury for a third time in a superseding indictment on 24 counts: one count of engaging in a pattern of corrupt activity (R.C. §2923.32(A)(1)) (Count 1); one count of complicity to theft (R.C. §2913.02(A)(3)) (Count 2); seven counts of complicity to money laundering (R.C. §1315.55(A)(1)) (Counts 3-9); one count of tampering with records (R.C. §2913.42(A)(2) (Count 10); one count of complicity to tampering with evidence (R.C. §2913.42(A)(2) (Count 11); twelve counts of identity fraud (R.C. §2913.49(B) (Counts 12-23); and one count of possession of criminal tools (R.C. §2923.24) (Count 24). Doc. 42-1, pp. 45-66. Cody, through counsel, entered a plea of not guilty. Doc. 42-1, p. 67 (Exhibit 9).

On August 21, 2012, the parties stipulated to the competency reports returned in Cody's psychiatric evaluation. Doc. 42-1, p. 68 (Exhibit 11).

On August [*6] 24, 2012, Cody, through counsel, filed a motion to dismiss based on speedy trial delay pursuant to R.C. §2945.71. Doc. 42-1, pp. 69-75 (Exhibit 12). The trial court denied Cody's motion. Doc. 42-1, p. 146 (Exhibit 14).

On motion by the state, the trial court dismissed the two 2010 indictments and proceeded on the charges in Case No. CR-12-565050. Doc. 42-1, pp. 147-149 (Exhibits 15, 16).

On January 30, 2013, Cody filed a waiver of attorney and sought to represent himself. Doc. 42-1, p. 151 (Exhibit 18). After a hearing, the trial court permitted Cody to proceed pro se and appointed his current counsel as advisory counsel. Doc. 42-1, p. 152 (Exhibit 19); Doc. 43-1, pp. 125-145 (Tr. Vol. 1).3

On February 11, 2013, proceeding pro se, Cody filed a motion to dismiss Counts 13-24 on grounds of lack of jurisdiction, a motion to dismiss with prejudice for lack of effective counsel, and a "Motion to Dismiss: Internal Revenue Code: §501(c)(19)" on Counts 1, 2, and 3-9. Doc. 42-1, pp. 153, 162, 181 (Exhibits 20-22).4 The trial court denied Cody's motion based on alleged lack of effective counsel. Doc. 42-1, p. 241 (Exhibit 27).

On February 22, 2013, Cody filed a motion to dismiss for tampering with evidence, arguing that [*7] the state failed to preserve the U.S. Navy Veterans Association website. Doc. 42-1, pp. 242-245 (Exhibit 28). He also filed a "Demand and Motion to Compel Subpoenas Sub Duces Tecum Re: ACS, CPS and CSI," requesting that the trial court issue an order compelling the state to produce the documents it received from subpoenas issued to the Professional Fundraisers Associated Community Services and Community Support Inc. Doc. 42-1, p. 268 (Exhibit 31).

On August 26, 2013, a month before trial, Cody, on the record, relinquished his position as pro se counsel and his advisory counsel was assigned as counsel of record. Doc. 42-1, p. 282 (Exhibit 34); Doc. 43-2, pp. 217-225 (Tr. Vol. 2).

On August 28, 2013, Cody's attorney filed a motion to continue trial, Doc. 42-1, p. 283, which the state opposed, Doc. 42-1, p. 285 (Exhibits 35, 36). The trial court denied Cody's motion for a continuance. Doc. 42-1, p. 288 (Exhibit 37).

On September 30, 2013, the state filed a motion to quash defense subpoenas issued to various current and former state elected officials, including Mike DeWine, Richard Cordray, John Boehner, Steve Chabot, Steve LaTourette, Deborah Pryce, Steve Stivers, Kirk Schuring, and Jim [*8] Petro. Doc. 42-1, p. 289 (Exhibit 38). The trial court granted the state's motion to quash. Doc. 42-1, p. 304 (Exhibit 39).

Following trial, the jury found Cody guilty of Counts 1-23 as charged in the indictment and Count 24 (possession of criminal tools) was dismissed by the court. Doc. 42-1, p. 305 (Exhibit 40).

On December 10, 2013, Cody, through counsel, filed a motion for a new trial, arguing that the jury improperly considered the fact that he did not testify. Doc. 42-1, p. 307 (Exhibit 41). On December 16, 2013, the trial found Cody's motion for new trial not well taken and denied it. Doc. 43-22, pp. 4534-4535 (Tr. Vol. 22). The court proceeded to sentencing and ordered Cody to serve ten years on Count 1; eight years on Count 2 to run consecutively with Count 1; 24 months on each of Counts 3-9, served concurrently to each other but consecutively to Counts 1 and 2; 24 months on Counts 10-11, served concurrently to each other but consecutively to Counts 1, 2 and 3-9; five years on Count 12, served consecutively with Counts 1, 2, 3-9 and 10-11; and 12 months on Counts 13-23, served concurrently to each other but consecutively to Counts 1, 2, 3-9, 10-11 and 12, for an aggregate sentence [*9] of 28 years in prison. The court also ordered Cody to spend every Veteran's Day in solitary confinement. Doc. 42-1, p. 318 (Exhibit 43).

B. Direct Appeal

On December 23, 2013, Cody, through new counsel, appealed to the Eighth District Court of Appeals, Cuyahoga County, Ohio. Doc. 42-1, p. 320 (Exhibit 44). In his merit brief, he raised the following three assignments of error:

1. The trial court erred, and violated due process, when it entered convictions for eleven counts of identity fraud for which it did not have jurisdiction. (Fifth and Fourteenth Amendments, United States Constitution; Sections 10 and 16, Article I, Ohio Constitution. R.C.2901.11. December 17, 2013 Journal Entry of Sentence).

2. The trial court violated the Appellant's rights to due process and a fair trial when it allowed the admission of irrelevant and overly prejudicial testimony and documentary evidence referencing a potential future charitable organization Appellant was establishing. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution; Evid.R. 402; 403 (Tr. at 1215-1217; 1965-1967; 2223-2243; 3841-3861; 3711-3716; 3832-3858; Exh. 26-1).

3. The trial court erred when it imposed a day of solitary confinement on each Veteran's Day (Tr. at 4550; Dec. 16, 2013 Journal Entry).

Doc. 42-1, p. 329 (Exhibit 45). The state filed a brief in response conceding Cody's third assignment [*10] of error but opposing his first two assignments of error. Doc. 42-1, pp. 354-381 (Exhibit 46). The Ohio Court of Appeals ordered the parties to brief whether the trial court committed plain error in its instruction to the jury regarding the state's burden of proof on Counts 13-23 and the parties filed supplemental briefs as ordered. Doc. 42-1, pp. 395-445 (Exhibits 48, 49, 50, 51).

On June 11, 2015, the Ohio Court of Appeals sustained Cody's first and third assignments of error and overruled his second assignment of error, thereby affirming in part, vacating in part, and remanding to the trial court for a new judgment entry. Doc. 42-1, pp. 448-464 (Exhibit 52); *State v. Cody*, 34 N.E.3d 189 (Oh. Ct. App. 2015).

On June 19, 2015, Cody, pro se, appealed to the Ohio Supreme Court. Doc. 42-1, p. 465 (Exhibit 53). In his memorandum in support of jurisdiction, he set forth the following propositions of law:

1. The Court of Appeals Lacked Jurisdiction to make any hypothetical ruling, or even to address the subject at all, on any Evid. R. 401-404(B) issues; and the fact evidence came in as relevant to dismissed Counts 13-24 [identity fraud (others) and Possession of Criminal Tools] required jurisdictional remand to the Common Pleas Court for retrial as to how [*11] that evidence was to come in, or if it should come in at all.

2. Where an Appellate Court creates a new Evid. R. 101, 105, 401-404(B) issue which stems from a preliminary holding or finding, a criminal defendant may retain a constitutional right to trial on such issue(s) by a common pleas court and jury, under the 6th and 14th Amendments to the United States Constitution, and Art. I, §§5 and 10 of the Ohio Constitution.

3. The Trial Court Lacked Subject Matter Jurisdiction to Proceed on CR-12-565050 A, At All, because the entire indictment was void at the moment of its presentment by the Grand Jury.

4. If the Appellate Court had jurisdiction to decide the hypothetical evidentiary issues it did in Section III of its Opinion, the Harmless Error Standard, not the Plain Error Standard, should have applied, and the case remanded for new trial.

4(A). Assuming the Appellate Court had authority to rule on the 403/404(B) issues raised, the introduction of that evidence amounted to character assassination of the Defendant unfairly prejudicing a trial against him, and therefore new trial was mandated.

Doc. 42-1, pp. 469-470 (Exhibit 54) (brackets in original). On October 28, 2015, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4). Doc. 42-1, p. 523 (Exhibit 56).

On January 6, 2016, Cody, [*12] pro se, filed a petition for writ of certiorari in the United States Supreme Court. Doc. 42-1, p. 524 (Exhibit 57). On May 20, 2016, his petition was denied. Doc. 42-1, p. 525 (Exhibit 58).

C. Remand from the Ohio Court of Appeals

On December 7, 2015, pursuant to the Ohio Court of Appeals' decision, the trial court issued a journal entry vacating Counts 13-23 and the concurrent 12-month aggregate sentence for those counts. Doc. 42-1, p. 526 (Exhibit 59).

D. First State Petition for Post-Conviction Relief

On June 30, 2014, while his direct appeal was pending, Cody, pro se, filed a petition to vacate or set aside judgment of conviction or sentence pursuant to R.C. §2953.21. Doc. 42-1, p. 527 (Exhibit 60). In his petition, he raised the following claims:

1. Ineffective Assistance of Defense Counsel Mr. Patituce — Denial of 6th/14th Amendment Rights, U.S. Const.; Sec. 10, Art. I, Ohio Const. Rights.

2. Lack of territorial jurisdiction and venue on Counts 3-9 (Money Laundering) and Counts 13-23 (Identity Fraud), as required by the federal and Ohio constitutional fair trial and due process mandates, and the Ohio jurisdictional/venue statutes (2901.11/2901.12) (5th/14th/6th Amend, U.S. Const; Sec 16, Art I, Sec. 5, Art. I, Ohio Const. - Right of Due Process, Right to Fair Trial.

3. Lack of State provided required discovery (off the [*13] record, outside the record) relating to Petitioner's Notice of [CIA] Defense: in violation of Brady v. Maryland and the federal and Ohio Constitutions' Due Process clauses, (5th/14th Amends., U.S. Const.; Sec 16, Art I, Ohio Const.), and the Right to Effective Counsel, Compulsory Process (6th Amend. U.S., Const.; Sec. 10, Art. I, Ohio Const.) and Right to a Fair Trial (6th Amend., U.S. Const.; Sec. 5, Art. I, Ohio Const.)

4. Denial of Due Process Rights (5th/Fourteenth Amends, U.S. Const.; Sec. 16, Art. I), Denial of Right to U.S. Const; 5 Art. I Ohio Excessive Fines/Cruel and Unusual Const. Sec. 9, Art. I Ohio Const.) conditions imposed on Defendant pre-trial while in custody by agents of the State dehors record, and trial counsel's ineffectiveness in not raising these issues sufficiently with the Court. Also claim's constitutional basis includes violations of 14th Amend., U.S. Const. and Ohio Const. prescriptions for Equal Protection of the Law.

5. Violation of Due Process Clauses (5th/14th Amendments, U.S. Const. and Ohio Const. prescriptions for Equal Protection of Amendments, U.S. Const., Sec. 16 Art. I, Ohio Const.), because the Attorney General's Office brought and maintained the prosecution for reasons forbidden by the U.S. and Ohio Constitutions, to wit: prosecutorial misconduct involving (a) Vindictive Prosecution, (b) Selective Prosecution, U.S. v. Armstrong, 517 U.S. 456, 463 (1996), U.S. v. Lupton, 2008 U.S. Dist. LEXIS 87217 (Ea. Dist. Wis.); prosecutorial misconduct (suppression of exculpatory Brady material....

Doc. 42-1, pp. 528-132 (Exhibit 60) (brackets in original).

The state filed a memorandum in opposition to the petition for post-conviction relief/motion for summary judgment. Doc. 42-1, p. 552 (Exhibit 61). On October 16, 2014, the trial [*14] court denied Cody's petition to vacate or set aside judgment of conviction or sentence. Doc. 42-2, p. 187, and, on October 20, 2014, issued an order granting the state's motion for summary judgment with supporting Findings of Fact and Conclusions of Law finding Cody's claims meritless and barred by res judicata, Doc. 42-2, pp. 188-210 (Exhibit 65).

On November 18, 2014, Cody, pro se, appealed to the Ohio Court of Appeals, Eighth District. Doc. 42-2, p. 211 (Exhibit 66). In his merit brief, Cody raised the following nine assignments of error:

1. The trial court abused its discretion when it ruled, as to Claim No. 1, that Petitioner presented insufficient cognizable evidence and insufficient applicability of the evidence to warrant post-conviction relief, and to state a constitutional claim.

2. The trial court abused its discretion in denying Petition Claim No. 2 for dismissal of Counts 13-23, and 3-9 of the indictment on grounds of lack of jurisdiction.

3. The trial court abused its discretion in dismissing Petition Claim No. 3, holding Petitioner presented insufficient cognizable evidence and insufficient applicability of the evidence to warrant a hearing of postconviction relief, and [*15] failed to state a constitutional claim.

4. The trial court abused its discretion not holding a hearing on Petitioner's claims of discrimination, disproportionality and excessivity of sentence.

5. The trial court abused its discretion in not holding a hearing on Petitioner's claims of a vindictive, and politically selective prosecution.

6. The trial court abused its discretion in granting the State's motion for summary judgment.

7. The trial court abused its discretion in applying the State's lack of credibility standards to the case.

8. The trial court abused its discretion in making numerous fundamental erroneous conclusions of law which, whether considered separately claim-by-claim and issue-by-issue, or as a whole as cumulative error, permeating the entire judgment of dismissal, require remand for correction and re-decision.

9. The trial court abused its discretion in providing Appellant with no meaningful appeal given its adoption of the structuring of the PFF/CL.

Doc. 42-2, pp. 249-253 (Exhibit 67). On July 9, 2015, the Ohio Court of Appeals overruled Cody's assignments of error and affirmed the judgment of the trial court. Doc. 42-2, pp. 430-446 (Exhibit 69); *State v. Cody*, 2015 WL 4133281 (Oh. Ct. App. July 9, 2015); 2105-Ohio-2764.

On July 22, 2015, Cody, [*16] pro se, filed a timely notice of appeal to the Ohio Supreme Court. Doc. 42-2, p. 447 (Exhibit 70). In his memorandum in support of jurisdiction, he set forth the following propositions of law:

1. Res Judicata did not apply to Appellant's never-before-made claims of lack of subject matter (territorial) jurisdiction on Counts 3-9 (money laundering) of the indictment and they should be dismissed for that lack. Neither res judicata nor mootness applied to Appellant's claims he should be granted a new trial related to lack of subject matter jurisdiction on Counts 13-24 (Identity Fraud; Possession of Criminal Tools) of the indictment; and Appellant should be granted new trial related to that lack.

2. Appellant was denied a meaningful appeal because he was not given the State's Brady materials to review for preparation.

3. A court may not intuit lack of a PCRP affidavit's credibility absent specific references to evidence in the record.

4. A Post Conviction Relief Petition ("PCRP") hearing should be had on an ineffective assistance of counsel ("I.A.C.") claim where the claim is different from any made, if any, on direct appeal and the trial court ("T.C.") does not cite to compelling and overwhelming [*17] evidence of trial counsel's competence from the record. Res judicata does not bar a PCRP claim where facts essential to the claim occurred dehors record.

5. A simultaneous PCRP grant of a summary dismissal under R.C. 2953.21(C), and a summary judgment under 2953.21(D), voids the judgment because the two are mutually inconsistent and logically impossible to be granted simultaneously, contrary to the PCRP statute and due process of law; and leaving the Appellant nothing meaningful to appeal from.

6. PCRP Claim 1 stated a cognizable claim because the Affidavit stated uncontradicted and essential dehors record evidence Appellant was assaulted by sheriff's deputies and placed in due-process-violative pre-trial holding, and inmate cells; that his counsel did not request a continuance because of his resultant physical condition so that he could testify at trial; and the decision's reasons given for Appellant's lack of credibility on this subject were not cognizable. PCRP Claim 5 stated a cognizable claim because the Affidavit stated essential dehors record evidence that the prosecuting Ohio Attorney General, Mick DeWine ("DeWine"), knew the United States Navy Veterans Association ("USNVA") was a CIA/Bush White House [*18] connected organization; that DeWine had asked for campaign contributions from Appellant and USNVA, and was dissatisfied with the results, and the essential evidence of an excessive sentence as a factor in a vindictive prosecution not occurring by definition, until date of sentence; and the decision's reasons given for Appellant's lack of credibility on this subject were not cognizable. PCRP Claim 3 stated a cognizable claim because the Affidavit stated essential dehors record evidence of DeWine's personal knowledge of USNVA's CIA and Bush White House connections; and argued cogently therefrom (a) Brady-violative suppression by the State of Appellant's CIA connection and (b) motivation therefor constituting prosecutorial misconduct; and the Decision's reasons given for Appellant' lack of credibility on this subject were not cognizable.

Doc. 42-3, pp. 10-14 (Exhibit 71). On October 28, 2015, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4). Doc. 42-3, p. 51 (Exhibit 73).

E. Ohio App. Rule 26(B) Application to Reopen Direct Appeal

On June 30, 2015, Cody, pro se, filed a notice of intent to file an application to reopen his direct appeal on grounds of ineffective assistance of appellate [*19] counsel pursuant to Oh.App.R. 26(B). Doc. 42-3, p. 52 (Exhibit 74). In his application, he alleged ineffective assistance of appellate counsel and raised the following assignments of error:

1. Appellate Counsel failed to argue the State suppressed outcome determinative required Brady disclosures, related due process violations, and the forced ineffectiveness of trial counsel.

2. Appellate Counsel failed to argue it was error for the trial court to deny Defendant any witnesses at trial in violation of the 5th Amendment's right to equal protection, the 6th Amendment's right to compulsory process, and the 14th Amendment's right to due process of law.

3. Appellate Counsel failed to argue automatic reversal was required because the Defendant was forced to stand trial while incompetent, violating the standards of Pate v. Robinson, 383 U.S. 375 (1966) and State v. Were, 94 Ohio St. 3d 173 (2002).

4. Appellate Counsel failed to argue that the trial court's order (JE 3.19.2013) placing the Defendant, after he had been appointed counsel pro se, and through 12.16.2013, in solitary "no contact" confinement in the Cuyahoga County jail pre-trial, and other court and jail imposed condictions pertinent to that confinement, exacerbated the Defendant's mental state of dysfunctional incompetence to stand trial, in violation of the Constitution's [*20] prohibition against cruel and unusual punishment, because that placement and those condictions met that standard and the trial court had a penchant for punishing the defendant with solitary confinement [see, Sentencing order, JE 12.17.2013; this Court's holding that portion of the sentence outside the boundaries of Ohio permissible sentences, direct appeal, State v. Thompson (caption as retained by Ohio Supreme Court , 2015-Ohio-4468), 2015-Ohio 2261]; Bell v. Wolfish, 441 U.S. 520 (1979). The trial court's solitary "no contact" order bore no stated rationale; it had no purpose and/or was overly punitive or was an exagerated response to a fictional or perceived concern.

5. Appellate counsel failed to argue Defendant was denied his right to testify on his own behalf under the 6th and 14th Amendments U.S. Constitution, pursuant to his holdings of Sheens v. Haskis, 4 Fed. Appx. 236 (6th Cir., 2001), and/or to argue trial counsel's ineffectiveness related thereto.

6. Appellate Counsel failed to argue the requirements of Faretta v. California, 422 U.S. 806 (1975) and State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012) were not met in the appointment of Defendant as counsel pro se or, in the alternative, if Defendant were effectively appointed, he was forced involuntarily and unintelligently to relinquish that appointment in violation of due process.

7. Appellate counsel failed to argue that the trial court's failure to rule on pre-trial motions in CR-12-565050A denied [*21] the Defendant his right to a fair trial and due process of law, pursuant to U.S v. Ruiz, 2536 U.S. 622 (2002) et. al because the defendant prosecution when they make legitimate requests by motion sufficiently in advance of trial requesting ruling on fundamental questions as to how the trial is to proceed, and its parameters, are entitled to court guidance in preparation where one side of the case alone, took 6 weeks of evidence presentation.

8. Appellate counsel failed to argue Count 12 should be dismissed for insufficiency of the evidence, judgment contrary to the weight of the evidence and lack of subject matter jurisdiction under Stassheim v. Daily, 331 U.S. 280 (1911).

9. Appellate counsel failed to argue that the tried indictment should have been dismissed for denial of Quick and Speedy Trial, a violation of the Defendant's due process rights pursuant to the 6th and 14th Amendments, Article I §10 of the Ohio Constitution; State v. Sloane, 2009-Ohio App. LEXIS 1022 (Mahoning cty., 2009); and State v. Johnson, 2013-Ohio-856 (Butler cty., 2013). The mental competency examination ordered for CR-10-545577A did not carry over, and could not have carried over, into CR-12-565050A because the subject matter of the examination as to the charges was fundamentally different for the two cases, and because the trial court could not have intended for such a carryover into a case which did not exist at the time of the order.

10. Appellate [*22] counsel failed to argue that, if the trial court's order for a mental competency examination did not carry over from 10-545577A to 12-565050-A, then Defendant's due process rights to a competency exam and R.C. § 2945.371(G) finding in 12-565050A were not met.

11. Appellate counsel failed to argue evidence of Defendant's protected medical and dental information at trial should have been stricken.

12. Appellate counsel failed to argue it was contrary to Ohio law on allied offenses not to run the sentences on Count 2 with Counts 3-9 as concurrent.

13. Appellate counsel failed to argue that a superfine and costs imposed on the Defendant were contrary to law and void per se.

14. Appellate counsel failed to argue that the trial court's sentence was contrary to Ohio law, and to the equal protection and due process clauses of both Constitutions because it failed to make a singular review of consistency and proportionality with the Co-Defendant's sentence. Alternatively, if the underlying argument is rejected, or not heard on Re-Opening causing Blanca Contreras' cases are not part of the record herein, thus causing Appellant to lose this claim, Appellate counsel, by not moving for inclusion, caused Appellant to suffer the prejudice [*23] described in the supporting Affidavit.

Doc. 42-3, pp. 56-64 (Exhibit 75) (brackets in original). On April 21, 2017, the Ohio Court of Appeals denied Cody's application to reopen as meritless. Doc. 42-3, pp. 198-216 (Exhibit 77); *State v. Cody*, 2017 WL 1507211 (Oh. Ct. App. April 21, 2017); 2017-Ohio-1543.

On May 24, 2017, Cody, pro se, appealed to the Ohio Supreme Court. Doc. 42-3, p. 217 (Exhibit 78). In his memorandum in support of jurisdiction, he set forth the following propositions of law:

1. In violation of due process of law, the State suppressed exculpatory and outcome-determinative Brady disclosures relating to the Defendant's Bush White House, military intelligence and Central Intelligence Agency affiliation and the United States Navy Veterans Association we[b]site, www.Navyvets.org; and the trial court and the State suppressed defense evidence and forced the ineffectiveness of trial counsel in violation of both the due process and equal protection clauses of both the U.S. and Ohio Constitutions; and by the trial court's failure to provide the Defendant with sufficient, necessary and reasonable legal resources to mount a defense, or for appointed trial defense counsel to perform his necessary investigatory activities, in violation of both the due process and equal protection clauses of both the [*24] U.S. and Ohio Constitutions. Appellate Counsel failed to raise or argue the above in violation of counsel's Strickland responsibilities.

2. In violation of the 6th Amendment and 14th Amendment's right to due process of law (and of those rights pursuant to the Ohio Constitution), of the 5th Amendment's right to equal protection (and of those rights pursuant to the Ohio Constitution), and of the 6th Amendment's right to compulsory process (and of that right pursuant to the Ohio Constitution), the trial court denied the Defendant any defense witnesses at trial by failing to provide the Defendant with requested subpoenas sub duces tecum, by denying motions for all requested defense witnesses to be served with subpoenas, by quashing all defense expert witnesses; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

3. Automatic reversal and new trial were required because the Defendant was forced to stand trial while legally incompetent, violating the due process and equal protection standards of Pate v. Robinson, 383 U.S. 375 (1966) and State v. Were, 94 Ohio St. 3d 173 (2002) et al.; Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. This proposition and its basis spill over into the following Proposition, and are also [*25] incorporated therein.

4. In violation of the Defendant's rights of due process of law under the 14th and 6th Amendments pursuant to Gibson v. Washoe, 290 F. 3d 1175, 1188 n. 9 (9th Cir., 2002) and Alberti v. Klevenhagen, 79 F. 2d 1220, 1224 (5th Cir., 1986), et al. (and of those rights pursuant to the Ohio Constitution); and/or in violation of his rights against cruel and unusual punishment under the 8th Amendment pursuant to Bell v. Wolfish, 441 U.S. 520 (1979) et al. (and of those rights pursuant to the Ohio Constitution), the trial court's "no contacts" order [JE, 3.19.2013] placing the Defendant, after he had been appointed counsel pro se, in solitary confinement in the Cuyahoga County Jail pre-trial through 12.16.2013, and other court and jail imposed conditions pertinent to that confinement, contributed to the causation of the Defendant's mental state of dysfunctional incompetence to stand trial, to plea bargain and to relinquish his right to self-representation on 8.26.2013; contributorily caused his attempted suicide; blocked his fundamental right to access counsel of choice pursuant to Sullivan v. Louisiana, et al. and to access his courts pursuant to Bounds v. Smith, 430 U.S. 817 (1977) et al.; and to obtain discovery on his own behalf pursuant to D'Ambrosio v. Bagley, 527 F. 3d 489 (6th Cir., 2008) et al.; the order bore no stated rationale; it had no purpose and/or was overly punitive or was an exaggerated response to a fictional or perceived [*26] concern; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

5. The Defendant was denied his right under the 6th and 14th Amendments to the U.S. Constitution (and his parallel rights under the Ohio Constitution) to testify on his own behalf at trial by the trial court and/or the forced or unforced ineffectiveness of trial counsel related thereto, pursuant to the holdings of Sheens v. Haskis, 4 Fed. Appx. 236 (6th Cir., 2001) et al.; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

6. Automatic reversal is required because Defendant's due process and equal protection rights pursuant to the U.S. and Ohio Constitutions were violated because a satisfactory colloquy and examination to be pro se counsel pursuant to the requirements of Faretta v. California, 422 U.S. 806 (1975) and State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012) was not held prior to the appointment by the trial court of the Defendant as counsel pro se, or, in the alternative, if Defendant were effectively

appointed counsel, he relinquished involuntarily and unintelligently that appointment on 8.26.2013 in violation of those same rights; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

7. There was a lack of subject (territorial) jurisdiction, [*27] insufficiency of the evidence, and verdict contrary to the weight of the evidence, all in violation of the due process of law clauses of the U.S. and Ohio Constitutions on count 12, Identity Fraud on Bobby Thompson of Washington State, because the Defendant never met any of the elements of the crime in Ohio other than the use of the generic name Bobby Thompson and that was insufficient to tie that act with the actual victim identified by the State; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

8. Defendant was never given a constitutionally mandated (pursuant to the due process and equal protection clauses of the U.S. and Ohio Constitution) mental health and insanity examination as also required by R.C. 2945.371(G) in Defendant's case No. CR-12-565050-A because he was never given such an examination tailored, on the insanity issue, to the times, facts and specific charges of 12-565050-A, and no required finding was ever made; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

9. In violation of Defendant's right of due process of law and of a fair trial under the U.S. and Ohio Constitutions, and of his rights [*28] pursuant to R.C. 2317.02 and 2317.02 (B)(5)(a), Defendant's dentist, Dr. Gary Steen, and Defendant's hair restorative surgeon, Dr. Francis Rieger, gave testimony as to Defendant's protected medical and dental information, the only evidence at trial as to how the Defendant, over a 12 year indictment period of stealing "hundreds of millions" of dollars, spent any of his ill-gotten gains on what might be perceived as personal inurement, and the testimony was not stricken; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

10. It was contrary to Ohio law on allied offenses for the trial court to run the sentence on Count 2 (Agg. Theft/Complicity) with Counts 3-9 (Money Laundering) consecutively; Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

11. The appellate court erred preliminarily to the Opinion's decision, in denying Cody's motion to supplement the record [JE: 8.4.2015; denied in pertinent part, [JE: 9.25.2015] to include the items of the State's Brady disclosures not in the record, and in the same proceeding, finding that Cody was merely speculating as to what was and was not in the disclosure (as the [*29] court's basis for denying Cody's constitutional claims for reversal found in his App. R. 26(B) application assignments: as to discovery of Cody's intelligence agency files (Proposition I, herein); and in accepting a state's "affirmation", without any record reference, to what the State included on disclosure on the highly exculpatory www.Navyvets.org site (Proposition I; Opinion, ¶ 9; and finding in the same proceeding (without record reference to the actual disclosure) that Cody's claims as to what was in the disclosure (which Cody saw only temporarily in his solitary confinement for reading on a computer monitor) were "incredible" (Opinion, ¶¶ 8, 9), i.e. not worthy of any belief. There were violations of substantive (and perhaps also procedural) due process under the 6th and 14th Amendments, and under the parallel provisions of the Ohio Constitution because, although occurring on a procedural motion, the onerous outcome against Cody on the application was substantively unfair; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

12. The appellate court erred as a matter of procedural and substantive due process in violation of the 6th and 14th Amendments to the U.S. Constitution, preliminarily to the [*30] Opinion's decision, in striking Cody's first application's affidavit (the Appellate Rules stated the affidavit was to contain the factual bases for the applicant's claims and could contain citations to authorities). These Cody made in a 503 pp. long affidavit. There was no authority in Ohio for striking such an affidavit, without which the appellate court lost jurisdiction, based on its length. New law was created uniquely, for Cody. Based upon Cody's hindsight, that, since his pre-trial (commencing around October, 2012) pro se representations of record of his "CIA and Bush White House affiliation-based-defenses" were being denied by the state, and the trial court was pre-trial making rulings cited in this memorandum having the effect of substantially denying Cody these defenses at trial, Cody had the foresight to realize this stonewall (suppressing these affiliations at-law) posture of the prosecution and trial court would continue throughout the trial proceeding, at minimum, Cody added to the first affidavit on the factual bases showing that affiliation substantially greater than he had theretofore. These factual bases were stricken, and all of Cody's other factual bases to establish [*31] these defenses were ignored by the appellate court in finding Cody's claims of CIA or Bush White House affiliations "incredible," as its basis for denying the application's assignment I (Referenced in Proposition I).

Doc. 42-3, pp. 219-229 (Exhibit 79) (brackets in original). On July 26, 2017, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4). Doc. 42-3, p. 276 (Exhibit 81).

F. Delayed Post-Conviction Proceedings

On June 13, 2018, Cody filed a motion for leave to file a delayed motion for new trial. Doc. 42-3, p. 278 (Exhibit 83). He argued that he was unavoidably prevented from discovering evidence of prosecutorial misconduct and evidence of an official document from the CIA indicating that he had a classified affiliation with it. Doc. 42-3, p. 278. He simultaneously filed a pleading titled "In Limine Motion for New Trial/Request for R.C. 2953.21 et seq. Post-Conviction Relief." Doc. 42-3, p. 279.

On July 5, 2018, Cody filed a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence (hereinafter "PCRP")" pursuant to R.C. 2953.21, again arguing that he was unavoidably prevented from discovering evidence disclosing his alleged CIA classified affiliation because of prosecutorial [*32] misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Doc. 42-3, pp. 386-421 (Exhibit 87). He also asserted a violation of *McCoy v. Louisiana*, __ U.S. __, 138 S. Ct. 1500 (2018), arguing that his trial attorney interfered with his autonomous right to pursue his chosen "CIA defense" strategy. Doc. 42-3, p. 419.

In orders issued on July 30, 2018, the trial court denied all three filings. Doc. 42-3, pp. 491-492 (Exhibit 88).

On August 6, 2018, Cody filed a "Petition to Vacate Judgment of Conviction and Sentence made 12.16.2013 ("PCRP3")" alleging that his sentence was void because the trial court did not follow mandatory sentencing requirements under Ohio law. Doc. 42-3, pp. 493-494 (Exhibit 89). On August 14, 2018, the trial court denied Cody's petition. Doc. 42-3, p. 542 (Exhibit 90).

On August 23, 24, and September 12, 2018, Cody appealed the trial court's rulings to the Ohio Court of Appeals, Eighth District. Doc. 42-3, pp. 543, 550, 559 (Exhibit 91). The Ohio Court of Appeals, *sua sponte*, consolidated his three appeals. Doc. 42-3, p. 568 (Exhibit 92). In his consolidated merits brief, he raised the following assignments of error:

1. It was error for the trial court not to conclude at law, on the facts and law presented to it, that it had no jurisdiction to make [*33] the 12.16.2013 oral "judgment of conviction and sentence" it did, in the courtroom.

2. It was error for the trial court not to conclude at law, on the facts and law presented to it, that it had no jurisdiction to make the 12.17.2013 written judgment journalized.

3. It was error for the trial court not to conclude at law that it had no jurisdiction to issue the entry of (re)sentence it made by journal entry on 12.7.2015 (a) with or (b) without the defendant being present.

Doc. 42-3, pp. 571, 585, 587-588, 590 (Exhibit 93). In addition to these assignments of error, he separately enumerated the following "Segments":

1. Brady violations occurred in the denial to Cody at trial of exculpatory evidence showing, or tending to show, he had a covert classified intelligence affiliation with (a) the CIA; and/or the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A judgment.

2. Fair trial violations occurred in the denial to Cody at trial of exculpatory evidence showing, or tending to show, Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, [*34] or a vacation of the CR-12-565050-A judgment.

3. A denial of Cody's 1st Amendment right of access to the courts occurred in the denial to Cody at trial (and in all subsequent proceedings attaching his conviction) of exculpatory evidence showing, or tending to show, Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A judgment.

4. A denial of Cody's 1st Amendment freedom of expression right, pursuant to McCoy v. Louisiana occurred in the denial to Cody at trial of exculpatory evidence showing or tending to show, Cody had a covert classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A judgment.

5. Denial of Cody's right to counsel and to the effective assistance of trial counsel and to the effective assistance of trial counsel (Patituce) for his defense occurred in the denial to Cody at trial of exculpatory evidence showing, or tending to show, Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of [*35] the president; Cody is therefore entitled to a new trial, or a vacation of CR-12-565050-A judgment.

6. Prosecutorial misconduct occurred in the suppression of exculpatory evidence showing, or tending to show, Cody has a covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A judgment.

7. Fair trial violation occurred at trial in the prosecutorial misconduct involving the suppression of exculpatory evidence showing, or tending to show, Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A judgment.

8. Denial of Cody's 1st Amendment right of access to the courts occurred at trial (and in all subsequent proceedings attacking his conviction) in the prosecutorial misconduct involving suppression of exculpatory evidence showing, or tending to show, Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A [*36] judgment.

9. Denial of Cody's 6th Amendment right to the assistance of counsel, and the effective assistance of counsel with his defense, occurred at trial in the prosecutorial misconduct involving the suppression of exculpatory evidence showing, or tending to show, Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A judgment.

10. Cody was denied at trial the effective assistance of counsel (Patituce) with his defense because Patituce failed to properly investigate and develop evidence showing or tending to show, Cody had a covert, classified intelligence affiliation with (a) the CIA; and/or the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050-A judgment.

11. A McCoy v. Louisiana violation of Cody's autonomous right to a defense strategy he willed and wanted occurred in Patituce's denial of providing Cody that strategy, related to one or more of the violations alleged in claims (1)-(10), supra; Cody is therefore entitled to a new trial, or a vacation of CR-12-565050-A judgment.

Doc. 42-3, pp. [*37] 572-575 (Exhibit 93).

On July 11, 2019, the Ohio Court of Appeals issued its opinion. Doc. 42-4, p. 73 (Exhibit 96). Finding Cody's assignments of error difficult to decipher, the appellate court broke down his arguments into these two assignments of error:

1. Cody argues that he was not properly informed of his sentence on Count 1, engaging in a pattern of corrupt activity.

2. Cody argues that there is "new evidence" that is both "material" and "outcome determinative" and he should be granted a new trial and postconviction relief.

Doc. 42-4, pp. 77-78 (Exhibit 96); *State v. Cody*, 2019 WL 3046584 (Oh. Ct. App. July 11, 2019); 2019-Ohio-2824, ¶15. The Ohio Court of Appeals found that the first claim was barred by res judicata and the second claim was untimely; overruled both assignments of error; and affirmed the judgment of the trial court. Doc. 42-4, pp. 78-85. On August 19, 2019, Cody appealed to the Ohio Supreme Court, which declined to accept jurisdiction pursuant to S.Ct.Prac.R. 7.08(B)(4). *See announcement*, 2019-Ohio-4211.

On April 10, 2019. Cody filed another petition to vacate or set aside judgment of conviction or sentence to present a claim under a recent Supreme Court case *Timbs v. Indiana*. Doc. 42-4, p. 86 (Exhibit 97). He presented the following claim:

1. Statement of constitutional claim: [*38] The 12.17.2013 CR-12-565050-A trial judgment sentencing impositions of a fine of $6,000,000 +; court costs of approximately $300,000; and the seizure of cash assets of the defendant of $980,500 were each, separately (and as also considered collectively), excessive in violation of the prohibition against excessive fines clause of the 8th Amendment to the United States Constitution.

Doc. 42-4, p. 88. On April 15, 2019, the trial court denied Cody's petition for post-conviction relief. Doc. 42-4, p. 97 (Exhibit 98).

On August 16, 2019, Cody appealed to the Ohio Court of Appeals, requesting it accept his late filing; the Ohio Court of Appeals accepted his appeal as timely and that appeal remains pending at this time.5

G. Federal Habeas Petition

On July 24, 2018, Cody, pro se, filed his Petition for a Writ of Habeas Corpus. Doc. 1. He listed the following grounds for relief:

Ground One: Where subject matter jurisdiction of the trial court was found not to exist on 12 out of 24 counts of Cody's indictment, the due process clauses and fair trial concepts of the United States Constitution entitled the defendant to new trial on the remaining convicted-upon counts without the jury considering evidence upon the dismissed counts, if at all, with the taint of a [*39] criminal conviction attached to each, and such consideration having taken place, not in the context of res gestae, but only in the context of relevance to criminal guilt as charged on those dismissed counts, on the ground that, under the circumstances of Cody's case, and defense he forwent involuntarily, (but in part) because of that consideration, he was unduly prejudiced by the circumstances of the presentation of the evidence on Counts 13-24 at trial.

Ground Two: 6 Cody's prerogative pursuant to the 6th Amendment to decide upon the objective of his defense was violated by the activities of the prosecution, the trial court, and/or trial counsel Patituce, or one or more of them acting in complicity with another, or one or more than one other, requiring vacation of the 12.16.2013 judgment without the necessity of Cody showing prejudice.

Ground Three: In violation of the 6th Amendment and the 14th Amendment's right to due process of law, of the 5th Amendment's right to compulsory process, the trial court denied the Defendant any of his 'CIA defense' witnesses at trial by failing to provide the Defendant with pro se requested defense witnesses to be served with subpoenas; by quashing all pro se defense expert witnesses; by forcing the Defendant, [*40] through the above, and by the pressures of solitary confinement, to accept appointed counsel who was refusing, as a matter of trial strategy contrary to the will of the Defendant, to pursue the CIA defenses, including demanding these witnesses; and Appellate Counsel failed to raise or ague the above in violation of his Strickland responsibilities.

Ground Four: The Defendant was denied his right under the 6th and 14th Amendment to the U.S. Constitution to testify on his own behalf at trial by the trial court and/or by the forced or unforced ineffectiveness of trial counsel related thereto, pursuant to [clearly established federal law as explained by] Sheens v. Haskins, 4 Fed. Appx. 236 6th Cir. 2001) et al., and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Five: Automatic reversal is required because Defendant's due process and equal protection rights pursuant to the U.S. Constitution were violated because a satisfactory colloquy and examination to be pro se counsel pursuant to the ... requirements of Faretta v. California, 422 U.S. 806 (1975) was not held prior to the appointment by the trial court of the Defendant as counsel pro re; or, in the alternative, if Defendant were effectively appointed counsel, he relinquished involuntarily and unintelligently [*41] that appointment on 8.26.2013 in violation of those same rights to an appointed counsel who was refusing at trial to aggressively pursue Defendant's "CIA defense", because of prosecutorial statements that the facts of that defense lacked credibility, contrary to the will of the Defendant as to trial strategy; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Six: In violation of the Defendant's rights of due process of law under the 14th and 6th Amendments pursuant to [clearly established federal law as explained by] Gibson v. Washoe, 290 F. 3d 1175, 1188 n. 9 (9th Cir. 2002) and Alberti v. Klevenhagen, 790 F. 2d 1220, 1224 (5th Cir. 1986) et al., and/or in violation of his rights against cruel and unusual punishment under the 8th Amendment pursuant to Bell v. Wolfish, 441, U.S. 520 (1979) et al., the trial court's "no contact" order [JE 3.19.2013] placing the Defendant, after he had been appointed counsel pro se, in solitary confinement in the Cuyahoga County Jail pretrial through 12.16.2013, and other court and jail imposed conditions pretrial to that confinement, contributed to the causation of the Defendant's mental state of dysfunctional incompetence to stand trial; to plea bargain; and to his relinquishment of his right to self-representation on 8.26.2013; contributorily caused his attempted suicide; [*42] blocked his fundamental right to access counsel of choice pursuant to Sullivan v. Louisiana, et al., and to access his courts pursuant to Bounds v. Smith, 430 U.S. 817 (1977), et al., and to obtain discovery on his own behalf pursuant to [clearly established federal law as explained by] D'Ambrosio v. Bagley, 527 F. 3d 489, (6th Cir. 2008), et al.,. the 'no contact' order bore no stated rationale; it had no purpose and/or was overly punitive or was an exaggerated response to a fictional or perceived concern; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Seven: Automatic reversal and new trial were required because the Defendant was denied an incompetency continuance as ordered by the trial court, violating the due process and equal protection standards of Pate v. Robinson, 383 U.S. 375 (1966), et al. Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Eight: Defendant was never given a constitutionally mandated (pursuant to the due process and equal clauses of the U.S. Constitution) mental health and insanity examination, in Defendant's case No. CR-12-565040A, because he was never given such an examination tailored, on the insanity issue, to the times, facts and specific charges of 12-565050A, [*43] and no required finding was ever made; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Nine: There was a lack of subject matter (territorial) jurisdiction and insufficiency of the evidence in violation of the due process of law clauses of the U.S. Constitution, on Count 12, Identity Fraud on Bobby Thompson of Washington State, because the Defendant never met any of the elements of the crime in Ohio other than the use of the generic name "Bobby Thompson" and that was insufficient to tie that use with an actual victim identified by the State as required; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Ground Ten: Trial Counsel Patituce provided numerous instances of I.A.C., pre-trial and at trial, and violation of the autonomous decision making required by Faretta and McCoy as to trial strategy, which can only be evidenced by the dehors record evidence provided by Cody's two PCRP trial court affidavits; and those instances require new trial under Strickland; or new trial under McCoy.

Ground Eleven: This claim is a lack of subject matter (territorial) jurisdiction for the Indictment Counts 3-9 (Money Laundering) of which [*44] Cody was convicted. Cody requests dismissal with prejudice of those counts. Subject matter jurisdiction is a fundamental 14th Amendment due process right. *Clendenning v. Newpage*, 2010 U.S. Dist. LEXIS 11289, HN 17 (S.D. Ohio, 2010). Lack of territorial jurisdiction is a structural error requiring dismissal with prejudice. Strasshein v. Daily, 221 U.S. 280 (1911) (requiring a sufficient territorial nexus with the actus reus of the crim[e]s for subject matter jurisdiction to apply); U.S. v. Gatewood, 173 F. 3d 983 (6th Cir. 1999). Ohio's long-arm territorial jurisdictional statutes must be strictly construed against the state of Ohio. Clendenning, supra, at HN 17; State v. Human, 381 N.E. 2d 969 (Oh. S. Ct. 1978), citing §18, Art. IV. Ohio Constitution.

Ground Twelve: The State failed to disclose exculpatory material and information relating to Cody's CIA defense, and classified intelligence affiliation with the CIA and the Bush 43 office of the President, known personally to Mike DeWine, constituting (a) a Brady-Kyles violation; (b) prosecutorial misconduct involving (1) suppression with a bad intent; and (2) lying about the non-existence of the information so as to effectively intimidate defense counsel Patituce to sabotage Cody's CIA defense.

Ground Twelve (1): There was a violation of the due process clauses of the 14th and 6th Amendments because Mike DeWine, and his office of the Ohio attorney general, brought and maintained the prosecution for reasons proscribed by the Constitution, to wit, causes involving [*45] vindictive, and selective prosecution; and because prosecutorial misconduct occurred by reason of the prosecution's strategy of suppressing Cody's CIA defenses, and, more particularly, by affirmatively misrepresenting that Cody never had any affiliation with the CIA or any office of any president of the United States, with a purposive view toward intimidating, and which misrepresentations did intimidate, defense counsel Patituce in refusing Cody's chosen strategy of the CIA defense.

Doc. 1-1, pp. 9-15 (brackets in original).

After being granted leave to amend his petition, on July 30, 2019, Cody raised five additional grounds for relief:

Ground Thirteen: Brady violations occurred in the denials to Cody at trial of exculpatory evidence showing he had a covert classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation ... of the CR-12-565050A judgment;

Ground Fourteen: Denial of Cody's right to counsel, and to the effective assistance of trial counsel (Patituce) for his defense occurred in the denial to Cody at trial of exculpatory evidence showing or tending to show Cody had a covert, classified [*46] intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to new trial, or a vacation of the CR-12-565050A trial judgment;

Ground Fifteen: Prosecutorial misconduct occurred in the suppression of exculpatory evidence showing, or tending to show, Cody had covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050A trial judgment;

Ground Sixteen: Cody was denied at trial the effective assistance of counsel (Patituce) with his defense because Patituce failed to properly investigate and develop evidence showing, or tending to show, Cody has a covert, classified intelligence affiliation with (a) the CIA; and/or (b) the Bush 43 office of the president; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050A trial judgment;

Ground Seventeen: McCoy v. Louisiana violations of Cody's autonomous 6th Amendment right to counsel; and his 6th Amendment right to effective assistance of counsel, in denying Cody his desired defense strategy of CIA-affiliation, including denying Cody his desired right to self-testify at trial, [*47] occurred; Cody is therefore entitled to a new trial, or a vacation of the CR-12-565050A trial judgment.

Doc. 41, pp. 1-2.

On August 6, 2019, Respondent file a Return of Writ (Doc. 42) and Cody filed a Traverse (Doc. 57).

II. Legal Standard

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("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 [*48] 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 also Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir. 2006) (quoting *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003) ("Federal 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 [*49] 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 [*50] 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, 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). 28 U.S.C. § 2254(d).

"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, [*51] 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 principles 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); *White v. Woodall*, 572 U.S. 415, 426 (2014) ("Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error.") (emphasis in original).

In determining whether the state [*52] 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.

Ineffective Assistance of Counsel. The two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), governs ineffective assistance of counsel claims. A petitioner must show that counsel was objectively unreasonable and a reasonable probability that, but for counsel's unreasonable failure, the result of the proceedings would have been different. *Id.*, at 687-691, 694. Upon federal habeas review, there is a double layer of deference applied: to counsel, under *Strickland*, and to the state court of appeal's decision on the merits of that claim, under AEDPA. *Kelly v. Lazaroff*, 846 F.3d 819, 832 (6th Cir. 2017) (citing *Burt v. Titlow*, 571 U.S. 12, 15 (2013); *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). The *Strickland* standard also applies to an ineffective assistance of appellate counsel claim. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

III. [*53] Analysis

In his Traverse, Cody argues in support of Grounds 4, 6, and "16/17." Doc. 57. For convenience, the Court discusses these claims first, out of sequential order.

A. Ground 4: the first part of this Ground is procedurally defaulted and the second part fails on the merits

Ground 4 has two parts. Cody first argues that he was denied his right to testify on his own behalf by the trial court and/or due to the ineffectiveness of trial counsel. Doc. 1-1, p. 11. He also alleges that appellate counsel was ineffective for failing to raise this claim on direct appeal. Doc. 1-1, p. 11.

Summary of Analysis: The underlying claim that the trial court denied Cody his right to testify on his own behalf is procedurally defaulted. The Ohio Court of Appeals' denial of Cody's claim that appellate counsel was ineffective for failing to raise a claim on direct appeal that his right to testify was violated is not unreasonable. Therefore, Cody's ineffective assistance of appellate counsel claim fails on the merits, and ineffective assistance of appellate counsel does not constitute cause to excuse the procedurally defaulted underlying claim.

The underlying claim is procedurally defaulted

The underlying claim [*54] in Ground 4□that Cody was denied the right to testify on his own behalf□is procedurally defaulted because it was based on the trial court record and Cody did not present this claim on direct appeal as he was required to do. *See Hill v. Mitchell*, 842 F.3d 910, 936 (6th Cir. 2016) (in Ohio, ineffective assistance of trial counsel claims based on evidence within the trial court record must be brought on direct appeal); *State v. Perry*, 226 N.E.2d 104, 108 (Ohio 1967) (defendant's claims that were raised at trial and disposed of by the trial court are based on the record and must be raised on direct appeal). See Doc. 43-21, pp. 187-195 ((Tr. Vol. 21) trial transcript of the court's discussion with Cody and counsel as to whether Cody would testify). Because this claim was not raised on direct appeal, and state law no longer allows Cody to present it, it is procedurally defaulted. *See Hill*, 842 F.3d at 936 (explaining that, under Ohio law, a claim based on the trial court record not brought on direct appeal is barred upon collateral review).

Ineffective assistance of appellate counsel for failing to raise this issue on direct appeal may constitute cause to excuse a procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-452 (2000) (a fairly presented and valid claim of ineffective assistance of counsel may serve as cause sufficient to excuse a procedural [*55] default in federal habeas corpus). Here, however, an ineffective assistance of appellate counsel claim for failing to raise this issue on direct appeal does not constitute cause to excuse the procedural default because, as described below, the Ohio Court of Appeals rejected such a claim when denying Cody's Rule 26(B) Application to Reopen. *See id.* at 541 ("Not just any deficiency in counsel's performance will do [to establish cause], however; the assistance must have been so ineffective as to violate the Federal Constitution."). Furthermore, for the reasons explained in the undersigned's discussion regarding "new evidence" in Ground 16, *infra*, Cody has not shown 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).

The ineffective assistance of appellate counsel claim fails on the merits

In his App. R. 26(B) Application to Reopen, Cody raised an ineffective assistance of appellate counsel claim for failing to raise, on direct appeal, a claim that the trial court and/or trial counsel denied him the right to testify on his behalf. Doc. 42-3, p. 62 (Exhibit 75). After setting forth the *Strickland* standard governing ineffective assistance [*56] of counsel claims, the Ohio Court of Appeals considered this claim as follows:

{¶13} Cody also argues that he was denied his right to testify on his own behalf. When the state rested its case, the judge asked Cody directly whether he wished to testify; the judge noted that throughout the proceedings Cody indicated he wanted to testify. However, Cody refused to answer the judge's question directly. Instead, he whispered into his counsel's ear, after which counsel said that Cody wished to answer the charges against him. Again, the judge directly asked Cody if he wanted to testify, and again he whispered into his attorney's ear and did not answer the judge directly. After taking a break to allow Cody to better his appearance[] and to further consult with his attorney, Cody's lawyer said that it was his understanding that Cody would not be taking the stand. Cody did not object to these proceedings. (Tr. 4314-4322.) This record does not support an argument that the trial court denied Cody's right to testify, and appellate counsel in the exercise of professional judgment could decline to raise it.

Cody, 2017 WL 1507211 at *3; 2017-Ohio-1543.

Claim that the trial court denied Cody his right to testify. As an initial matter, Cody argues [*57] that this Court's review of this issue should be a "modified" deferential AEDPA standard as announced in *Davie v. Mitchell*, 547 F.3d 297 (6th Cir. 2009),

because the Ohio Court of Appeals provided "little analysis on the substantive constitutional issue." Doc. 57, p. 9. In *Davie*, the Sixth Circuit explained that, when a state court adjudicates a claim "but with little analysis on the substantive constitutional issue," a modified AEDPA deference applies, under which a court conducts "a careful and independent review of the record and applicable law" but still cannot reverse "unless the state court's decision is contrary to or an unreasonable application of federal law." 547 F.3d at 315 (internal citations and quotation marks omitted). Even if a modified deference applies, the undersigned finds that, after a careful and independent review of the record and applicable law, Cody has not shown that the state court's decision is contrary to or an unreasonable application of federal law. *See id.* The transcript of the proceedings cited by the Ohio Court of Appeals supports its explanation and is as follows:

THE COURT: .... And so I know there has been some conversations -- Mr. Patituce has indicated that you were wanting to testify. Certainly, I think [*58] you appreciate you have a Constitutional right to not testify. And have you had an opportunity to reach a conclusion as to whether or not you wish to testify?

(Thereupon, the defendant conferred with counsel off the record.)

MR. PATITUCE: Can we approach, your Honor?

THE COURT: Well, let's just hold on a second. Mr. Thompson, I think it's a fairly straightforward question. We can address some of the other issues, such as your appearance in court here today. What's your desire, sir? Do you intend on taking the stand and testifying in your own behalf, or not?

MR. PATITUCE: Your Honor, my client indicates he wishes to answer to his Complaint.

THE COURT: Well, and certainly I appreciate that, Mr. Thompson, but in any regard, I'm going to hear it from you as to what your intentions are so it's on the record and there can't be no mistake, because if there is a need for a reviewing court, that there's a clear intention on your behalf as to either to exercise your Constitutional right to remain silent, or if you would like to testify. So what would you like to do?

(Thereupon, the Defendant conferred with counsel Mr. Patituce off the record.)

MR. PATITUCE: Your Honor, he is reiterating to me the same. [*59] He wishes to answer to all the charges.

THE COURT: Mr. Thompson, we can — it's a simple question, sir. I'm asking you, do you wish to testify, or not; yes or no? Mr. Thompson? Mr. Thompson? You don't need to whisper in Mr. Patituce's ear. You can look right at me and say the word yes or no. Would you like to testify on your own behalf, or not; yes or no.

(No response.)

THE COURT: Well, Mr. Thompson, I can perhaps infer from your silence that you do not wish to testify, as is your Constitutional right to remain silent and proceed accordingly, if that's what you'd like to do.

Now we can address a couple other issues, such as your appearance in court here today. And if you would like to testify on your own behalf, I'm happy to give you some time, if you so desire, to, for example, fix your hair, finish buttoning up your shirt, put a tie on, if that's what you choose to do.7 If you choose not to do all those things and appear in front of the jury in such a manner, that's fine as well and I'll simply give the jury an instruction that they're not to make any determination as to your guilt or innocence based upon your appearance in court here today. So having said that, what would you like to [*60] do?

THE DEFENDANT: I would like to put myself in physical appearance state, I think is reasonable.

THE COURT: All right.

THE DEFENDANT: Have my hair combed, have it washed, with my spectacles returned to me. I feel that is a reasonable request --

THE COURT: All right.

THE DEFENDANT: -- under the circumstances.

THE COURT: I don't necessarily disagree with you. Having done those things, and I'll provide you with a reasonable period of time for which to accomplish those, what is your intention with respect to testifying on your own behalf?

THE DEFENDANT: I can't answer that question without consulting with my attorney.

THE COURT: Go ahead, Mr. Patituce, take a few moments if you would like to.

(Pause.)

MR. PATITUCE: Your Honor, can we step aside maybe two seconds?

[thereafter the trial court recessed for almost 40 minutes and returned on the record]

***

THE COURT: [discussing Cody banging his head against the wall of his holding cell seven days prior and seeing the jail psychiatric staff] .... Having said that, before we broke, before this most recent recess, I made an inquiry from Mr. Thompson as to whether or not he wished to take the stand in his own defense. And I believe the record would accurately [*61] reflect that there was some difficulty in getting an answer from him. So let me ask it this way, Mr. Patituce, have you had conversations with Mister -- with your client relative to his Constitutional right to either testify or not testify on his own behalf?

MR. PATITUCE: I have, your Honor.

THE COURT: And do you feel that he has an adequate understanding of the nature of the -- not the nature of the case, but the nature of whether or not he chooses to testify, or not?

MR. PATITUCE: Your Honor, I do, as we discussed his physical and mental capabilities to testify, I explained his rights and possibilities to testify, and I do believe he will not be taking the stand, your Honor.

THE COURT: All right. And you indicated his physical and mental abilities. You just referring to the prospect, if you will, being cross-examined by, I'll say perhaps a seasoned prosecutor?

MR. PATITUCE: Your Honor, I certainly believe that direct will be difficult, but I do believe that he would not be able to survive the prospects of a seasoned prosecutor such as Brad Tammaro, or seasoned Attorney General Brad Tammaro cross-examining him.

THE COURT: All right. And so is it your intention to rest at this point in time, [*62] subject to the admission of any evidence, items of evidence that you wish to present?

MR. PATITUCE: Along with renewal of the [Rule 29] motion.

(Doc. 43-21, pp. 187-195) (Tr. Vol. 21).

Cody alleges that the transcript shows that he stated his desire to testify "five times." Doc. 57, pp. 15-17. The undersigned disagrees. Cody's refusal to answer the trial court's direct question to him as to whether he wanted to testify certainly did not indicate a desire to testify. Twice whispering to his counsel and counsel's subsequent statement, "my client indicates he wishes to answer to his Complaint" (Doc. 57, p. 15) is not a statement by Cody that he wished to testify. Cody's statement that he wanted to tidy his appearance (Doc. 57, p. 15) is not a statement that he wished to testify. The fact that defense counsel told the jury during opening statement that Cody would testify and the fact that the trial court stated that Cody's counsel had previously indicated off the record that Cody wanted to testify (Doc. 57, p. 15; Doc. 43-5, p. 66 (Tr. Vol. 5); Doc. 43-21, p. 188-189) (Tr. Vol. 21) are not statements by Cody that he wished to testify. Thus, to the extent Cody argues that the Ohio Court of Appeals' [*63] factual determination that Cody did not state he wished to testify was unreasonable (Doc. 57, p. 17), such an assertion is without merit.

Cody argues that he was justified in not answering the trial court's questions posed to him directly and not objecting to trial counsel's statement that Cody would not testify because of clearly established constitutional law that his attorney speaks for him in the courtroom. Doc. 57, p. 15, 17. He cites no legal authority indicating that a defendant directly addressed by a court must not speak because he is represented by an attorney. Cody also cites examples during trial wherein the trial court allegedly gave Cody mixed messages about whether he was permitted to speak in court. Doc. 57, p. 16. Cody's arguments fail because he cites instances where the trial court told Cody not to speak at the same time as the court for the reason that the court reporter could not transcribe two speakers at once (Doc. 43-1, p. 89) (Tr. Vol. 1), reminded him that he is represented by counsel (Doc. 43-1, p. 74), and cautioned him that he was on the record and to be careful when answering questions posed by the court (Doc. 43-1, p. 84). None of these examples cited [*64] by Cody show that the trial court's statements had a "mental sandbagging effect" on him such that he was "justified" in not responding to the trial court's question to him asking whether he wanted to testify, as he alleges (Doc. 57, pp. 15-16).

Next, Cody argues that it was improper for the Ohio Court of Appeals to observe that he did not object when his counsel stated that he would not be testifying. Doc. 57, pp. 16, 17. He asserts that he had no legal obligation to "personally object to defense counsel waiving his right to testify[.]" Doc. 57, p. 16. In support, he relies on *Ward v. Sternes*, 334 F.3d 696 (7th Cir. 2003). Doc. 57, p. 16. In *Ward*, the Seventh Circuit agreed with the habeas petitioner that the state trial court erred when it accepted the petitioner's purported waiver of his right to testify despite "uncontroverted trial testimony [] that Ward's brain injuries severely disrupted his ability to think, reason, take in verbal information, and understand and use language to express his understanding." *Id.* at 705-706. Additionally, the Seventh Circuit stated that, when the trial court asked the petitioner whether he was "in agreement" with his counsel's advice not to testify, the petitioner had answered, "I guess, I don't know." *Id.* at 705-706 [*65] . The court explained,

...more than an equivocal, "I guess, I don't know," in response to the trial court's question of whether Ward was "in agreement" with his counsel's "best advice and professional judgment that [he] not be called to testify [himself]" was required to ensure an accused with severe brain damage was knowingly and intelligently waiving a fundamental right. In the abstract, the words themselves are inconclusive, equally capable of classification as words of assent or of reluctance. Yet, absent any evidence that the speaker had mental handicaps and a severe language-processing deficiency, we would accept a trial court's interpretation given that court's superior position to observe the speaker and infuse meaning into the statement. Here, however, where it was known that the defendant's ability to express himself through language was severely compromised, it was unreasonable to assign the statement meaning without the benefit of further inquiry. By quickly deciding "that's the best we'll ever do," the trial court concluded its inquiry prematurely and accepted what was an at-best ambiguous statement for a conclusive waiver.

Id. at 706 (brackets in original). In this case, unlike *Ward*, there is no evidence that Cody had mental handicaps and a severe language processing deficiency; in fact, Cody is a Harvard Law School graduate with professional trial and appellate experience. See Doc. 43-1, p. 85 (Tr. Vol. 1); Doc. 1-1, p. 20; Doc. 43-20, p. 44 (Tr. Vol. 20); *State v. Cody*, 2017 WL 1507211, at *3, and n. 3 (Oh. Ct. App. April 21, 2017). Nor did Cody equivocally respond to the trial court's question whether he wanted to testify; rather, Cody refused to respond at all. In *Hodge v. Haeberlin*, the Sixth Circuit explained,

Although the right to testify [*66] is a fundamental right subject only to knowing and intelligent waiver, "waiver of certain fundamental rights can be presumed from a defendant's conduct alone, absent circumstances giving rise to a contrary inference." *United State v. Stover*, 474 F.3d 904, 908 (6th Cir. 2007). Notably, Hodge has not stated that he was unaware of his right to testify or that he was somehow prevented from seeking the court's assistance in overcoming counsel's allegedly unilateral decision. We have previously stated that, "[a]lthough the ultimate decision whether to testify rests with the defendant, when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed." *Webber*, 208 F.3d at 551. Indeed, "[b]arring any statements or actions from the defendant indicating disagreement with counsel or the desire to testify, the trial court is neither required to sua sponte address a silent defendant and inquire whether the defendant knowingly and intentionally waived the right to testify, nor ensure that the defendant has waived the right on the record." *Id.* To the contrary:

A defendant who wants to testify can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel. At base, [*67] a defendant must alert the trial court that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so.

Id. (internal citations and quotation marks omitted). As Hodge does not show that his right to testify was impaired, he cannot show deficient performance by counsel.

579 F.3d 627, 639-640 (6th Cir. 2009) (brackets in original).

Here, the Ohio Court of Appeals' recitation of the facts was accurate and its conclusion that appellate counsel, exercising professional judgment, was not ineffective for not raising a claim on direct appeal alleging that the trial court denied Cody his right to testify is not unreasonable. *Id.; Hand v. Houk*, 871 F.3d 390, 410 (6th Cir. 2017) ("Mere failure to raise a potentially viable claim is not enough" to show that counsel is constitutionally ineffective); *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004) ("Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result [*68] of the appeal[,]" citing *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)).

Finally, Cody states that he had head injuries at the time the trial court asked him whether he wished to testify and that this prevented him from objecting to counsel's statement that Cody would not testify. Doc. 57, pp. 14, 17. The transcript page Cody references (Doc. 57, p. 14; Doc. 43-21, p. 145) (Tr. Vol. 21) indicates that the trial court discussed with counsel the fact that, seven days prior, counsel and others witnessed Cody banging his head against the wall in the holding cell adjacent to the courtroom and he told his attorney that he did not want to participate in the "sham" trial proceedings. The trial court considered this fact when addressing the issue whether Cody wanted to testify and observed that it did not find cause to believe that Cody had mental heath issues that required attention at that time. See Doc. 43-21, pp. 193-194. The fact that counsel referenced Cody's physical and mental capabilities to withstand rigorous cross examination (Doc. 43-21, p. 195), as Cody complains (Doc. 57, p. 16), further supports a finding that trial counsel made a tactical decision as to which Cody's assent is presumed. *Hodge*, 579 F.3d at 641; *United States v. Webber*, 208 F.3d 545 (6th Cir. 2000).

Cody has not shown that the Ohio [*69] Court of Appeals' determination as to this claim is unreasonable.

Claim that trial counsel denied Cody his right to testify. Cody asserts that the Ohio Court of Appeals "ignored" the portion of his claim that alleged ineffective assistance of trial counsel. Doc. 57, p. 10. Therefore, Cody argues, this Court should conduct a de novo review of this claim. Doc. 57, p. 10 (citing *Carter v. Mitchell*, 693 F.3d 555 (6th Cir. 2012); *Davie*, 547 F.3d 297; *Vance v. Scutt*, 573 Fed. App'x 415 (6th Cir. 2014)); Doc. 57, p. 18. The cases Cody relies on do not support his assertion that the Court is required to conduct a de novo review of this claim. *See, e.g., Carter*, 693 F.3d at 562 (stating that de novo review is applied when a state court does not address the merits of a claim at all, not when the state court's decision is unaccompanied by an explanation, citing *Harrington*); *Vance*, 573 Fed. App'x at 419-420 (relying on *Harrington*, applying AEDPA's deferential review despite the state court not directly addressing the petitioner's claim that counsel was ineffective). There is no requirement that the state court explain its reasoning as to all elements of a multipart claim. *See Harrington*, 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. [*70] This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated."); *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013) (In *Harrington*[,]..., the Supreme Court recently clarified that even summary decisions by state courts are entitled to the AEDPA standard of review under § 2254(d). 'There is no merit to the assertion that compliance with § 2254(d) should be excused when state courts issue summary rulings.' Summary rulings on the merits do not receive de novo review." (internal citations omitted)).

Moreover, when a state court considers some, but not all, of a defendant's claims on the merits, there is a rebuttable presumption that AEDPA deference applies to the undiscussed claims. *Johnson v. Williams*, 568 U.S. 289, 292-293, 298 (2013) ("[I]t is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference."). "While it is preferable for an appellate court in a criminal case to list all of the arguments that the court recognizes as having been properly presented, federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Id.* at 300 (citations omitted).

Here the Ohio Court of Appeals [*71] addressed the merits of Cody's claim that his right to testify on his own behalf was violated. Although the Ohio Court of Appeals framed its summary of the discussion of this claim as whether the trial court denied Cody's right to testify, the court discussed trial counsel's role in the matter. *See Cody*, 2017 WL 1507211, at *3; 2017-Ohio-1543, ¶13. Simply put, the Ohio Court of Appeals found that Cody's right to testify was not violated, whether Cody alleged it was the trial court or counsel who violated it. *See Brown v. Romanowski*, 845 F.3d 703, 712 (6th Cir. 2017) (the *Johnson* presumption applies when an undiscussed claim is too insubstantial or covered by another claim by implication). Cody has not successfully rebutted the presumption that AEDPA deference applies to the state court of appeals' disposition of this claim; therefore, the undersigned finds that AEDPA deference applies to the Court's consideration of the Ohio Court of Appeals' decision on this claim.8

Cody argues that trial counsel was ineffective because he waived Cody's right to testify without evidence of Cody's direction or consent, instead basing his decision upon his personal belief that Cody did not have the mental or physical ability to assist

counsel during such testimony. Doc. 57, p. 18. He asserts that, if [*72] he was temporarily incapacitated, counsel should have requested a continuance, not waived his right to testify.9 Doc. 57, p. 18.

First, Cody's assertion that counsel waived his right to testify without evidence of Cody's direction or assent is belied by the trial transcript reproduced, *supra*; namely, that Cody and counsel discussed the matter off the record and Cody did not object when counsel subsequently informed the Court of the outcome of that conversation. Nor does the transcript show that he attempted to commit suicide or was temporarily incapacitated justifying counsel requesting a continuance. See also Doc. 43-22, pp. 162-165 ((Tr. Vol. 22) Cody's allocution at sentencing referencing his purported suicide attempt on November 5, 2013, and the trial court's response). Moreover, the Ohio Court of Appeals separately considered Cody's claim that he was incompetent to stand trial as follows:

{¶11} Cody's next assignment of error is that he was forced to stand trial while he was incompetent. The record in this case does not support that argument. On July 12, 2012, the trial judge referred Cody to the court psychiatric clinic to determine competency to stand trial. After the evaluation [*73] took place, defense counsel and the state stipulated to the competency report on August 21, 2012. Throughout the proceedings, Cody raised the issue of representing himself.[3] Eventually, on January 30, 2013, after repeatedly and thoroughly reviewing the matter, the judge allowed Cody to represent himself with assigned counsel, Mr. Patituce, as advisory counsel. Cody then inundated the court with motions for discovery, dismissal, in limine, suppression, grand jury transcripts, and assistance, and with reply briefs to the state's opposition briefs.[4] Cody also filed a mandamus action and an affidavit of disqualification of the trial judge. Cody then on August 26, 2013, stopped representing himself and accepted appointed counsel for trial, which commenced on September 30, 2013. Reviewing the transcripts of the pretrial hearings while Cody represented himself shows that his comments were thoughtful, pertinent, intelligent, and articulate. At the end of the trial, the judge noted that Cody played an active role in his defense, paying close attention to the evidence, taking notes, conferring with counsel, and providing information and suggestions for cross-examination. (Tr. 4513.) These are [*74] not the actions of an incompetent person. Thus, appellate counsel in the exercise of professional judgment could decide not to raise this argument.

[FN3] Evidence was presented at trial that Cody had attended law school and had practiced law for awhile.

[FN4] Cody filed over 120 pro se motions during the course of the proceedings. In some of these motions, he had the foresight to try to form the foundation of appellate arguments.

Cody, 2017 WL 1507211 at *3; 2017-Ohio-1543. In short, the Ohio Court of Appeals rejected Cody's claim that he was incompetent to stand trial and Cody does not show that its determination was unreasonable. Thus, it cannot be said that appellate counsel was ineffective for failing to raise a claim on direct appeal that trial counsel was ineffective for failing to ask for a continuance on the basis that Cody was incompetent.

Cody's other stated reasons why trial counsel was ineffective (Doc. 57, p. 19) are not relevant to his claim in Ground 4 that trial counsel violated his right to testify.

B. Ground 6: the first part of this Ground is procedurally defaulted and the second part fails on the merits

In Ground 6, Cody argues that the trial court issued a no contact order placing him in solitary confinement [*75] from March 2013 until his sentencing on December 16, 2013, which violated his due process rights and was cruel and unusual punishment in violation of the Eighth Amendment. Doc. 1-1, p. 12. He alleges that this court-ordered confinement caused his mental state to deteriorate such that he became incompetent to stand trial and also blocked his right to access counsel and the courts and to obtain discovery. Doc. 1-1, p. 12. And he alleges that appellate counsel was ineffective for failing to raise this claim on direct appeal. Doc. 1-1, p. 12.

Summary of Analysis: The underlying claim, that the trial court's alleged solitary confinement order violated Cody's constitutional rights, is procedurally defaulted. The Ohio Court of Appeals' denial of Cody's claim that appellate counsel was ineffective for failing to raise a claim on direct appeal that the trial court's no contact order violated his constitutional rights is not unreasonable. Therefore, Cody's ineffective assistance of appellate counsel claim fails on the merits, and ineffective assistance of appellate counsel does not constitute cause to excuse the procedurally defaulted underlying claim that the trial court's no contact order violated Cody's constitutional [*76] rights.

The underlying claim is procedurally defaulted

The underlying claim in Ground 6—that the trial court's alleged solitary confinement order violated Cody's rights, caused him to become incompetent, and violated additional rights—is procedurally defaulted because, to the extent it was based on the trial court record, Cody did not present this claim on direct appeal as he was required to do. *Hill*, 842 F.3d at 936; *Perry*, 226 N.E.2d at 108. Because this claim was not raised on direct appeal, and state law no longer allows Cody to present it, it is procedurally defaulted. *See Hill*, 842 F.3d at 936.

Ineffective assistance of appellate counsel for failing to raise this issue on direct appeal may constitute cause to excuse a procedural default. *Edwards*, 529 U.S. at 451-452. Here, however, an ineffective assistance of appellate counsel claim for failing to raise the issue on direct appeal does not constitute cause to excuse the procedural default of this claim because, as described below, the Ohio Court of Appeals rejected this claim when denying Cody's Rule 26(B) Application to Reopen. *See id.* at 541. And, as discussed in Ground 16, *infra*, Cody does not show actual innocence.

To the extent this claim is based on evidence outside the record, it is also procedurally defaulted because Cody never presented [*77] such a claim to the Ohio courts. Although Cody alleged ineffective assistance of trial counsel for failing to pursue an incompetency defense in his first postconviction petition,10 that claim is legally and factually distinct from the claim alleged in Ground 6. *See McMeans*, 228 F.3d at 681 (to satisfy the fair presentation requirement, a habeas petitioner must present both the factual and legal underpinnings of his claims to the state courts).

The ineffective assistance of appellate counsel claim fails on the merits

In his App. R. 26(B) Application to Reopen, Cody raised an ineffective assistance of appellate counsel claim for failing to raise, on direct appeal, a claim that the trial court's no contact and solitary confinement orders violated his constitutional rights (his Eighth Amendment right to be free from cruel and unusual punishment, his due process rights, and his Sixth Amendment right to counsel of his choice, access to the courts, and ability to obtain discovery on his own behalf) and caused him to become incompetent to stand trial. Doc. 42-3, pp. 62-63 (Exhibit 75). The Ohio Court of Appeals considered this claim:

{¶12} Cody further argues that the trial court placed him in solitary confinement, which further drove him insane and undercut his [*78] ability to represent himself. The docket shows that on March 19, 2013, the trial judge issued an order that "[d]efendant is restricted to have no contact by phone, mail or social visits." Cody describes the horrible effect this had on him in his supporting affidavit. Nevertheless, it is understandable why appellate counsel would not raise this as an assignment of error. As explained above, the record does not support the proposition that Cody was going insane before trial, much less that his solitary confinement was causing it. Cody referred to his solitary confinement in his motions and at pretrials, but did not dwell at length on the deleterious effect it was having on his mind. Thus, this proposition was better suited to the postconviction relief petition he filed; indeed, he raised this argument there, too. Finally, it is difficult to discern how the solitary confinement prejudiced the outcome of the trial or the appeal.

Cody, 2017 WL 1507211, at *3; 2017-Ohio-1543.

As an initial matter, the trial court issued an order stating that Cody was to have no contact by phone, mail or social visits, Doc. 42-4, p. 126 (Exhibit 101); as the Ohio Court of Appeals observed, the trial court did not order Cody into solitary confinement. [*79] 11 Moreover, Cody admits that the trial court's order was a response to Cody "smuggling" a note he wrote to another inmate in the restrictive housing unit by slipping the note under the inmate's cell door in an attempt to contact another attorney (Doc. 57, p. 20). Thus, it cannot be said that the trial court's order "had no purpose and/or was overly punitive or was an exaggerated response to a fictional or perceived concern," as Cody asserts (Doc. 1-1, p. 12).

Regardless, Cody criticizes the Ohio Court of Appeals for focusing "entirely on a separate 'solitary confinement' issue... as to whether Cody 'was going insane' by reason of the solitary confinement." Doc. 57, p. 23. The undersigned notes that, in his brief in support of his Rule 26(B) Application, Cody alleged just that: he was going insane due to the trial court's no contact order that rendered him incompetent to stand trial. See Doc. 42-3, pp. 62, 83 (Exhibit 75). In his Traverse, Cody focuses on the portion of Ground 6 that alleges he was denied the right to access counsel of his choice. See Doc. 57, pp. 20-23. He states that he is "voluntarily limiting his argument" to this issue. Doc. 57, p. 20. Therefore, based on Cody's own assertions, [*80] the

undersigned considers the claim in Ground 6 that Cody now challenges: that he was denied the right to access counsel of his choice by virtue of the trial court's no contact order.

The appropriate standard. Cody argues that the Ohio Court of Appeals ignored his claim that the trial court's no contact order denied him his right to access counsel of his choice. Doc. 57, p. 10. In his brief in support of his Rule 26(B) Application, Cody argued that the trial court's no contact order in March 2013 occurred when he "attempted to smuggle a request to an inmate's counsel to see him about potential representation." Doc. 42-3, p. 82 (Exhibit 75). At that time, Cody was representing himself. Doc. 42-3, p. 82. He represented himself until August 2013, when he stated, in court on the record, that he wished to turn over his representation to Attorney Patituce. Doc. 43-2, p. 225 (Tr. Vol. 2). In its opinion denying Cody's Rule 26(B) Application, the Ohio Court of Appeals reasoned:

{¶14} Cody's next assignment of error is difficult to discern. He argues that pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *State v. Smith*, 8th Dist. Cuyahoga No. 98093, 2012-Ohio-5420, the trial court erred in allowing him to represent himself or in the alternative deprived him of his right to self-representation by driving [*81] him insane through the solitary confinement order. To the extent that Cody argues that the trial court erred by allowing Cody to represent himself, the argument is ill-founded. The judge and Cody reviewed the risks of self-representation, and the judge finally granted Cody's motion. The record indicates that Cody received legal training at Harvard Law School and practiced criminal law outside of Ohio. The record also shows that while he represented himself, he resorted to multiple legal remedies, endeavored to reach a plea agreement, and conducted himself well during pretrials. To the extent that he argues that the trial court deprived him of his right to self-representation, the argument is not supported by the record. As discussed previously, the record does not show that Cody was going insane during the summer of 2013. Throughout the proceedings, Cody and the trial judge discussed self-representation, and on August 26, 2013, when the trial judge asked Cody if it was his intention to proceed pro se or to have Mr. Patituce resume primary representation, Cody replied: "Thank you, your honor. I wish to turn the case over to Mr. Patituce." (Tr. 493.) Accordingly, this assignment of error [*82] is ill-founded.

Cody, 2017 WL 1507211, at *3; 2017-Ohio-1543. The Ohio Court of Appeals' discussion above is adequate consideration of Cody's claim alleged in Ground 6. *See Brown*, 845 F.3d at 712 (the *Johnson* presumption applies when an undiscussed claim is too insubstantial or covered by another claim by implication). Thus, AEDPA deference applies to the Ohio Court of Appeals' decision in this case.[12]

The Ohio Court of Appeals' decision was not unreasonable. The Sixth Amendment to the United States Constitution guarantees an indigent criminal defendant the right to assistance of appointed counsel at trial. *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). However, the right of an accused to assistance of counsel does not include the right to appointment of counsel of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 626 (1989)). "Nor may a defendant ... demand that a court honor his waiver of conflict-free representation." *Id.* at 152 (citing *Wheat*, 486 U.S. at 159-160).

Cody alleges, "No motion for determination of [his] indigency was ever filed by the State or by the defendant"; he never asked the trial court to find him indigent; and he was never affirmatively declared to be indigent by the trial court. Doc. 57, p. 21. In other words, he appears to argue that he was not, in fact, indigent throughout his trial. This assertion is baseless. He was declared indigent by the trial court in May 2012. Doc. 42-1, p. 39 (Exhibit [*83] 5). He repeatedly stated in his Rule 26(B) Application that he *was* indigent. See Doc. 42-3, p. 83 ((Exhibit 75) complaining of his solitary confinement and noting "his indigency is of record."); *Cody*, 2017 WL 1507211, at *6 (Ohio Court of Appeals decision: "Cody also claims that appellate counsel should have argued that it was improper to impose a superfine of $6,345,114.57 and the costs of prosecution of $330,778.70 against an indigent defendant."); see also Doc. 1-14, pp. 4, 9 (Cody's writ of mandamus filed in December 2012 stating that he is indigent); Doc. 42-1, p. 551 ((Exhibit 60) Affidavit of Indigency signed by Cody in June 2014). To the extent that Cody now challenges his indigency, he does not show that he was not in fact indigent. *See Burt v. Titlow*, 571 U.S. 12, 18 (2013) ("when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court's decision only if it was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" (citing 28 U.S.C. § 2254(d)(2)). Nor did he raise the issue of his indigency on direct appeal or in his Rule 26(B) Application. Accordingly, he is procedurally defaulted from arguing that he was not indigent [*84] and could have retained counsel of choice and/or that appellate counsel was ineffective for failing to raise this issue on direct appeal. *Williams*, 460 F.3d at 806 (a petitioner procedurally defaults a claim by failing to raise it in state court and pursue that claim through the state's ordinary appellate review procedures).

Finally, Cody's assertion that his solitary confinement prevented him from asking family members for money to hire an attorney or to raise a defense fund online (Doc. 57, p. 23) is not well taken. Cody was declared indigent in May 2012 and had

numerous, robust discussions with the trial court, including three times on the record in January 2013, about his options for representation prior to the trial court's no contact order in March 2013 and he did not mention or pursue these alleged avenues of funding at those times. See, e.g., Doc. 43-1, pp. 93-98 ((Tr. Vol. 1) January 14, 2013, trial court discussions regarding Cody's request to represent himself, wherein Cody stated that he wished to represent himself, that he understood he does not have a right to name appointed counsel, and requested to proceed pro se with up to ten advisory counsel appointed for him); Doc. 43-1, pp. 106-120 (January [*85] 23, 2013, trial court discussions regarding Cody's request to proceed pro se with Patituce as standby counsel); Doc. 43-1, pp. 125-134 (January 30, 2013, hearing in which Cody waived his right to counsel and elected to proceed pro se); Doc. 42-1, p. 151 ((Exhibit 18) signed waiver).

Because Cody was indigent, he was not entitled to appointment of counsel of his choice, as he conceded on the record when discussing representation with the trial court. See Doc. 43-1, pp. 95-96). Thus, the Ohio Court of Appeals' decision that appellate counsel was not ineffective is not unreasonable. Appellate counsel was not ineffective for failing to raise a claim on direct appeal that the trial court's no contact order prevented Cody from retaining counsel of his choice.

C. Grounds "16/17" are procedurally defaulted

In his Traverse, Cody refers to these two grounds collectively as Grounds "16/17." *E.g.*, Doc. 57, pp. 4-5, 10. In Ground 16, Cody argues that trial counsel was ineffective for failing to properly investigate and develop evidence showing or tending to show that Cody had a covert, classified intelligence affiliation with the CIA and/or President George W. Bush. Doc. 41, p. 2. Relatedly, in Ground [*86] 17, Cody argues that trial counsel was ineffective because counsel denied Cody his right to pursue his desired CIA affiliation defense strategy per *McCoy v. Louisiana*. Doc. 41, p. 2. Grounds 16 and 17 are procedurally defaulted.

1. Ground 16 is procedurally defaulted

Cody raised the issue in Ground 16—that trial counsel was ineffective for failing to pursue certain witnesses identified by Cody as being able to establish that he had a CIA affiliation—in his first postconviction petition in June 2014. Doc. 42-1, pp. 528, 534 (Exhibit 60).

The Ohio Court of Appeals applied a procedural bar and Cody does not show cause to excuse the default

As an initial matter, Cody alleges that Ground 16 "arises out of" his motion for new trial/postconviction petition proceedings in 2018. Doc. 57, pp. 11, 8. In June and July 2018, Cody filed a Motion for Leave to File (Delayed) Motion for New Trial and a second postconviction petition, respectively. Doc. 42-3, p. 278, 386 (Exhibits 83, 87). However, in these filings, Cody did not assert a claim that trial counsel was ineffective, which is his claim in Ground 16. Rather, Cody argued that he *and trial counsel* were unavoidably prevented from discovering new [*87] evidence and placed blame on the prosecution. Doc. 42-3, pp. 285-289, 402-404. Thus, although Cody claims that Ground 16 "arises" out of his motion for new trial/postconviction petition in 2018, it does not because Cody did not allege ineffective assistance of trial counsel in his 2018 motion for new trial or postconviction petition.**13**

Therefore, the operative state court opinion for this Court to review is the Ohio Court of Appeals' 2015 decision denying Cody relief on appeal from his 2014 postconviction petition, in which he alleged ineffective assistance of trial counsel for failing to pursue certain witnesses who could have shown that he had an affiliation with the CIA and/or former President Bush. The Ohio Court of Appeals considered this claim as follows:

{¶ 17} In his first assignment of error, Cody argues that his trial counsel was ineffective because counsel (1) refused to pursue certain witnesses that would have established that Cody was working for the CIA; and (2) did not pursue a line of defense that Cody was medically incompetent to stand trial or assist in his defense due to beatings he received in jail.

{¶ 18} In its findings of fact and conclusions of law, the trial court [*88] found that the sole support for Cody's claims was contained in his own self-serving affidavits and he was unable to demonstrate that any facts existed from outside the record.

{¶ 19} Cody's claims that he received ineffective assistance of counsel because his trial attorney failed to pursue specific witnesses and present a certain line of defense are both claims that could have been brought on direct appeal. Although Cody argues that both of these claims would be proved by evidence outside the record, he does not show what the evidence would be. Because Cody did not raise these issues on direct appeal, he has waived those claims and they are barred by res judicata.

Cody, 2015 WL 4133281, at *4; 2015-Ohio-2764.

Because Cody failed to comply with a state procedural rule, the Ohio Court of Appeals enforced the rule, and the procedural rule is an adequate and independent state ground for denying review of Cody's claim, Ground 16 is procedurally defaulted unless Cody can show cause and prejudice to excuse the default. *See Williams*, 460 F.3d at 806; *Maupin*, 785 F.2d at 138; *Buell v. Mitchell*, 274 F.3d 337, 349 (6th Cir. 2001) ("Ohio courts have consistently held that claims that can be adjudicated based on facts in the record can only be presented on direct appeal," citing *State v. Lentz*, 639 N.E.2d 784, 785 (1994)).

Cody maintains (without relevant explanation) that a procedural [*89] bar does not apply to this claim but that, if a procedural bar does apply, it is excused by trial counsel's ineffectiveness. Doc. 57, p. 11. But ineffectiveness of trial counsel cannot serve as cause to excuse Cody's failure to raise this claim on direct appeal through new appellate counsel. And any claim that appellate counsel was ineffective for failing to raise this claim on direct appeal is itself procedurally defaulted because Cody didn't present it to the state courts in his Rule 26(B) Application. *Edwards*, 529 U.S. at 450-451 (when a petitioner procedurally defaults an ineffective assistance of counsel claim, ineffective assistance of counsel cannot serve as cause to excuse the procedural default of the underlying claim unless the petitioner can show cause and prejudice to excuse the ineffective assistance of counsel procedural default). Finally, Cody does not allege cause to excuse the procedural default of an ineffective assistance of appellate counsel claim that could then serve as cause to excuse the default of the underlying claim. In short, Ground 16 is procedurally defaulted.

Cody has not shown that he is actually innocent

Cody contends that he can overcome the procedural bar by showing actual innocence. Doc. [*90] 57, pp. 11, 28. To do so, Cody must show 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). A claim of actual innocence "requires the 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, 327 (1995).

Cody asserts that his newly discovered evidence supports a CIA defense he could have raised at trial. Doc. 57, p. 11. Even if evidence of an affirmative defense could constitute "actual innocence" rather than mere legal innocence, Cody's argument fails because his evidence does not show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327. As an initial matter, Cody does not provide the Court with his newly discovered evidence. Therefore, the undersigned looks to the state court record to determine what "newly discovered evidence" Cody submitted to the state courts.**14** The Ohio Court of Appeals cited the "newly discovered evidence" Cody submitted in support of his 2018 motion [*91] for new trial and second postconviction petition:

{¶ 33} Cody submitted the following in support of his motions: (1) various statements purportedly made by the prosecutor that Cody claims show the state knew he was involved with the CIA; (2) Cody's 19-page affidavit; (3) Cody's curriculum vitae; (4) the CIA's response to Cody's Freedom of Information Act request dated January 29, 2018; (5) a 1973 redacted letter from a law firm based in Hawaii that purports to list the name "John Cody" as one of the firm's associates; (6) various transcripts and court filings; and (7) a letter from the Office of Government Information Services dated April 19, 2018, explaining the CIA's response to Cody's Freedom of Information Act request.

Cody, 2019 WL 3046584, at *5; 2019-Ohio-2824; see also Doc. 42-3, pp. 283-284 ((Exhibit 83) Cody's motion for new trial listing newly discovered evidence); pp. 395-396 ((Exhibit 87) Cody's second postconviction petition).

First, item (1) various statements made by the prosecutor and item (6) various transcripts and court filings purporting to show that the state knew Cody had an involvement with the CIA are not new and do not, in fact, show that the state knew Cody had an affiliation with the CIA. See Doc. 42-3, pp. 324-333 (Exhibit 83). Cody's self-serving [*92] affidavit (item (2), Doc. 42-3, pp. 293-311) is not new evidence because Cody was fully aware of all the information he stated in his affidavit at the time of trial: he states he was an undercover CIA agent since 1974, the CIA was aware of USNVA's expenditures, and, therefore, he is

innocent of the theft, money laundering, and tampering with state records charges. Doc. 42-3, p. 298, 300. It cannot be said that it is more likely than not that no reasonable juror would have convicted him had it heard this information because it is not reliable evidence that Cody's actions operating the USNVA were excused by virtue of his alleged CIA affiliation. Next, item (3), Cody's curriculum vitae (Doc. 42-3, p. 318), is also not new evidence as this information was known to him at trial and it does not show that his actions operating the USNVA were excused by virtue of his alleged CIA affiliation.

As for item (4), the CIA's response to Cody's Freedom of Information Act request dated January 29, 2018, the letter states that there are no records showing an openly acknowledged affiliation between Cody and the CIA and the CIA cannot confirm or deny whether there are records showing a classified association existed because such [*93] records are classified. Doc. 42-3, pp. 321-323. This letter does not show that Cody was an undercover CIA agent, or, more relevantly, that his actions running the USNVA were excused by virtue of his alleged CIA affiliation such that it is more likely than not that no reasonable juror would have convicted him of the charges had it known this information. So, too, item (7), a letter from the Office of Government Information Services dated April 19, 2018, explaining the CIA's response to Cody's Freedom of Information Act request. Finally, item (5), a redacted letter from a law firm based in Honolulu, Hawaii dated 1973 that lists the name "John Cody" as one of the firm's associates (Doc. 42-3, p. 337), does not show that Cody was an undercover CIA agent or that his actions running the USNVA were excused by virtue of his alleged CIA affiliation.

Indeed, Cody does not persuasively explain how the evidence he cites shows that it would be more likely than not that no reasonable juror would have convicted him. See Doc. 57, pp. 38-61 (Cody's explanation of what he would have testified to and why it would have mattered). He states,

The detailed evidence of and related to Cody's CIA affiliation, and its implications from [*94] which a reasonable juror could infer no theft, lack of specific intent, and national security operational intelligence related lawful purpose in Cody receiving and using assigned cover identities by the CIA, in Cody's MNT/PCRP, are overwhelming, and meet any standard for showing prejudice related to ineffectiveness by their omission from any second trial, which can be applied, absent a finding from a federal court that they are falsehoods, or that they are not capable of belief...

Doc. 57, p. 28. Cody's reliance upon a decade's-old alleged "affiliation" with the CIA that could lead to "implications" from which one "could infer" that he did not commit the crimes charged is not new reliable evidence such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. *Schlup*, 513 U.S. at 324. Moreover, nowhere in his filings does Cody explain how an "affiliation" with the CIA demonstrates actual innocence of the charges he was convicted of.

Ground 16 is procedurally defaulted.

2. Ground 17 is procedurally defaulted

Cody asserts that the issue in Ground 17—that trial counsel was ineffective for violating his rights pursuant to *McCoy v. Louisiana*, _U.S._, 138 S.Ct. 1500 (2018)—arises out of his [*95] motion for new trial and second postconviction petition filed in 2018. Doc. 57, p. 11. The Ohio Court of Appeals affirmed the trial court's denial of his motion and second postconviction petition as untimely. *Cody*, 2019 WL 3046584, at *6; 2019-Ohio-2824. Untimeliness is a proper basis upon which the state court may deny relief. *See Smith v. Warden, Toledo Corr. Inst.*, 780 Fed. App'x 208, 219-220 (6th Cir. June 16, 2019) (an Ohio postconviction petition deemed untimely is an independent and adequate state ground for denying relief; petitioner's claim was therefore procedurally defaulted); *Hill v. Mitchell*, 2006 WL 2807017, at *45-48 (S.D.Ohio Sept. 27, 2006) (collecting cases). Thus, Cody procedurally defaulted this claim.

Cody argues that this claim is not procedurally defaulted because the Ohio Court of Appeals "failed to 'explicitly' 'explain [ ] its reasons for its conclusions." Doc. 57, p. 11 (bracket in original). This assertion is not well-taken; Cody does not cite legal authority requiring the state courts to explicitly explain its reasons for finding that an untimely filing is untimely. Moreover, the Ohio Court of Appeals explicitly explained its reasons why Cody could not overcome the procedural bar of untimeliness. *Cody*, 2019 WL 3046584, at *6; 2019-Ohio-2824 (stating that Cody did not demonstrate that he was unavoidably prevented from discovering the evidence upon which he relied). Cody also argues that the controlling [*96] Ohio statute, R.C. § 2945.79(F), does not define "with reasonable diligence" or "unavoidably prevented" in the context of a defendant's ability to obtain newly discovered evidence to overcome the 120-day filing deadline, and that, therefore, the state rule is discretionary and is not a "clearly applicable state procedural rule." Doc. 57, p. 33. This argument has been rejected by the United States Supreme Court and the Sixth Circuit. *See Stone v. Moore*, 644 F.3d 342, 346-349 (6th Cir. 2011) (explaining that *Beard v. Kindler*, 558 U.S.

53 (2009), and *Walker v. Martin*, 562 U.S. 307 (2011), established that a state procedural rule permitting a state court broad discretion in applying it, including rejecting it on timeliness grounds, can serve as an adequate ground to bar federal habeas relief and holding that the Ohio procedural rule permitting broad discretion that was relied on by the Ohio courts when rejecting the petitioner's untimely motion was, therefore, an adequate state procedural rule).

For cause to excuse his procedural default, Cody again asserts ineffectiveness of trial counsel (Doc. 57, p. 32), but that is his underlying claim; it does not explain why he filed his motion and postconviction petition years after his conviction became final. Moreover, his motion and postconviction petition were premised upon newly discovered [*97] evidence, but that is not what Ground 17 is based on. Rather, Ground 17 alleges that trial counsel denied him his right to assert an affirmative defense at trial based on *McCoy v. Louisiana*. Although it appears that Cody relies on his newly discovered evidence to bolster his claim that trial counsel was ineffective in not asserting a CIA defense, the fact that counsel did not assert his CIA defense is not something that Cody has newly discovered.

Moreover, to the extent that Cody might have (but did not) allege as cause the fact that *McCoy v. Louisiana* was decided in 2018 (and thus he could not have raised it earlier), his ineffective assistance of counsel claim would fail because a court considers counsel's actions at the time of the conduct, not years later.**15** *See Strickland*, 466 U.S. at 690 (a federal habeas court considers the reasonableness of counsel's actions "as of the time of counsel's conduct"). Additionally, the rule in *McCoy v. Louisiana* was not held to be retroactive and the reasoning in that case does not indicate that the Court intended the rule to apply retroactively. *See, e.g., Smith v. Hooks*, 2018 WL 9815045, at *6-8 (E.D.N.C. Sept. 19, 2018) (explaining why *McCoy* is not retroactive). Finally, it is not apparent that the rule in *McCoy* would apply in Cody's case. [*98] In *McCoy*, the Supreme Court held that the trial court erred in permitting trial counsel to concede his client's guilt in a capital case despite the defendant's vociferous objections during trial that he was innocent. 138 S.Ct. at 1505. Here, Cody's case was not a capital case, his counsel did not concede guilt, and Cody did not object on the record at trial to counsel not pursuing his affirmative defense. Indeed, it appears that counsel did pursue evidence linked to this defense at trial.**16**

Finally, as above, Cody does not show actual innocence. Ground 17 is procedurally defaulted.

D. Cody is not entitled to relief on his remaining grounds

Cody is not entitled to relief on his remaining grounds (Grounds 1-3, 5, and 7-15), which the undersigned discusses below and groups according to the state remedies Cody used to pursue these claims.

1. Ground 1 is procedurally defaulted

In Ground 1, Cody argues that because the Ohio Court of Appeals found, on direct appeal, that the trial court lacked jurisdiction on 12 of 24 counts in the indictment, he was prejudiced by the presentation of evidence at trial on those later-dismissed counts. Doc. 1-1, p. 9. But Cody did not raise this claim on direct appeal to the [*99] Ohio Court of Appeals, which he was required to do because this claim is based on the trial court record. *See Perry*, 226 N.E.2d at 108; *Hill*, 842 F.3d at 936. Rather, Cody only argued to the Ohio Court of Appeals that the trial court lacked jurisdiction over counts 13-23, not that evidence related to those counts and count 24 (dismissed by the trial court at the close of evidence at trial) prejudiced him at trial. See Doc. 42-1, pp. 340-344 (Exhibit 45). Although Cody raised this argument in his discretionary appeal to the Ohio Supreme Court, doing so did not "fairly present" this claim. *Castille v. Peoples*, 489 U.S. 346, 349-351 (1989) (raising a claim for the first time to the highest state court on discretionary review is not "fair presentation" for exhausting a federal habeas claim); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim."); *Casey v. Moore*, 286 F.3d 896, 916-918 (9th Cir. 2004) (same, collecting cases); *see also Baston v. Bagley*, 282 F.Supp.2d 655, 661 (N.D.Ohio 2003) ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition."). Thus, Cody failed to fairly present this claim and it is [*100] unexhausted; because he may no longer present this claim, it is procedurally defaulted. *See Williams*, 460 F.3d at 806 ("Where state court remedies are no longer available to a petitioner because he or she failed to use them within the required time period, procedural default and not exhaustion bars federal court review.").

Cody does not demonstrate cause for his failure to exhaust this claim. Ineffective assistance of appellate counsel cannot constitute cause because Cody did not cite this as a reason appellate counsel was ineffective in his Rule 26(B) Application; as

such, he procedurally defaulted any such ineffective assistance of appellate counsel claim and does not show cause and prejudice to excuse that procedural default. *Edwards*, 529 U.S. at 451-452. As explained above, he does not demonstrate actual innocence. Ground 1 is procedurally defaulted.

2. Ground 2 is procedurally defaulted

In Ground 2, Cody alleges a "McCoy v. Louisiana Megaground." Doc. 1-1, p. 10. He asserts that the trial court, the prosecution, and/or trial counsel violated his right to decide his defense. Doc. 1-1, p. 10. For the reasons explained in the section discussing the related Ground 17, supra, this claim is procedurally defaulted.

3. Grounds 3, 5, 7, 8, and 9, ineffective [*101] assistance of appellate counsel claims, fail on the merits and are procedurally defaulted

In Grounds 3, 5, 7, 8, and 9 Cody alleges ineffective assistance of appellate counsel claims. He contends that his appellate counsel was ineffective for failing to raise certain issues on direct appeal: Ground 3, the trial court's denial of Cody's right to present CIA defense witnesses at trial; Ground 5, the trial court's failure to follow the requirements in *Faretta v. California* when it allowed Cody to proceed pro se, or he was properly appointed pro se but he involuntarily and unintelligently relinquished that right in August 2013; Ground 7, the trial court's denial of a continuance based on Cody's incompetency, requiring automatic reversal and a new trial; Ground 8, the failure to give Cody a constitutionally mandated mental health and insanity exam specific to the third-indicted case17 ; and Ground 9, the trial court's lack of subject matter jurisdiction of count 12, identity fraud on Bobby Thompson of Washington State, and the insufficiency of the evidence on this count. Doc. 1-1, pp. 10-13.

The Ohio Court of Appeals, after setting forth the proper *Strickland* standard governing ineffective [*102] assistance of counsel claims, denied Cody's claims as follows:

|Ground 3:| {¶8} Cody's first claim is that his appellate counsel failed to argue that the state suppressed exculpatory material. Cody maintains that throughout the relevant period of time he was working for the CIA and, thus, he had lawfully been assigned cover identities, including the ones for the identity fraud charges. Cody also maintains that if the state had not suppressed the CIA information, the jury would have been convinced that he lacked the criminal intent for the theft charges. Cody further claims that the trial court improperly quashed subpoenas of witnesses on this CIA defense, that the subpoenaed witnesses would have testified as to his and the USNVA's work for the CIA and would have eliminated criminal intent. A court is not required to accept as true that which is incredible. *Black v. Berea*, 137 Ohio St.611, 32 N.E.2d 1 (1941); *State v. Mattison*, 23 Ohio App.3d 10, 490 N.E.2d 926 (8th Dist.1985); and *Schaefer v. Cincinnati S.R. Co.*, 75 Ohio App. 288, 62 N.E.2d 102 (1st Dist.1945). So too, counsel in the exercise of professional judgment need not raise arguments that are incredible.

{¶9} Cody's claim that the state suppressed the USNVA's website is countered by the state's affirmation that it provided a complete copy of the website's printout version in the course of discovery. (Pg. 5-6 state's brief [*103] in opposition to application to reopen.) Moreover, Cody's assertion that the website would have established his CIA defense is countered by the principle that a court and counsel need not accept as true the incredible.

{¶10} As a variant on this argument, Cody maintains that the lack of resources and lack of attorneys resulted in the suppression of exculpatory evidence and in the involuntary ineffectiveness of trial counsel, because he and his counsel could not get the necessary evidence to properly defend the charges. He refers to the hearing made on the record by his first appointed counsel who moved to withdraw from the case. That counsel declared that he could not represent Cody in good faith because the defense would require thousands of hours of preparation, and he could not fulfill that role while also representing other clients, even if additional funds were paid. This argument is not persuasive, because it requires too much speculation on what could have been found, what could have been done, what could have been argued, and how that would necessarily have affected the trial. Speculation does not establish prejudice. *State v. Abdul*, 8th Dist. Cuyahoga No. 90789, 2009-Ohio-225, *reopening disallowed*, 2009-Ohio-6300; *State v. Thompson*, 8th Dist. Cuyahoga No. 79334, 2002-Ohio-5957, *reopening disallowed*, 2003-Ohio-4336; and *State v. Piggee*, 8th Dist. Cuyahoga No. 101331, 2015-Ohio-546 [*104] .

Cody, 2017 WL 1507211, at *2; 2017-Ohio-1543.

[Ground 5:] {¶14} Cody's next assignment of error is difficult to discern. He argues that pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *State v. Smith*, 8th Dist. Cuyahoga No. 98093, 2012-Ohio-5420, the trial court erred in allowing him to represent himself or in the alternative deprived him of his right to self-representation by driving him insane through the solitary confinement order. To the extent that Cody argues that the trial court erred by allowing Cody to represent himself, the argument is ill-founded. The judge and Cody reviewed the risks of self-representation, and the judge finally granted Cody's motion. The record indicates that Cody received legal training at Harvard Law School and practiced criminal law outside of Ohio. The record also shows that while he represented himself, he resorted to multiple legal remedies, endeavored to reach a plea agreement, and conducted himself well during pretrials. To the extent that he argues that the trial court deprived him of his right to self-representation, the argument is not supported by the record. As discussed previously, the record does not show that Cody was going insane during the summer of 2013. Throughout the proceedings, Cody and the trial judge discussed self-representation, and on August 26, 2013, when [*105] the trial judge asked Cody if it was his intention to proceed pro se or to have Mr. Patituce resume primary representation, Cody replied: "Thank you, your honor. I wish to turn the case over to Mr. Patituce." (Tr. 493.) Accordingly, this assignment of error is ill-founded.

Id. at *3.

[Ground 7:] {¶11} Cody's next assignment of error is that he was forced to stand trial while he was incompetent. The record in this case does not support that argument. On July 12, 2012, the trial judge referred Cody to the court psychiatric clinic to determine competency to stand trial. After the evaluation took place, defense counsel and the state stipulated to the competency report on August 21, 2012. Throughout the proceedings, Cody raised the issue of representing himself.[3] Eventually, on January 30, 2013, after repeatedly and thoroughly reviewing the matter, the judge allowed Cody to represent himself with assigned counsel, Mr. Patituce, as advisory counsel. Cody then inundated the court with motions for discovery, dismissal, in limine, suppression, grand jury transcripts, and assistance, and with reply briefs to the state's opposition briefs.[4] Cody also filed a mandamus action and an affidavit of disqualification [*106] of the trial judge. Cody then on August 26, 2013, stopped representing himself and accepted appointed counsel for trial, which commenced on September 30, 2013. Reviewing the transcripts of the pretrial hearings while Cody represented himself shows that his comments were thoughtful, pertinent, intelligent, and articulate. At the end of the trial, the judge noted that Cody played an active role in his defense, paying close attention to the evidence, taking notes, conferring with counsel, and providing information and suggestions for cross-examination. (Tr. 4513.) These are not the actions of an incompetent person. Thus, appellate counsel in the exercise of professional judgment could decide not to raise this argument.

[FN3] Evidence was presented at trial that Cody had attended law school and had practiced law for awhile.

[FN4] Cody filed over 120 pro se motions during the course of the proceedings. In some of these motions, he had the foresight to try to form the foundation of appellate arguments.

Id.

[Ground 8:] {¶22} Cody further complains that the mental competency examination initially ordered for Case II should not have been and could not have been also used for CR-565050, because [*107] the dates and charges differed from the two cases. This is unpersuasive because the order of competency was to determine competency to stand trial, not whether Cody was competent during the commission of the offenses. Additionally, the nature and times of the charged offenses were not that different. Furthermore, as mentioned above, Cody's actions throughout the proceedings were not those of an incompetent.

Id. at *5.

[Ground 9:] {¶16} Cody then argues that there was insufficient evidence and lack of jurisdiction to convict him of Count 12, identity fraud, in Ohio using the name Bobby Thompson. His reliance *Strassheim v. Daily*, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed.735 (1911), is misplaced.[] In *Daily*, the United States Supreme Court stated that obtaining money under false pretenses warrants punishment by the aggrieved state even if the offender did not come into the state until after the fraud was complete. Furthermore, the state of Ohio showed that Bobby Thompson was not Cody's name and that he used Bobby Thompson in submitting multiple registrations and records to Ohio to allow the USNVA to collect money in Ohio. (Tr. 2951-3000.) This argument is meritless.

Id. at *4.

The Ohio Court of Appeals' decision is not unreasonable, and Cody's claims that appellate counsel was [*108] ineffective for failing to raise the issues in Grounds 3, 5, 7, 8, and 9 fail on the merits. To the extent that Cody raises the underlying claims as stand-alone claims, such claims are procedurally defaulted because they are based on the trial court record, Cody did not raise them on direct appeal and he does not demonstrate cause, prejudice, or manifest injustice to overcome the procedural default of these claims.

4. Grounds 10, 11, 12, and 12(1) are procedurally defaulted

In Ground 10, Cody alleges that trial counsel was ineffective and violated his decision-making as to trial strategy in violation of autonomous decision making set forth in *Faretta v. California* and *McCoy v. Louisiana*. Doc. 1-1, p. 14. The *McCoy* aspect of this claim is procedurally defaulted for the reasons discussed in Grounds 17 and 2, *supra*. To the extent Ground 10 alleges that trial counsel was ineffective for not pursuing witnesses establishing an affirmative defense that Cody was affiliated with the CIA, this is the same claim Cody alleged in Ground 16, and, for the same reason, it is procedurally defaulted. To the extent that Ground 10 alleges that trial counsel violated Cody's rights pursuant to *Faretta*, this [*109] is the same underlying claim Cody alleged in Ground 5. And, for the same reason, it is procedurally defaulted.

In Ground 11, Cody alleges that the trial court lacked subject matter jurisdiction over counts 3-9. Doc. 1-1, p. 14. He raised this issue in his first postconviction petition, which the Ohio Court of Appeals found barred by res judicata, explaining,

{¶ 21} Counts 3-9 charged Cody with money laundering. In its findings of fact and conclusions of law, the trial court found, in part, that Cody identified no set of facts from outside the record that identified why jurisdiction and venue were not capable of being raised in his direct appeal. We agree.

{¶ 22} In his direct appeal, Cody raised a jurisdictional challenge as to the identity fraud counts, Counts 13 to 23. He certainly could have raised any argument with respect to jurisdiction on the money laundering convictions, Counts 3-9, in that appeal as well if he wanted to challenge the trial court's jurisdiction and venue. Because he did not, his claim is barred by res judicata.

Cody, 2015 WL 4133281, at *4; 2015-Ohio-2764. Thus, this claim is procedurally defaulted, *see Williams*, 460 F.3d at 806; *Maupin*, 785 F.2d at 138; *Buell*, 274 F.3d at 349, and Cody does not allege cause to excuse the procedural default or demonstrate actual innocence. [*110]

In Ground 12, Cody alleges that the state failed to disclose exculpatory material and information relating to his CIA defense, amounting to a *Brady* violation and prosecutorial misconduct. Doc. 1-1, p. 15. He raised this issue in his first postconviction petition, which the Ohio Court of Appeals found barred by res judicata, explaining,

{¶ 23} In the third assignment of error, Cody challenges the alleged withholding of exculpatory evidence. He claims that the state withheld military and intelligence community files on him and such actions "occurred de hors the record." He argues that because the state's actions occurred outside the record he was only able to bring the current claim in a petition for postconviction relief as opposed to direct appeal.

{¶ 24} The trial court disagreed and again found that the sole support for Cody's argument was contained in his own self-serving affidavit. The court determined that Cody failed to show that the state withheld any military files, files concerning Cody's relationship to any other federal agency, or other exculpatory material, and identified no set of facts from outside the record. We agree; Cody fails to support his claim that the state acted [*111] outside the record or that he was prevented from making this claim on direct appeal with more than unsupported assertions.

{¶ 25} During pretrial discovery, Cody made multiple discovery requests, which the state responded to. Although many of the state's responses were that the discovery Cody requested did not exist, Cody is unable to provide any evidence that the state acted improperly.

{¶ 26} The issue Cody complains of could have been fairly determined without resorting to evidence outside the record; therefore, he is barred by res judicata from raising these issues in a postconviction petition.

Cody, 2015 WL 4133281, at *4-5; 2015-Ohio-2764. This claim is procedurally defaulted and Cody has not alleged cause to excuse the procedural default. Although he did allege that appellate counsel was ineffective for not raising this claim in his

Rule 26(B) Application (Doc. 42-3, p. 56, Exhibit 75), the Ohio Court of Appeals rejected his claim on the merits (Doc. 42-3, pp. 204-205, Exhibit 77); thus, any alleged ineffective assistance of appellate counsel does not constitute cause to excuse the procedural default. Finally, Cody does not demonstrate actual innocence.

In Ground 12(1), Cody alleges a claim for vindictive prosecution and prosecutorial [*112] misconduct for the state suppressing evidence of his CIA defense and "misrepresenting" that Cody had any affiliation with the CIA. Doc. 1-1, p. 15. The portion of this claim describing suppression of evidence related to Cody's CIA affiliation is duplicative of Ground 12, and, for the same reason, is procedurally defaulted. The portion of this claim containing allegations not encompassed in Ground 12 (vindictive and selective prosecution) is also procedurally defaulted because Cody did not raise this issue on appeal to the Ohio Court of Appeals. Rather, Cody argued, on appeal of the trial court's denial of his first postconviction petition, that the trial court abused its discretion when it failed to hold a hearing on his claim of vindictive and selective prosecution. See Doc. 42-2, p. 251 (Exhibit 67). Thus, Cody failed to present this claim to the state courts; therefore, it is unexhausted, and because state law no longer allows him to raise this claim, it is procedurally defaulted. *Williams*, 460 F.3d at 806; *McMeans*, 228 F.3d at 681 (to satisfy the fair presentation requirement, a habeas petitioner must present both the factual and legal underpinnings of his claims to the state courts). He does not demonstrate cause to excuse his [*113] procedural default or actual innocence.

In sum, Grounds 10, 11, 12, and 12(1) are procedurally defaulted.

5. Grounds 13, 14, and 15 are procedurally defaulted

In Ground 13, Cody alleges the state committed *Brady* violations with respect to evidence that he had an affiliation with the CIA and/or the Office of President George W. Bush. Doc. 41, p. 1. In Ground 14, Cody alleges ineffective assistance of trial counsel for "the denial to Cody at trial of exculpatory evidence" showing he had an affiliation with the CIA and/or the Office of President George W. Bush. Doc. 41, p. 2. And in Ground 15, Cody alleges prosecutorial misconduct in suppressing evidence showing that he had an affiliation with the CIA and/or the Office of President George W. Bush. Doc. 41, p. 2.

These three grounds are procedurally defaulted. Cody asserts that he presented these claims in his second postconviction petition based on new evidence that he filed in 2018. Doc. 41, p. 1; Doc. 42-3, pp. 569-623 (Exhibit 93). The Ohio Court of Appeals affirmed the trial court's denial of his claims, explaining,

{¶ 34} We have reviewed Cody's motions and evidence in support of his motions. None of the documents attached to Cody's request [*114] for leave clearly and convincingly demonstrate that he was unavoidably prevented from discovering the evidence on which he relies; therefore, he was required to file his request for leave either within 120 days of the verdict (for a motion based on newly discovered evidence) or within 14 days of the verdict (for any of the other permissible reasons enumerated in Crim.R. 33(A)). Cody's request for leave to file his motion for new trial is untimely under Crim.R. 33.

{¶ 35} Cody's postconviction petition is likewise untimely. Cody has not shown that he was unavoidably prevented from discovering any purported new evidence.

{¶ 36} Therefore, the trial court's decision to deny the untimely Crim.R. 33 motion and postconviction petition are affirmed and the second assignment of error is overruled.

Cody, 2019 WL 3046584, at *6; 2019-Ohio-2824. Untimeliness is a proper basis upon which the state court may deny relief. *Smith*, 780 Fed. App'x 208, 219-220; *Hill*, 2006 WL 2807017, at *45-48. Thus, Cody procedurally defaulted this claim, and he does not demonstrate cause toexcuse his procedural default or actual innocence.

IV. Conclusion and Recommendation

For the reasons stated above, the undersigned recommends that Cody's habeas Petition be **DISMISSED in part and DENIED in part.**

Dated: March 24, 2020

/s/ Kathleen B. Burke

Kathleen B. Burke

United [*115] 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).

Footnotes

1

Cody was initially convicted of 23 counts; the convictions on eleven counts were vacated on appeal, along with the aggregate 12-month sentence for those eleven counts. Doc. 42-1, p. 526 (Exhibit 59).

2

The grounds in the petition that are procedurally defaulted results in a dismissal; the grounds in the petition that are addressed on the merits result in a denial.

3

Cody filed many pretrial motions as a pro se litigant. *See State v. Cody*, 2017-Ohio-1543, ¶11, n. 4 (observing that Cody filed over 120 pro se motions); see also Doc. 42-4 (Cuyahoga County Court of Common Pleas docket, Case No. CR-12-565050). Respondent discussed only the relevant filings, which the undersigned includes in this section of background facts.

4

On March 1, 2013, Cody filed a second motion to dismiss Counts 2 and 3-9. Doc. 42-1, p. 186 (Exhibit 23).

5

See Cuyahoga County Clerk of Courts, Case Information, Case No. CA-19-108913.

6

Cody refers to this ground as the "McCoy v. Louisiana Megaground." Doc. 1-1, p. 10.

7

"The record indicates that Cody appeared disheveled that day in court." *State v. Cody*, 2017 WL 1507211, at *3, n. 5 (Oh. Ct. App. April 21, 2017).

8

Even under a de novo standard, Cody's claim fails.

9

Cody states, "For the colloquy, Cody had just come off a suicide attempt in a Cuyahoga county justice center holding cell." Doc. 57, p. 14. This reference is to Cody banging his head against the wall of the holding cell on November 5, 2013, which was discussed on the record at the time of Cody's colloquy regarding his desire to testify seven days later,

on November 12, 2013. See Doc. 43-21, pp. 143-147, 193-194 (discussion on the day of and during the colloquy); Doc. 43-22, p. 162 (sentencing transcript).

10
The Ohio Court of Appeals rejected Cody's claim that counsel was ineffective for pursuing a line of defense that he was incompetent to stand trial because (1) it was based on the trial court record and barred by res judicata and (2) Cody did not describe evidence outside the record that would support such a claim. *Cody*, 2015 WL 4133281, at *4; 2015-Ohio-2764.
11

Cody agrees that it was the Cuyahoga County Sheriff Regulations that caused him to be placed in solitary confinement as a result of the trial court's no contact order. Doc. 42-3, p. 82 (Exhibit 75).

12

Even if a de novo standard were applied, Cody's claim fails on the merits.

13
Cody discussed an ineffective assistance of counsel claim in his consolidated brief on appeal to the Ohio Court of Appeals of the trial court's denial of his Motion for Leave to File (Delayed) Motion for New Trial and second postconviction petition. Doc. 42-3, p. 574 (Exhibit 93). However, the Ohio Court of Appeals did not construe his brief as asserting an ineffective assistance of counsel claim, remarking that Cody's "numerous assignments of error, which are difficult to decipher," could be boiled down into two assignments of error and considered those two assignments. *Cody*, 2019 WL 3046584, at *2. The Ohio Court of Appeals also discussed the fact that Cody had filed an earlier, 2014 postconviction petition alleging ineffective assistance of appellate counsel for failing to pursue certain witnesses that would have established that Cody was working for the CIA and that it had previously found this claim barred by res judicata. *Id.* at *1-2 (referencing *Cody*, 2015 WL 4133281, at *4; 2015-Ohio-2764).
14

See also Doc. 57, p. 26 (Cody referencing the new evidence that he presented to the state court "contained, exclusively, in Cody's 19 page trial court affidavit with incorporated exhibits[.]").

15
But see Doc. 57, p. 57 (Cody expressly disclaiming that he seeks to apply the holding in *McCoy* to his case).
16

Prior to trial, while Cody was proceeding pro se, the trial court ruled that he was permitted to assert his CIA defense over the state's objections. See Doc. 43-2, pp. 102-106 (Tr. Vol. 2). At trial, Cody's trial counsel referred to Cody's classified work for the U.S. Government during opening statement and explored his work history as an intelligence officer with the U.S. Military. See Doc. 43-5, pp. 59-62 (Tr. Vol. 5) (opening statement); Doc. 43-20, pp. 44-69 (Tr. Vol. 20) (counsel reviewing Cody's work history with state's witness Al Bansky).

17

The trial court ordered a mental health exam on July 12, 2012, while proceeding in the first two cases Cody was indicted in and prior to the third superseding indictment issued on July 25, 2012. Cody submits that he was entitled to another mental health exam in the third-indicted case. But see Doc. 42-1, p. 68 (August 21, 2012 journal entry in the third-indicted case stating that the state and defense stipulated to the competency reports submitted by the psychiatric clinic in the first two cases) (Exhibit 11).

Appendix C

United States Court of Appeals Denial of Petitioner's Timely Filed Petition for Rehearing

No. 21-3462

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN CODY, AKA BOBBY THOMPSON,

Petitioner-Appellant,

v.

TIM MCCONAHAY, WARDEN,

Respondent-Appellee.

ORDER

FILED
Mar 24, 2022
DEBORAH S. HUNT, Clerk

Before: NORRIS, McKEAGUE, and STRANCH, Circuit Judges.

John Cody petitions for rehearing en banc of this court's order entered on January 7, 2022, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: March 24, 2022

Mr. John Cody
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901

Re: Case No. 21-3462, *John Cody v. Tim McConahay*
Originating Case No.: 1:18-cv-01787

Dear Mr. Cody,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Stephanie Lynn Watson

Enclosure

Appendix D

Decision of Judgment of Conviction of State Trial Court

Certificate of Service

This is to certify that the foregoing **State of Ohio Memorandum Contra Defendant's Motion for a New Trial** was served upon the following by **Regular US Mail**, this 11th day of December, 2013.

Joseph C. Patituce, Esq.
26777 Lorain Road, Suite 708
North Olmstead, Ohio 44070
Attorney for Defendant Thompson

Brad L. Tammaro (0030156)
Assistant Attorney General
Special Prosecuting Attorney

Appendix D

82315143

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

BOBBY THOMPSON
Defendant

Case No: CR-12-565050-A

Judge: STEVEN E GALL

INDICT. 2923.32 ENGAGING IN PATTERN OF CORRUPT ACTIVITY; FORFEITURE
2913.02 COMPLICITY, THEFT; AGGRAVATED THEFT
1315.55 COMPLICITY, ADDITIONAL MONEY LAUNDERING PROHIBITIONS
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT AKA JOHN DONALD CODY.
DEFENDANT IN COURT. COUNSEL JOSEPH C PATITUCE PRESENT.
COURT REPORTER PRESENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ENGAGING IN PATTERN OF CORRUPT ACTIVITY; FORFEITURE 2923.32 A(1) F1 AS CHARGED IN COUNT(S) 1 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF COMPLICITY, THEFT; AGGRAVATED THEFT 2923.03/2913.02 A(3) F1 AS CHARGED IN COUNT(S) 2 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF COMPLICITY, ADDITIONAL MONEY LAUNDERING PROHIBITIONS 2923.03/1315.55 A(1) F3 AS CHARGED IN COUNT(S) 3, 4, 5, 6, 7, 8, 9 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF TAMPERING WITH RECORDS 2913.42 A(2) F3 AS CHARGED IN COUNT(S) 10, 11 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF IDENTITY FRAUD 2913.49 B F2 AS CHARGED IN COUNT(S) 12 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF IDENTITY FRAUD 2913.49 B F5 AS CHARGED IN COUNT(S) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 OF THE INDICTMENT.
DEFENDANT TO FORFEIT TO THE STATE: $981,650.00 PURSUANT TO SECTION 2923.32 (B)(3), TO BE DISTRIBUTED CONSISTENT TO FRANKLIN COUNTY CASE # 10 CV 089791.
DEFENDANT ADDRESSES THE COURT, PROSECUTOR ADDRESSES THE COURT.
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 28 YEAR(S).
10 YEARS ON COUNT 1; 8 YEARS ON COUNT 2, TO RUN CONSECUTIVE WITH COUNT 1; 24 MONTHS ON COUNTS 3, 4, 5, 6, 7, 8, 9. COUNTS 3 - 9 TO RUN CONCURRENT TO EACH OTHER BUT CONSECUTIVE TO COUNTS 1 AND 2.
24 MONTHS ON COUNTS 10 AND 11, TO RUN CONCURRENT TO EACH OTHER BUT CONSECUTIVE WITH COUNTS 1, 2, AND 3 - 9 5 YEARS ON COUNT 12 TO RUN CONSECUTIVE TO COUNTS 1, 2, 3 - 9, 10-11. 12 MONTHS ON COUNTS 13, 14, 15, 16, 17, 18, 19, 20, 21, 23. COUNTS 13 - 23 TO RUN CONCURRENT TO EACH OTHER BUT CONSECUTIVE TO COUNTS 1, 2, 3-9, 10-11 AND 12.
DEFENDANT ORDERED INTO SOLITARY CONFINEMENT EVERY VETERAN'S DAY.
POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS MANDATORY FOR THE ABOVE FELONY(S) UNDER R.C.2967.28. DEFENDANT ADVISED THAT IF/WHEN POST RELEASE CONTROL SUPERVISION IS IMPOSED FOLLOWING HIS/HER RELEASE FROM PRISON AND IF HE/SHE VIOLATES THAT SUPERVISION OR CONDITION OF POST RELEASE CONTROL UNDER RC 2967.131(B), PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE OFFENDER.
SENT
12/16/2013

RECEIVED FOR FILING
12/17/2013 16:45:01
ANDREA F. ROCCO, CLERK

EXHIBIT 43

82315143

DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 591 DAY(S), TO DATE.
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT, COURT APPOINTS THOMAS A REIN AS APPELLATE COUNSEL.
TRANSCRIPT AT STATE'S EXPENSE.
PAY FINE OF $6,345,114.57; PAY COST OF PROSECUTION $330,778.70.
THE COURT HEREBY ENTERS JUDGMENT AGAINST THE DEFENDANT IN AN AMOUNT EQUAL TO THE COSTS OF THIS PROSECUTION.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT BOBBY THOMPSON, DOB: 02/21/1946, GENDER: MALE, RACE: WHITE.

12/16/2013
CPSEG 12/17/2013 16:38:17

Judge Signature 12/17/2013

SENT
12/16/2013

RECEIVED FOR FILING
12/17/2013 16:45:01
ANDREA F. ROCCO, CLERK

48 pg

PA

FILED
2013 DEC 23 A 8:49
CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY

STATE OF OHIO,	)	CASE NO. CR 565050
Plaintiff-Appellee	)	JUDGE STEVEN E. GALL
-vs-	)	**NOTICE OF APPEAL**
BOBBY THOMPSON,	)	
Defendant-Appellant	)	Complaint CA 13 100797

The defendant, by and through undersigned counsel, appeals to the Court of Appeals of Cuyahoga County, Eighth Appellate District from the judgment of conviction, entered on December 16, 2013, and filed in the Clerk's office on December 17, 2013.

This appeal is taken pursuant to Ohio Rule of Appellate Procedure 4(A) and is filed as a matter of right.

Respectfully submitted,

THOMAS REIN (0041571)
Attorney for Defendant-Appellant
Leader Bldg. Suite 940
526 Superior Avenue
Cleveland, Ohio 44114
(216) 687-0400

SERVICE

A copy of the foregoing Notice of Appeal has been served this 23rd day of December, 2013, upon Timothy McGinty, Cuyahoga County Prosecutor, by Hand Delivery to his office.

THOMAS REIN, Esq.

FILED
COURT OF APPEALS
DEC 23 2013
Clerk of Courts
Cuyahoga County, Ohio

CA13100797 82375348

EXHIBIT
44

Appendix E

Decision of State Court of Appeals on Direct Appeal

Direct Appeal

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

STATE OF OHIO

Appellant

COA NO. 100797

LOWER COURT NO. CP CR-12-565050-A

COMMON PLEAS COURT

-vs-

BOBBY THOMPSON

Appellee

MOTION NO. 487909

Date: August 18, 2015

Journal Entry

THE JOURNAL ENTRY AND OPINION OF THIS COURT IN THIS CASE RELEASED ON JUNE 11, 2015 (2015-OHIO-2261), DID NOT REFLECT THE CHANGE IN THE CASE CAPTION ON THE COVER PAGE ORDERED BY THE TRIAL COURT SUBSEQUENT TO THE NOTICE OF APPEAL BEING FILED IN THIS COURT. "STATE OF OHIO V. BOBBY THOMPSON" SHOULD READ "STATE OF OHIO V. JOHN DONALD CODY A.K.A. BOBBY THOMPSON."

TO REFLECT THAT CHANGE, IN PARAGRAPH 1, "BOBBY THOMPSON" SHOULD READ "JOHN DONALD CODY A.K.A. BOBBY THOMPSON."

IN LIGHT OF THE CAPTION CHANGE, FOOTNOTE 1 IN PARAGRAPH 1, "IN THIS OPINION, THE DEFENDANT IS REFERRED TO AS BOBBY THOMPSON." SHOULD READ "IN THIS OPINION, THE DEFENDANT IS REFERRED TO AS APPELLANT."

ACCORDINGLY, ANY REFERENCE TO THE APPELLANT AS "THOMPSON" IN THE OPINION AFTER PARAGRAPH 2 SHOULD READ "APPELLANT."

IT IS HEREBY ORDERED THAT SAID JOURNAL ENTRY AND OPINION OF JUNE 11, 2015 BE AMENDED NUNC PRO TUNC TO CORRECT THE ERROR AS STATED ABOVE.

Appendix E

IT IS FURTHER ORDERED THAT, AS SO AMENDED, SAID JOURNAL ENTRY AND OPINION SHALL STAND IN FULL FORCE AND EFFECT IN ALL ITS PARTICULARS.

THIS IS A CLERICAL ERROR ONLY. THIS NUNC PRO TUNC DOES NOT AFFECT THE FINAL JUDGMENT OF THIS OPINION. THE CORRECTED ENTRY IS ATTACHED.

MARY J. BOYLE, P.J., AND

TIM McCORMACK, J., CONCUR.

Kathleen Ann Keough

KATHLEEN ANN KEOUGH, JUDGE

Direct Appeal

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100797

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN DONALD CODY A.K.A. BOBBY THOMPSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART;
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-565050-A

BEFORE: Keough, J., Boyle, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: June 11, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, John Donald Cody a.k.a. Bobby Thompson,[1] appeals his convictions. For the reasons that follow, we find that the state Ohio lacked jurisdiction over Counts 13 through 23 of the indictment, therefore, only those convictions, including the one-year sentence, are vacated. We also vacate the trial court's sentencing term ordering Appellant to spend every Veteran's Day in solitary confinement. Appellant's remaining convictions and sentence are otherwise affirmed.

I. Background and Procedural History

{¶2} This case arises from an investigation regarding the United States Naval Veteran's Association ("USNVA"), a charity organized and created by a person holding himself out to be Bobby Thompson. Through the investigation, it was discovered that the USNVA was a sham, fabricated by a person named John Donald Cody, who manipulated unsuspecting individuals across the United States to donate to this charity, unlawfully procuring millions of dollars.

{¶3} In mid-2010, the state of Ohio began its investigation into the USNVA after a story was published in the St. Petersburg Times that the charity was fictitious. Through its investigation, the state revealed that Ohio residents had been solicited by various professional fundraisers contracted by USNVA to

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[1]After sentencing, the caption in the lower case was changed to reflect that the defendant's real name is John Donald Cody a.k.a. Bobby Thompson. In this opinion, the defendant is referred to as Appellant.

donate money to the USNVA. It was discovered that approximately $2 million was solicited on behalf of the USNVA from resident-donors in the state of Ohio.

{¶4} As a result of the investigation, on October 13, 2010, Appellant was indicted in Cuyahoga C.P. No. CR-10-543025 on charges of engaging in a pattern of corrupt activity involving the USNVA, money laundering, and aggravated theft. In December 2010, another indictment was issued against Appellant in Cuyahoga C.P. No. CR-10-545577 on 22 additional charges, including engaging in a pattern of corrupt activity, aggravated theft, money laundering, tampering with records, and identity fraud.

{¶5} A warrant was subsequently issued for Appellant's arrest. In April 2012, Appellant was finally apprehended in the state of Oregon. After Appellant was in custody in Ohio, a new indictment was issued against him in July 2012, Cuyahoga C.P. No. CR-12-565050. Appellant was charged with one count each of engaging in a pattern of corrupt activity pertaining to the criminal enterprise of the USNVA, complicity to commit theft, tampering with records, complicity to tamper with records, identity fraud (a felony of the second degree), and possessing criminal tools; and seven counts of complicity to commit money laundering, and 11 counts of identity fraud (felonies of the fifth degree). The previous indictments issued in Case Nos. CR-10-543025 and CR-10-545577 were dismissed and the surviving indictment in Case No. CR-12-565050 ultimately was tried before a jury that heard testimony from 47 witnesses and viewed over 200 exhibits.

{¶6} At the close of evidence, the court granted Appellant's renewed Crim.R. 29 motion for judgment of acquittal as it pertained to Count 24, possessing criminal tools. The court concluded that the state of Ohio lacked jurisdiction to pursue this charge because, although the criminal tools were found in Appellant's possession when he was arrested, they were located in the state of Oregon.

{¶7} The jury returned a guilty verdict on the 23 remaining counts. After considering merger, the trial court imposed a total sentence of 28 years in prison and ordered that Appellant spend every Veteran's Day in solitary confinement.

{¶8} Appellant now appeals raising three assignments of error. This court sua sponte ordered the parties to address an additional issue regarding the instructions given to the jury on Counts 13 through 23.

II. Jurisdiction — Counts 13 through 23

{¶9} The identity fraud Counts 13 through 23 of the indictment identified different applicable time periods and pertained to different victims, but consistently charged, in relevant part,

> * * * [i]n a continuing course of conduct involving offenses committed in Cuyahoga County, Ohio, Defendant did without the express or implied consent of the other person, use, obtain, or possess any personal identifying information of another person with intent to hold themselves out to be the other person and/or

represent the other person's identifying information as the Defendant's own personal identifying information as provided in R.C. 2913.49(B).

* * * The commission of the offense was part of a course of continuing conduct involving offenses committed in Cuyahoga County per R.C. 2901.12(E), and/or (H).

{¶10} In his first assignment of error, Appellant contends that the trial court erred and violated due process when it entered convictions for 11 counts of identity fraud for which it did not have jurisdiction. Appellant presents the following issue: whether Ohio has jurisdiction to prosecute these identity-fraud crimes, which were committed in another state, where no element of the offenses was committed in Ohio, and the crimes did not result from criminal offenses committed in Ohio. He relies on Ohio's jurisdictional statute, R.C. 2901.11.

{¶11} The state contends that Ohio has jurisdiction over these crimes because they were committed in a continuing course of criminal conduct pursuant to Ohio's venue statute under R.C. 2901.12(H). Specifically, the state contends that Ohio has jurisdiction over the 11 identity-fraud counts because these charges naturally flowed in the course of events of Appellant's crimes of engaging in a pattern of corrupt activity, theft, and tampering with records involving the USNVA. Additionally, the state asserts that the use of the identities allowed Appellant to evade apprehension and avoid detection by the state of Ohio after the indictment and arrest warrant were issued. The state does not identify or make any argument pertaining to any section under R.C. 2901.11 to establish jurisdiction for these 11 counts.

{¶12} R.C. 2901.11 grants jurisdiction to Ohio courts over criminal offenses that occur in Ohio. "Jurisdiction" refers to the judicial power to hear and determine a criminal prosecution. *State v. Williams*, 53 Ohio App.3d 1, 4-5, 557 N.E.2d 818 (10th Dist.1988). This is called "territorial jurisdiction" or "subject matter jurisdiction." *Id.* at 5.

{¶13} "Venue," on the other hand, is governed by R.C. 2901.12. Venue commonly refers to the appropriate place of trial for a criminal prosecution within a state. *Id.*, citing *State v. Shrum*, 7 Ohio App.3d 244, 245, 455 N.E.2d 531 (1st Dist.1982), fn.3 (venue refers to the appropriate place of trial for a criminal prosecution as between different geographical subdivisions within a state, it being assumed that the court or courts involved have subject matter or territorial jurisdiction).

{¶14} Therefore, jurisdiction and venue are not the same; once jurisdiction is established, then venue is determined. In fact, "the Legislative Service Committee comments to R.C. 2901.12 state, '[t]his section *presupposes that the state has jurisdiction to try an offender*, and speaks to the question of where the trial is to take place.'" (Emphasis sic.) *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 46, quoting 1974 Committee Comment to H 511.

{¶15} Accordingly, the state's reliance on R.C. 2901.12(H) to establish territorial jurisdiction over Appellant pertaining to Counts 13 through 23 is misplaced. "The General Assembly did not include 'course of criminal conduct' in R.C. 2901.11, the jurisdictional statute." *Yarbrough* at ¶ 45.

{¶16} Nevertheless, this court must still determine whether Ohio had jurisdiction over these 11 identity fraud counts pursuant to R.C. 2901.11. "'Subject matter jurisdiction is a question of law, which we review de novo.'" *ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 96120, 2011-Ohio-5654, ¶ 5, quoting *Udelson v. Udelson*, 8th Dist. Cuyahoga No. 92717, 2009-Ohio-6462, ¶ 13.

{¶17} Counts 13 though 23 pertain to evidence that was discovered following Appellant's arrest in the state of Oregon. When Appellant was finally apprehended in the state of Oregon in April 2012, he possessed on his person three wallets that each contained different identifications — Anderson Yazzie (Count 18), Kenneth D. Morsette (Count 16), and Alan Lacy (Count 19). A review of the record reveals that the names Anderson Yazzie, Kenneth D. Morsette, and Alan Lacy have no apparent connection to the USNVA. However, Appellant used the identity of Kenneth D. Morsette in March 2012 to rent a room at a rooming house in Portland, Oregon.

{¶18} In addition to the wallets, Appellant also possessed a set of keys. One of the keys opened a storage locker in Portland, Oregon. The locker was rented under the name of Alan Lacy (Count 19). Inside the storage locker were two suitcases — one with over $940,000 in cash bundled inside newspapers, and the second suitcase with numerous identification documents for seven other individuals — Anatoly Volokhonskiy (Count 13), Arthur V. Burrola (Count 14), Dale Booqua (Count 15), Richard L. Overturf, Jr. (Count 17), Michael Delaney (Count 20), Vincent Yazzie (Count 21), Albert Gross-Ventre (Count 22). There was no evidence that Appellant used these identities or identification information in furtherance of his criminal enterprise in laundering money through the USNVA.

{¶19} During the course of the investigation, it was learned that after the USNVA was discovered to be fictitious, Appellant used the identity of Ronnie Brittain (Count 23) to open bank accounts and create the "Plymouth Rock Society," a non-profit church affiliated organization. However, a review of the record reveals that there is no apparent connection between the name Ronnie Brittain or the establishment of the Plymouth Rock Society and the USNVA.

{¶20} Applying the facts and circumstances to the subsections of R.C. 2901.11, we must determine whether Ohio has jurisdiction over these 11 identity fraud counts. We make this determination while recognizing that the General Assembly intended to grant Ohio broad jurisdiction. Specifically, R.C. 2901.11(G) provides that "[t]his section shall be liberally construed, consistent with the

constitutional limitations, to allow this state the broadest possible jurisdiction over offenses and persons committing offenses in, or affecting this state."

{¶21} Pursuant to R.C. 2901.11(A)(1), a person is subject to criminal prosecution and punishment in the state of Ohio if a person commits an offense under Ohio law in which any element of which takes place in this state. This section is not applicable and does not grant Ohio jurisdiction over these identity fraud counts because none of the identity fraud elements occurred in Ohio.

{¶22} R.C. 2901.11(A)(2) applies when an individual, while in the state of Ohio, attempts to commit acts with complicity, or conspires to commit an offense in another jurisdiction. Evidence was presented that Appellant traveled to Ohio on a few occasions to meet with the USNVA's attorney to discuss the dealings of the USNVA as they related to an audit in Connecticut. However, no evidence was presented that Appellant obtained or utilized any of the identities identified in Counts 13 through 23 during these visits or that he possessed these identities while in the state of Ohio. Based on the evidence presented, the identity fraud offenses were not committed or attempted in any way, complicit or otherwise, while Appellant was in Ohio. Furthermore, the indictment demonstrates that Appellant was not charged with conspiracy to commit the identity fraud offenses. Finally, the identity fraud offenses were not the result of any of the other crimes in this case that were committed in Ohio — they were not connected to the USNVA. Therefore, R.C. 2901.11(A)(2) does not apply.

{¶23} Reviewing the subsections conferring jurisdiction over individuals whose actions occur outside the state of Ohio, we find that only subsections (A)(3) or (A)(5) could potentially be applicable. Subsection (A)(3) confers jurisdiction if, while out of this state, "the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in this state." This section does not apply because the identities Appellant assumed were not those of individuals from the state of Ohio, and no evidence was presented that Appellant used any of the identities while in Ohio or to further the criminal enterprise involving the USNVA.

{¶24} Subsection (A)(5) of R.C. 2901.11 confers jurisdiction if, while out of Ohio, "the person unlawfully takes or retains property and subsequently brings any of the unlawfully taken or retained property into this state." This section does not give Ohio jurisdiction over these identity fraud counts because no evidence was presented that Appellant brought any unlawfully obtained or retained property into Ohio under the guise or use of the assumed identities.

{¶25} Finally, subsection (A)(7) gives Ohio jurisdiction if a person "by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, causes or knowingly permits any writing, data, image, or other telecommunication to be disseminated or transmitted into [Ohio] in violation of the law of [Ohio]." No evidence was presented that Appellant used the identities

or personas of the 11 individuals named in Counts 13 through 23 in any way that would satisfy the jurisdictional requirement of R.C. 2901.11(A)(7).

{¶26} When considering whether they have jurisdiction over crimes committed over state boundaries, courts have looked at the crimes and circumstances themselves. In *Shrum*, 7 Ohio App.3d 244, 455 N.E.2d 531, the First District considered whether Ohio had jurisdiction over a rape that occurred in the state of Kentucky. The court recognized that the employment of force and threat of force began in Ohio and persisted in a continuous, unbroken sequence until the culmination of the rape in Kentucky. *Id.* at paragraph one of the syllabus. Therefore, the court determined that because the "force" element of the crime was used in Ohio, Ohio has territorial jurisdiction pursuant to R.C. 2901.11(A)(1) over the rape offense. *Id.*

{¶27} In *State v. Hall*, 8th Dist. Cuyahoga No. 90365, 2009-Ohio-461, ¶ 80, this court determined that, although much of the defendant's criminal activity occurred in states other than Ohio, the conspiracy that made up the RICO charge clearly occurred in Ohio, thus giving Ohio jurisdiction over the RICO charges. Additionally, other indicted offenses pertained to activity that occurred in Ohio, and the money laundering count was properly under the jurisdiction of Ohio under R.C. 2901.11(D) because the money was commingled from multiple states. *Id.*

{¶28} From these cases, it appears that Ohio's broad jurisdictional arm reaches to offenses when the offenses are a continuation or have a reasonable connection to the underlying criminal enterprise. In this case, the underlying criminal enterprise, as indicted, involves the USNVA. Therefore, the state of Ohio would have territorial jurisdiction over those indicted offenses that bear a reasonable connection to the USNVA.

{¶29} Considering all the subsections of R.C. 2901.11, including Ohio's broad and liberal jurisdictional arm, and the relevant case law, we find that the identity fraud charges in Counts 13 through 23 have no reasonable connection to the underlying criminal enterprise involving the USNVA for which Appellant was prosecuted. There was no evidence that Appellant used these identities or identification information in furtherance of his criminal enterprise in laundering money through the USNVA that affected the state of Ohio. Pursuant to R.C. 2901.11, the state of Ohio did not have jurisdiction over the 11 counts of identity fraud contained in Counts 13 through 23. Appellant's assignment of error is sustained, and his convictions on those counts are hereby vacated.

{¶30} Finding merit to this assignment of error renders moot the sua sponte issue this court raised regarding the jury instructions given on Counts 13 through 23.

III. Admission of Evidence

{¶31} In his second assignment of error, Appellant contends that his rights to due process and a fair trial were violated when the trial court allowed the admission of irrelevant and overly prejudicial testimonial and documentary evidence regarding other charitable organizations he was establishing, specifically, the Quaker Penn's Landing and Plymouth Rock Society of Christian Pilgrims.

{¶32} The state argues that the evidence was proper to demonstrate intent, plan, preparation, identity, and absence of mistake. During trial, the state maintained that after Appellant realized that the USNVA has been discovered to be fictitious and illegitimate, he traveled to Boston and opened bank accounts under the name of Ronnie Brittain, including an account for the Plymouth Rock Society, a non-profit church affiliated organization. Testimony and documentary evidence was presented regarding the development and formation of the Plymouth Rocky Society and Quaker Penn's Landing, another non-profit organization. The state's theory was that once the USNVA was exposed, Appellant moved on to a new identity and a new scheme.

{¶33} No objection was made to the introduction of this evidence. The failure to raise a timely objection at a time when the trial court can correct an error constitutes a waiver of any objection to the admissibility of evidence. Nevertheless, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Therefore, plain error occurs only when, but for the error, the outcome of the trial clearly would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus; *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-141, 749 N.E.2d 274.

{¶34} Under Evid.R. 402, only relevant evidence is admissible. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Nevertheless, even relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Unfair prejudice is "that quality of evidence that might result in an improper basis for a jury decision." *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 24. Therefore, evidence, which "'arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish'" may be unfairly prejudicial. *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001), quoting Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3. Evidence that is unfairly prejudicial "appeals to the jury's emotions rather than intellect." *Id.*

{¶35} Assuming without deciding that the testimony and evidence regarding Quaker Penn's Landing and Plymouth Rock Society was unfairly

prejudicial, the admission of such evidence does not rise the level of plain error. Overwhelming evidence was presented to the jury that Appellant assumed the identity of Bobby Thompson, created a fictitious charitable organization, laundered millions of dollars from citizens across the United States, including the state of Ohio, and continued to engage in this pattern of corrupt activity for years. The jury did not need to hear additional testimony regarding other seemingly fictitious enterprises to find Appellant guilty in this case.

{¶36} Due to the overwhelming evidence of Appellant's guilt regarding the charges of engaging in a pattern of corrupt activity, tampering with evidence, identity fraud (Count 12), complicity money laundering, and theft, the trial court's admission of this testimony, even if unfairly prejudicial, does not rise to the level of plain error, such that the outcome of the trial would have been different if the evidence were omitted. *Long*, 53 Ohio St.2d 91, 372 N.2d 804, at paragraph two of the syllabus; *State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). Accordingly, the assignment of error is overruled.

IV. Solitary Confinement

{¶37} At sentencing, the trial court ordered Appellant to spend every Veteran's Day in solitary confinement. In his final assignment of error, Appellant contends that the trial court lacked the authority to impose this type of punishment. The state concedes the error and after reviewing the relevant case law, we agree. *See State v. Williams*, 8th Dist. Cuyahoga No. 88737, 2007-Ohio-5073, ¶ 20 (there is no statutory provision for this type of punishment and it is contrary to law). Appellant's third assignment of error is sustained.

V. Conclusion

{¶38} Judgment affirmed in part and vacated in part. This case is remanded to the trial court to enter a new judgment entry of conviction to reflect that Counts 13 through 23 are vacated, including Appellant's 12-month total sentence imposed for these offenses. The trial court is also ordered to vacate the imposition of solitary confinement.

It is ordered that appellant recover from the appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, P.J., and
TIM McCORMACK, J., CONCUR

Appendix F

F-1: Decision of State Court of Appeals on Petitioner's Ohio R. App. P. 26(B) Application

F-2: Petitioner's "Application to Re Open Direct Appeal Pursuant to App. R. 26 (B)" (Habeas Record Copy)

F-3: Petitioner's App. R. 26 (B) Denial Memorandum in Support of Jurisdiction to the Ohio Supreme Court (Habeas Record Copy)

Appendix F-1

Decision of State Court of Appeals on Petitioner's Ohio R. App. P. 26(B) Application

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100797

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

**JOHN DONALD CODY, A.K.A.
BOBBY THOMPSON**

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Court of Common Pleas
Case No. CR-12-565050-A
Application for Reopening
Motion No. 491304

RELEASE DATE: April 21, 2017

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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Ohio Attorney General
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Columbus, Ohio 43215

Appendix F-1

A Bobby never permitted her to do anything without his specific authorization, and he would tell me what she was and was not authorized to do.

Q Now, staying on the tack of the financial, the financial part of this, are you familiar with the term of a chief auditor or a chief internal auditor, something like that?

A Yes.

Q As the general counsel for an organization such as the USNVA, what is your understanding just as to what a chief auditor or an internal auditor for an organization like the USNVA would actually do?

A An auditor's role is to have an independent third party review of the Association's records, and they would look at it and make sure there were receipts for things that were purchased, that the funds that were brought in were put in proper accounts, and do the balancing and the checks to make sure that no one was not doing -- that everyone was doing what they were supposed to be doing and no one was taking things inappropriately, and that most importantly, that the funds raised were going to the veterans.

Q So with a chief auditor, if there is really an auditor, their role is to review these mountains of financial records and actually produce more financial records because they are reconciling the problems, if there are any problems?

A Correct. The auditor will take all that information, and

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 100797 | LOWER COURT NO. CR-12-565050-A

COMMON PLEAS COURT

-vs-

JOHN DONALD CODY A.K.A. BOBBY THOMPSON

Appellant

MOTION NO. 491304

Date 04/21/17

Journal Entry

Appellant's pro se application to reopen direct appeal pursuant to App.R.26(B) is denied. See journal entry and opinion of same date.

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OF THE COURT OF APPEALS
By _____ Deputy

Judge TIM MCCORMACK, Concurs

Judge MARY J. BOYLE, Concurs

KATHLEEN ANN KEOUGH
Administrative Judge

CA13100797 98581272

EXHIBIT 77

KATHLEEN ANN KEOUGH, A.J.:

{¶1} In September 2015, the applicant, John Cody, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Thompson*, 2015-Ohio-2261, 34 N.E.3d 189 (8th Dist.), in which this court affirmed his convictions for engaging in a pattern of corrupt activity, complicity to commit theft, tampering with records, complicity to tamper with records, second-degree identity fraud, and seven counts of complicity to commit money laundering; vacated 11 convictions of identity fraud; and modified his sentence.[1] This was a 513-page, hand-written application to reopen claiming ineffective assistance of appellate counsel. This court struck that application and ordered him to file a ten-page application with a supporting affidavit as allowed by the appellate rules. Cody complied with that order, and the state of Ohio has filed a brief in opposition.

{¶2} Using the pseudonym Bobby Thompson, Cody organized a charity called the United States Navy Veteran's Association ("USNVA"). Using professional fund-raisers, the USNVA collected millions of dollars, including approximately $2,000,000 from Ohioans. Cody deposited the money collected for the USNVA into various bank accounts. Then he and a codefendant withdrew money from the accounts, and the money could no longer be traced. During the relevant time, Cody moved around the country, including Florida and Oregon.

[1]John Cody is the defendant's real name. Bobby Thompson was a pseudonym Cody used.

When he was arrested in Oregon in April 2012, he had identification papers for multiple people and over $900,000 in cash.

{¶3} On July 25, 2012, the grand jury indicted Cody in *State v. Thompson*, Cuyahoga C.P. No. CR-12-565050-A.[2]

{¶4} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶5} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

[2]However, the state of Ohio had been aware of his wrongdoing for some time and had been investigating him. The Cuyahoga County Grand Jury had indicted him on similar charges on December 27, 2010. These charges were pending when he was arrested and brought to Ohio.

defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.

{¶6} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶7} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶8} Cody's first claim is that his appellate counsel failed to argue that the state suppressed exculpatory material. Cody maintains that throughout the relevant period of time he was working for the CIA and, thus, he had lawfully been assigned cover identities, including the ones for the identity fraud charges. Cody also maintains that if the state had not suppressed the CIA information, the jury would have been convinced that he lacked the criminal intent for the theft charges. Cody further claims that the trial court improperly quashed subpoenas of witnesses on this CIA defense, that the subpoenaed witnesses would have testified as to his and the USNVA's work for the CIA and would have eliminated criminal intent. A court is not required to accept as true that which is incredible. *Black v. Berea*, 137 Ohio St.611, 32 N.E.2d 1 (1941); *State v. Mattison*, 23 Ohio App.3d 10, 490 N.E.2d 926 (8th Dist.1985); and *Schaefer v. Cincinnati S.R. Co.*, 75 Ohio App. 288, 62 N.E.2d 102 (1st Dist.1945). So too, counsel in the exercise of professional judgment need not raise arguments that are incredible.

{¶9} Cody's claim that the state suppressed the USNVA's website is countered by the state's affirmation that it provided a complete copy of the website's printout version in the course of discovery. (Pg. 5-6 state's brief in

opposition to application to reopen.) Moreover, Cody's assertion that the website would have established his CIA defense is countered by the principle that a court and counsel need not accept as true the incredible.

{¶10} As a variant on this argument, Cody maintains that the lack of resources and lack of attorneys resulted in the suppression of exculpatory evidence and in the involuntary ineffectiveness of trial counsel, because he and his counsel could not get the necessary evidence to properly defend the charges. He refers to the hearing made on the record by his first appointed counsel who moved to withdraw from the case. That counsel declared that he could not represent Cody in good faith because the defense would require thousands of hours of preparation, and he could not fulfill that role while also representing other clients, even if additional funds were paid. This argument is not persuasive, because it requires too much speculation on what could have been found, what could have been done, what could have been argued, and how that would necessarily have affected the trial. Speculation does not establish prejudice. *State v. Abdul*, 8th Dist. Cuyahoga No. 90789, 2009-Ohio-225, *reopening disallowed*, 2009-Ohio-6300; *State v. Thompson*, 8th Dist. Cuyahoga No. 79334, 2002-Ohio-5957, *reopening disallowed*, 2003-Ohio-4336; and *State v. Piggee*, 8th Dist. Cuyahoga No. 101331, 2015-Ohio-546.

{¶11} Cody's next assignment of error is that he was forced to stand trial while he was incompetent. The record in this case does not support that

argument. On July 12, 2012, the trial judge referred Cody to the court psychiatric clinic to determine competency to stand trial. After the evaluation took place, defense counsel and the state stipulated to the competency report on August 21, 2012. Throughout the proceedings, Cody raised the issue of representing himself.[3] Eventually, on January 30, 2013, after repeatedly and thoroughly reviewing the matter, the judge allowed Cody to represent himself with assigned counsel, Mr. Patituce, as advisory counsel. Cody then inundated the court with motions for discovery, dismissal, in limine, suppression, grand jury transcripts, and assistance, and with reply briefs to the state's opposition briefs.[4] Cody also filed a mandamus action and an affidavit of disqualification of the trial judge. Cody then on August 26, 2013, stopped representing himself and accepted appointed counsel for trial, which commenced on September 30, 2013. Reviewing the transcripts of the pretrial hearings while Cody represented himself shows that his comments were thoughtful, pertinent, intelligent, and articulate. At the end of the trial, the judge noted that Cody played an active role in his defense, paying close attention to the evidence, taking notes, conferring with counsel, and providing information and suggestions for cross-

[3]Evidence was presented at trial that Cody had attended law school and had practiced law for awhile.

[4]Cody filed over 120 pro se motions during the course of the proceedings. In some of these motions, he had the foresight to try to form the foundation of appellate arguments.

examination. (Tr. 4513.) These are not the actions of an incompetent person. Thus, appellate counsel in the exercise of professional judgment could decide not to raise this argument.

{¶12} Cody further argues that the trial court placed him in solitary confinement, which further drove him insane and undercut his ability to represent himself. The docket shows that on March 19, 2013, the trial judge issued an order that "[d]efendant is restricted to have no contact by phone, mail or social visits." Cody describes the horrible effect this had on him in his supporting affidavit. Nevertheless, it is understandable why appellate counsel would not raise this as an assignment of error. As explained above, the record does not support the proposition that Cody was going insane before trial, much less that his solitary confinement was causing it. Cody referred to his solitary confinement in his motions and at pretrials, but did not dwell at length on the deleterious effect it was having on his mind. Thus, this proposition was better suited to the postconviction relief petition he filed; indeed, he raised this argument there, too. Finally, it is difficult to discern how the solitary confinement prejudiced the outcome of the trial or the appeal.

{¶13} Cody also argues that he was denied his right to testify on his own behalf. When the state rested its case, the judge asked Cody directly whether he wished to testify; the judge noted that throughout the proceedings Cody indicated he wanted to testify. However, Cody refused to answer the judge's

question directly. Instead, he whispered into his counsel's ear, after which counsel said that Cody wished to answer the charges against him. Again, the judge directly asked Cody if he wanted to testify, and again he whispered into his attorney's ear and did not answer the judge directly. After taking a break to allow Cody to better his appearance[5] and to further consult with his attorney, Cody's lawyer said that it was his understanding that Cody would not be taking the stand. Cody did not object to these proceedings. (Tr. 4314-4322.) This record does not support an argument that the trial court denied Cody's right to testify, and appellate counsel in the exercise of professional judgment could decline to raise it.

{¶14} Cody's next assignment of error is difficult to discern. He argues that pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *State v. Smith*, 8th Dist. Cuyahoga No. 98093, 2012-Ohio-5420, the trial court erred in allowing him to represent himself or in the alternative deprived him of his right to self-representation by driving him insane through the solitary confinement order. To the extent that Cody argues that the trial court erred by allowing Cody to represent himself, the argument is ill-founded. The judge and Cody reviewed the risks of self-representation, and the judge finally granted Cody's motion. The record indicates that Cody received legal training at Harvard Law School and practiced criminal law outside of Ohio. The

[5]The record indicates that Cody appeared disheveled that day in court.

record also shows that while he represented himself, he resorted to multiple legal remedies, endeavored to reach a plea agreement, and conducted himself well during pretrials. To the extent that he argues that the trial court deprived him of his right to self-representation, the argument is not supported by the record. As discussed previously, the record does not show that Cody was going insane during the summer of 2013. Throughout the proceedings, Cody and the trial judge discussed self-representation, and on August 26, 2013, when the trial judge asked Cody if it was his intention to proceed pro se or to have Mr. Patituce resume primary representation, Cody replied: "Thank you, your honor. I wish to turn the case over to Mr. Patituce." (Tr. 493.) Accordingly, this assignment of error is ill-founded.

{¶15} Cody further argues that the trial court's failure to rule on all of the outstanding motions before trial deprived him of his right to a fair trial and due process, pursuant to *State v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002). However, *Ruiz* holds that under the United States Constitution, the federal government need not disclose impeaching information before a defendant pleads guilty, not that a trial court must rule on all pending motions before trial. Moreover, under Ohio law hybrid representation — a criminal defendant may represent himself while also being represented by counsel — is prohibited. Thus, after August 26, 2013, when Cody turned the case over to appointed counsel, all of his pro se motions were no longer properly before the court. *State*

v. Martin, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, and *State v. Pizzaro*, 8th Dist. Cuyahoga No. 94849, 2011-Ohio-611. This court further notes that under Ohio law any pending motions upon disposition of the case are deemed denied. In *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 692 N.E.2d 198 (1998), the Supreme Court of Ohio ruled that the trial court did not commit reversible error by failing to rule on discovery motions, because, inter alia, those motions were deemed denied with the disposition of the case. Thus, appellate counsel in the exercise of professional judgment could decline to argue this point.

{¶16} Cody then argues that there was insufficient evidence and lack of jurisdiction to convict him of Count 12, identity fraud, in Ohio using the name Bobby Thompson. His reliance *Strassheim v. Daily*, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed.735 (1911), is misplaced.[6] In *Daily*, the United States Supreme Court stated that obtaining money under false pretenses warrants punishment by the aggrieved state even if the offender did not come into the state until after the fraud was complete. Furthermore, the state of Ohio showed that Bobby Thompson was not Cody's name and that he used Bobby Thompson in submitting multiple registrations and records to Ohio to allow the USNVA to collect money in Ohio. (Tr. 2951-3000.) This argument is meritless.

[6]Cody incorrectly cited *Daily* as 331 U.S. 280.

{¶17} Cody argues that his case should have been dismissed for lack of a speedy trial. R.C. 2945.71(C)(2) requires that the state bring a person charged with a felony to trial within 270 days after the person's arrest. Under subsection (E), each day the person is held in jail counts as three days. Cody never made bail, so each day is subject to the triple-count provision. However, the time period may be waived or extended under R.C. 2945.72. If Cody can establish that more than 90 days elapsed after allowing for all waivers and extensions, his claim may have merit. The time for speedy trial begins to run when the accused is arrested, but the actual day of the arrest is not counted. *State v. Canty*, 7th Dist. Mahoning No. 08-MA-156, 2009-Ohio-6161. The court also notes that when a defendant waives his right to a speedy trial in one case, the waiver does not apply in a subsequent case based on the same facts and circumstances as the first case. Nevertheless, when a defendant files a motion in one case that statutorily tolls the speedy trial time, such tolling will apply in a subsequent case based on the same facts and circumstances. The tolling provisions of R.C. 2945.72 apply regardless of whether the defendant also waives time. *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319; and *Canty* at ¶ 77.

{¶18} The parties agree that Cody was taken into Ohio's custody on May 4, 2012, and the time began to run on May 5.[7] At that time, Cuyahoga C.P. No. CR-12-545577 ("Case II") was pending against Cody.[8] On May 8, 2012, in Case II, Cody filed a demand for discovery and a motion for a bill of particulars, both of which extended the time until the state had a reasonable time to respond. Given the amount of discovery necessary in this case, a reasonable time to respond would be at least July 13, 2012. The court further notes that during that time, Cody's counsel filed a motion for additional counsel on May 23, 2012, and motion for leave to withdraw as counsel on June 27, 2012. Cody also filed approximately ten pro se motions, which could have also tolled the time under R.C. 2945.72(D).

{¶19} On July 13, 2012, the court granted defense counsel's motion to withdraw holding the case in abeyance until new counsel was appointed. Moreover, the court referred Cody to the court's psychiatric clinic to determine competence to stand trial. On July 25, 2012, the grand jury indicted Cody in the current case, and the court appointed Joseph Patituce as Cody's counsel on July 31, 2012. New counsel filed a motion for a bill of particulars on August 10, 2012. On August 21, 2012, the parties stipulated to Cody's competency. The

[7]R.C. 2945.72(A) provides that speedy-trial time is extended by reason of the pendency of extradition proceedings.

[8]Cody was originally indicted in Cuyahoga C.P. No. CR-10-543025-A in October 2010.

trial court subsequently clarified that the competency evaluation applied to all cases and tolled the speedy-trial time on all cases. Tolling is also consistent with the Supreme Court's rulings in *Blackburn*. Thus, because of the overlapping tollings, only four days had elapsed from May 8, 2012, to August 21, 2012, in the current case.[3]

{¶20} Also on August 21, 2012, defense counsel moved to require the state to reveal any agreements entered into between the state and any witness or defendant. Counsel also moved to dismiss the indictment on August 24, 2012, and in early September several motions to strike state motions were filed. More significantly, on September 12, 2012, the court continued the trial until March 11, 2013, at the request of the defendant and stated the reason for the continuance was to allow necessary time to prepare for trial. While that continuance was in place, on January 30, 2013, Cody waived his speedy-trial rights until June 7, 2013. While that continuance was still in place, on April 22, 2013, Cody waived his speedy-trial right to December 31, 2013. His trial began on September 30, 2013. This chronology establishes that Cody was brought to trial well within the speedy-trial time limits.

{¶21} This chronology does not even consider the time during which Cody represented himself and inundated the court with motions or moved to have the

[3]On May 10, 2012, Cody waived speedy-trial time in Case II until December 31, 2012. However, *Blackburn* holds that waiver applies only to Case II.

judge disqualified. Accordingly, appellate counsel properly rejected this argument.

{¶22} Cody further complains that the mental competency examination initially ordered for Case II should not have been and could not have been also used for CR-565050, because the dates and charges differed from the two cases. This is unpersuasive because the order of competency was to determine competency to stand trial, not whether Cody was competent during the commission of the offenses. Additionally, the nature and times of the charged offenses were not that different. Furthermore, as mentioned above, Cody's actions throughout the proceedings were not those of an incompetent.

{¶23} Next, Cody asserts that his appellate counsel should have argued that the trial court erred in allowing Cody's protected medical and dental records to be introduced into evidence. During trial, the state called a plastic surgeon and a dentist. Both testified that Bobby Thompson had consulted with them, and they identified checks written by Bobby Thompson to them. The state did not elicit testimony concerning treatment or condition.

{¶24} The Supreme Court of Ohio in *Jenkins v. Metro. Life Ins. Co.*, 171 Ohio St. 557, 562, 173 N.E.2d 122 (1961), held that the privilege statute, R.C. 2317.02 does not prevent testimony by a physician as to the fact that he was consulted in a professional capacity by a person on a certain day. Thus, that aspect of the doctor's testimony was not privileged. Cody's reliance on *Baker v.*

Indus. Comm. of Ohio, 135 Ohio St. 491, 21 N.E.2d 593 (1939), and *In re Loewenthal*, 101 Ohio App. 355, 134 N.E.2d 158 (8th Dist.1956), are misplaced; neither hold that checks or negotiable instruments, which are issued, used, and published by and to third parties, come within the scope of the physician-patient privilege. Nor could this court find any Ohio authority for that proposition. Accordingly, appellate counsel in the exercise of professional judgment could decline to raise this issue.

{¶25} For his next assignment of error, Cody claims that the charge of Count 2, theft, should have merged with the charges of money laundering, Counts 3-9. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1601, ¶ 49, the Supreme Court of Ohio changed the law of allied offenses by requiring courts to "determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind,'" quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50. In the current case, using the fake USNVA charity, Cody committed theft when he obtained the money from unsuspecting donors. He committed the crimes of money laundering subsequently and in separate acts when he withdrew and dispersed the money through bank withdrawals and issuing checks. Furthermore, the crimes of theft and money laundering are not necessarily allied offenses. *State v. Dabney*, 1st Dist. Hamilton No. C-140575, 2015-Ohio-4142. This argument is ill-founded.

{¶26} Cody also claims that appellate counsel should have argued that it was improper to impose a superfine of $6,345,114.57 and the costs of prosecution of $330,778.70 against an indigent defendant. However, R.C. 2923.32(B)(2) explicitly authorized the fines and the costs, and the trial judge specifically relied on that statute in imposing them, after he noted the millions of dollars that were taken, the amount of money unaccounted for, and the damage done to the good will of charities. Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue, such as trying to declare a statute unconstitutional. *State v. Williams*, 74 Ohio App.3d 686, 600 N.E.2d 298 (8th Dist.1991); *State v. Munici*, 8th Dist. Cuyahoga No. 52579, 1987 Ohio App. LEXIS 9683 (Nov. 30, 1987), *reopening disallowed* (Aug. 21, 1996), Motion No. 271268.

{¶27} Finally, Cody argues that his sentence was disproportionate because his co-accomplice was given a more lenient sentence. This argument is ill-founded, because Cody was the mastermind of the entire scheme and benefitted most by it. Comparing the two sentences was not warranted.

{¶28} Accordingly, this court denies the application.

Kathleen Ann Keough

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

MARY J. BOYLE, P.J., and
TIM McCORMACK, J., CONCUR

Appendix F-2

Petitioner's "Application to Re-Open Direct Appeal Pursuant to App. R. 26(B)" (Habeas Record Copy)

ORIGINAL

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,	:	CASE NO. CA-13-100797
Plaintiff-Appellee,	:	COURT OF COMMON PLEAS NO. 12-565050-A
vs.	:	
John Cody a.k.a. BOBBY THOMPSON,	:	APPLICATION TO REOPEN DIRECT APPEAL PURSUANT TO APP. R. 26(B)
Defendant-Appellant.	:	(Affidavit Attached)

APPLICATION TO REOPEN DIRECT APPEAL PURSUANT TO APP. R. 26(B)

Bobby C. Thompson/John Cody #651-040
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(Appellant Pro Se)

COURT OF APPEALS
NOV 25 2015
Clerk of Courts
Cuyahoga County, Ohio

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CA13100797

EXHIBIT 75

App. F-2

STANDARDS FOR REVIEW

The standards for review of claims of ineffective assistance of appellate counsel on outcome-determinativeness are those of Strickland v. Washington, 466 U.S. 668, 687 (1984) (reasonable probability of undermining confidence in the outcome); Lockhart v. Fretwell, 506 U.S, 364 (1993), followed, State v. Harris, 1999 Ohio App. LEXIS 4729 (Richland cty., 1999), HN 2 citing State v. Carter, 72 Ohio St. 3d 545, 548 (1995) (reasonable probability result was unreliable or proceeding fundamentally unfair); and Burger v. Kemp, 483 U.S. 776, 781-82 (1987 (Strickland test of professional judgment applies to appellate counsel's actions and omissions).

ASSIGNMENTS OF ERROR

I. Appellate Counsel failed to argue the State suppressed outcome-determinative required Brady disclosures, related due process violations, and the forced ineffectiveness of trial counsel.

A. CIA Material. The state suppressed all written file material originated by federal intelligence agency authorities related to Defendant's actual contract agency relationship to the Bush White House's CIA, and Defendant's "CIA" defense. That material was exculpatory (because Defendant's CIA relationship and employment, at any time, established clearly from even one document from CIA sources, would have laid the groundwork for proof at trial Defendant had been lawfully assigned cover identities by the CIA, showing Defendant's specifically, "lawful purpose" in the use and possession of [illegible] Counsel's failure the affirmative defense to that count (R.C. 2913.49 (F)(2)(b)). The introduction of even one such document was also reasonably probable to have affected the outcome at trial because, without the evidence, Defendant would have had to rely solely on his own testimony to establish the relationship (this Assignment implicates also Assignment II-Denial of Any Defense Witnesses by the Trial Court). The probability of outcome change (on counts 2-12 and, therefore, on 1, or any one of them) with this evidence, as opposed to without, is made more evident given the State's knowing [illegible] of any involvement of the Defendant ever, with the CIA, and its assertion, therefore, of

his lack of credibility on the subject contra. See PCRP action, State v. Cody, jur. declined, 2015-Ohio-4468 (S.Ct., 2015), the trial court holding Defendant lacked credibility as to his claims of intelligence agency connection based upon the State's representations (aff., State v. Cody, 2015-Ohio-2764 (Cuyahoga cty., 2015), jur. declined, State v. Thompson, 2015-Ohio-4468 (S.Ct., 2015)).

The employment of the Defendant by both Bush Administrations and their CIAs also would have been relevant to, and would have established, lack of the Defendant's criminal intent to commit theft, theft by deception (or, derivatively, complicity), money laundering, or tampering with records, all specific intent crimes. See U.S. v. Duncan, 1992), U.S. v. Wilson, 289 F. Supp. 2d 801 (S.D. Tex., 20030,[1] creating the reasonable probability of outcome change on at least one, and probably all, of the verdicts on counts 2-11, and therefore, again, Count 1, which required the commission of at least two "incidents" of predicate offenses.

B. Navyvets.org website.

Outcome-determinativness: It is an unfortunate circumstance of contemporary American criminal legal process that high profile defendants having actual intentions which their average peer might perceive as nowhere near approaching saintliness but which are, nonetheless, not identical to the mens rea required as an element of the non-violent offense(s) of which they are accused, and who are, or have been associated with, political figures or public policy makers, are prosecuted with a view toward manipulating evidentiary facts to create a critical emotive response by inference in the jurors' minds, like it or not, against the defendant's bad character. Thus in U.S. v. Lt. Col. Oliver North, a National Security Advisor Operative, the prosecution sought to create the prejudice North was a thief pilfering government funds to buy pantyhose for his secretary, Fawn Hall (partial convictions, no real sentence); in U.S. v. Edwin B. Wilson, a CIA operative, the government sought to portray the Defendant not just as someone who had no intelligence agency connection, but also a traitor who had sold C-4 explosives to Gaddafi's Libya to satiate Wilson's greed, munitions used to kill U.S. servicemen by Libyan operatives (2 convictions out of

1. Both cases involved covert intelligence operatives accused of finacial crimes in which their alleged greed was positioned by the prosecution as evidence of the required intent.

4 trials, 1 acquittal across the board, 1 dismissal after 20 years in prison on the grounds the government suppressed the evidence of CIA involvement in Wilson's business, and misled the courts by denying that involvement; Wilson, supra) and in U.S. v. Duncan, supra, where the government portrayed the defendant, a U.S. Army covert intelligence officer operating a covert business in Virginia, as a greed driven person; presented overwhelming circumstantial evidence he stole government funds, including the absence of business receipts; conviction reversed on appeal on the grounds intelligence operations inherently resulted in hidden or non-existent receipts); and in the instant case where the key emotional influence driving the jury to convict on all counts, and intended to drive the jury to convict on all counts, was the perception of the defendant's greed.

> "Indeed... it's difficult to measure ... the amount of harm your greed has caused... . The men and woman who have honorably served our country who suffer and continue to suffer because of the millions ... were supposed to help them, went to your pockets." [Trial Court, Sentencing Hearing Tr; 4545; 21-24; 4546: 4-7].
>
> "Prejudice may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an imparlment of the deliberative process of ... reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses." Sotomayor, J., Concurring opinion,
>
> Skilling v. U.S., 561 U.S. 358, 463-464 (2010), quoting U.S. v. McVeigh, 918 F. Supp., 1476, 1472 (W.D.Okla., 1995).[1]

This critical perception is caused by the that manipulation or outright suppression of evidence and the manipulation and suppression of www.Navyvets.org by the prosecution instantly was a critical example of such a manipulation which caused an unreliable outcome.

www.Navyvets.org was the [redacted] official website of USNVA, on the web from at least 2000 through 2010, consisting of approximately 1 gigabyte of information[2] dealing with

1. McVeigh is also cited in Appellant's Affidavit as an authority requiring the prosecution to independently search for and produce all intelligence agency files on the defendant and [redacted] his activities even though the prosecution asserts it already has produced all that was provided.

2. Printed out, Navyvets.org would have come out to approximately 3,000 8 1/2"x11" pages. It contained many video, moving [redacted] and wave files described above in the text, incapable of print reproduction. It was a full color site.

the organization, its history, its purpose, where fundraised monies went, [illegible][2] receipt, description of government involvement with the organization, the organization's IRS informational tax returns; news reporting and analysis on veterans' issues, the war on terror, national security affairs, lobbying activities of the organization, and news of the United States Navy[illegible].

In sum, the suppression of www.navyvets.org, whether considered by itself or cumulatively with other at trial error, would have been outcome-determinative. The publication and

1. In no wise did USNVA tell donors that donation money was going to support political candidates in election races. In no wise did USNVA public donor monies go to support any political candidate in an election race. Personal donations of the Defendant (and other USNVA members) did go to support candidates for office. In arguing via leading cross-examination questions that these personal donations of the Defendant came from USNVA money in support of its advocacy programs, defense trial counsel unreasonably misunderstood the fundamental legal distinction between advocacy and lobbying on the one hand, and electioneering activities on the other, and grossly and unreasonably erred in playing into the hands of a prosecution (accurately) eliciting testimony from the only two Ohio USNVA donors the prosecution could find to testify that they did not intend their donations to go to the electioneering expenses of political candidates. Trial counsel's unreasonable errors stemmed from the fact (1) the full www.navyvets.org website was not disclosed, and (2) he was given insufficient preparation and factual research time and resources by the trial court, in which www.navyvets.org - related issues, [illegible] only one set of complex issues in a case containing many such sets. See further, Assignment I (C), infra.

2 The news and analysis sections of Navyvets.org were highly reflective of detailed information as any reasonable reader/viewer could deduce, coming only from classified U.S. government sources including sources within the Department of the Navy. These sections bore the same relationship to the war policies of the Bush Administration, and were caused and motivated by the President's personal desires for his political fortunes, as the content of the official website of the Ohio Attorney General bears to his criminal law enforcement policies and is caused and motivated by the Attorney General's personal desires for his political fortunes. Thus in CR-12-565505OA, the war policies of Bush Administration were supported by USNVA, [illegible] by the Administration, by the national Republican Party, by the CIA, and by the Defendant, as an aspect of USNVA's primary purpose, the support of American patriotism. "Patriotism" is not defined in the Internal Revenue Code, or the Internal Revenue Code or Regulations, the sole authority for USNVA's tax-deductible status, granted by the Bush Administration's IRS in a record-setting 35 calendar days, even though the Code authorizes tax-exempt and tax-deductible status for organizations promoting it. It is not defined in the statutes of any state), thus there was a conflation, a nexus in fact, between Navyvets.org telling, as it did, the donating public that its money went to support its explicit (see, above) advocacy agenda in the cause of American patriotism, the money raised going to that purpose, war goals of the President, and the personal political agendas of national Republican policy makers. Showing that conflation was critical to a defense, and would have shown that there was no deprivation of property under Count 2; that therefore Count 2 would not have served as a predicate for Count 1; and that there was [illegible] therefore, no funds which, according to the State, took place per Counts 3-9. Navyvets.org would have clearly shown that conflation and all the other exculpatory factors cited in this Assignment and its statement of bases found in the supporting affidavit, and therefore have been outcome-determinative.

The Defendant did not cause that conflation. He was handed it.

introduction of www.navyvets.org in its full electronic and print formats to the jury at trial would have doomed the state's case. [illegible] Its' publication and introduction would have established the "CIA Defenses" of (I) lawful purpose to the identity fraud Counts by showing CIA involvement with USNVA per se, and by showing CIA officers using cover identities, other than Thompson, were working for the organization in a variety of capacities cited on the site; (2) privilege to the Tampering Counts by showing CIA involvement; and (3) by showing CIA involvement, lack of criminal intent to the Theft, Money Laundering and Tampering Counts.

Its publication and introduction would also have shown to the jury USNVA went out of its way to show every public donor the exact purposes of the organization and where their money was going. For calender years 2005, 2006, [illegible] and 2007, USNVA's informational IRS Return Form 990's were published as part of the website, and would have been included. Encomiums and specific [illegible] laudatory comments about USNVA for specific activities from the Bush[43] Department of Defense, the Bush[43] Department of Veterans Affairs, a variety of State Department of Veterans Affairs (not Ohio's), the New Hampshire Department of Employment and Job Security, Veterans' Division, the Office of the Mayor, New York City, the Office of the Brough President, Brough of Brooklyn, N.Y., and numerous other government officers and policy makers in the area of foreign policy, national security and veterans' issues.[1]

See, Affidavit for the statement of the factual bases of the State's suppression of the site and citations to authorities.

C. Denial of Due Process and Fair Trial by Ineffective Assistance of Trial Counsel and Suppression of Defense Evidence, Not by Lack of Counsel's Professional Judgment, But Forced by the Trial Court. The State spent costs of over $330,000 on its investigations of the case, according to the trial court [Sentencing Transcripts, 4546: 21-23], not including the salaries of the 3 courtroom-present prosecutors and other non-courtroom present prosecutors. The first appointed defense counsel, Mark Stanton, Esq., withdrew when the trial court refused to guarantee sufficient payment of defense fees and cost to present an adequate

1. Thanks-for-$5,000 and $10,000 contribution checks to dilapidated government veterans' facilities were common, from Hawaii, New Jersey, Alabama, Virginia, Florida and around the country, this in the face of Paladis' testimony [Tr. T. 2549; 6,. Paladis, Forensic Accountant, BCI, [illegible]] that absolutely no record could be found of any contribution by USNVA to veterans' benefits, and then his broad-bush statements that any contribution were a subterfuge. [T. Tr. 2550: 1-15]. Paladis' testimony, more than anything else, convicted the Defendant

and constitutionally required defense. [Motion for Assignment of Additional Counsel, JE 5. 23.2012; CR-10-545577 A; Hearing Transcript 7.12.2012, CR-10-545577A]. The defense in CR-12-5655050 A was never provided these resources, and, indeed, was denied witnesses and testimony at trial by the trial court. These activities are not ineffective assistance of counsel by reason of lack of counsel's professional judgment; they are, instead, violations of the defendant's due process rights related to the suppression of evidence by reason of ineffective assistance of counsel forced by action and inaction of the trial court, and the administrative judge of that court, if such be the case.

II. Appellate Counsel failed to argue it was error for the trial court to deny Defendant any witnesses at trial in violation of the 5th Amendment's right to equal protection, the 6th Amendment's right to compulsory process, and the 14th Amendment's right to due process of law.

III. Appellate Counsel failed to argue automatic reversal was required because the Defendant was forced to stand trial while incompetent, violating the standards of Pate v. Robinson, 383 U.S. 375 (1966) and State v. Were, 94 Ohio St. 3d 173 (2002). Assignment III and its bases spill over into Assignment IV and are incorporated therein.

IV. Appellate Counsel failed to argue that the trial court's order (JE, 3.19.2013) placing the Defendant, after he had been appointed counsel pro se, and through 12.16.2013, in solitary "no contact" confinement in the Cuyahoga County jail pre-trial, and other court and jail imposed conditions pertinent to that confinement, exacerbated the Defendant's mental state of dysfunctional incompetence to stand trial, in violation of the Constitution's prohibition against cruel and unusual punishment, because that placement and those conditions met that standard and the trial court had a penchant for punishing the defendant with solitary confinement [see, Sentencing order, JE 12.17.2013; this Court's holding that portion of the sentence outside the boundaries of Ohio permissible sentences, direct appeal, State v. Thompson (caption as retained by Ohio Supreme Court, 2015-Ohio-4468), 2015-Ohio 2261]; Bell v. Wolfish, 441 U.S. 520 (1979). The trial court's solitary "no contact" order bore no stated rationale; it had no purpose and/or was overly punitive, or was an exaggerated response to a fictional or perceived concern.

If the 8th Amendment's standard does not apply because the Defendant was not a "prisoner," then the even lower bar of the due process mandates on this Assigement's issues does, Gibson v. Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir., 2002); Alberti v. Kleven hagen, 790 F. 2d 1220, 1224 (5th Cir., 1986). On the excerbation and causation of Defendant's incompetence to stand trial, see Justice Anthony Kennedy, U.S. Supreme Court, testimony before Congress:

"Solitary confinement literally drives men mad."[1] In addition to causing and exacerbating the Defendant's incompetence to stand trial, and to defend himself pro se,[2] the trial court's 3.19.2013 order caused violations of the Defendant's fundamental rights (involving structural error) to access counsel of choice, Sullivan v. Louisiana, 508 U.S. 275, 288 (1993); to access his courts, Bounds v. Smith, 430 U.S. 817 (1977); and to obtain discovery on his own behalf, D'Ambrosio v. Bagley, 527 F. 3d 489 (6th Cir., 2008), requiring automatic reversal.

V. Appellate counsel failed to argue Defendant was denied his right to testify on his own behalf under the 6th and 14th Amendments U.S. Constitution, pursdant to the holdings of Sheens v. Haskis, 4 Fed. Appx. 236 (6th Cir., 2001), and/or to argue trial counsel's ineffectiveness related thereto.

VI. Appellate counsel failed to argue the requirements of Faretta v. California, 422 U.S. 806 (1975) and State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012) were not met in the appointment of Defendant as counsel pro se or, in the alternative, if Defendant were effectively appointed, he was forced involuntarily and unintelligently to relinquish that appointment in violation of due

1. USA Today, 11.5.2015, 5 A. The article also reported that only about 100,000 of U.S. total prisoners were subject to solitary confinement, and that the prisoners so confined reported suffering from "sensory paralysis," "perpetual vertigo," "uncommunicative despression," "thoughts of brutality," and a "daily" battle to maintain psychological equlibrium."

2. The Defendant's legal incompetence is not overruled by the so-called-waiver of counsel. In fact the reverse is true: the "waiver" must be knowingly and intelligently made. State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012). The "knowinglyness" and the "intelligentlyness" by definition, must be valid throughout the period of pro se representation and legal incompetence at any point thereof nullifies each separate prong.

process. The latter argument is implicated in and by Assignment IV - incompetency caused by solitary confinement.

VII. Appellate counsel failed to argue that the trial court's failure to rule on pre-trial motions in CR-12-5655050 A denied the Defendant his right to a fair trial and due process of law, pursuant to U.S. v. Ruiz, 536 U.S. 622 (2002) et. al because the defendant and prosecution when they make legitimate requests by motion sufficiently in advance of trial requesting rulings on fundamental questions as to how the trial is to proceed, and its parameters, are entitled to court guidance in preparation where one side of the case, alone, took 6 weeks of evidence presentation.

VIII. Appellate counsel failed to argue Count 12 should be dismissed for insufficiency of the evidence, judgment contrary to the weight of the evidence and lack of subject matter jurisdiction under Strassheim v. Daily, 331 U.S. 280 (1911).

IX. Appellate counsel failed to argue that the tried indictment should have been dismissed for denial of Quick and Speedy Trial, a violation of the Defendant's due process rights pursuant to the 6th and 14th Amendments, Article I § 10 of the Ohio Constitution; State v. Sloane, 2009-Ohio App. LEXIS 1022 (Mahoning cty., 2009); and State v. Johnson, 2013-Ohio-856 (Butler Cty., 2013). The mental competency examination ordered for CR-10-545577 A did not carry over, and could not have carried over, into CR-12-5655050 A because the subject matter of the examination as to the charges was fundamentally different for the two cases, and because the trial court could not have intended for such a carryover into a case which did not exist at the time of the order.

X. Appellate counsel failed to argue that, if the trial court's order for a mental competency examination did not carry over from 10-545577 A to 12-565050 A, then Defendant's due process rights to a competency exam and R.C. § 2945.371 (G) finding in 12-565050 A were not met.

XI. Appellate counsel failed to argue evidence of Defendant's protected medical and dental information at trial should have been stricken.

XII. Appellate counsel failed to argue it was contrary to Ohio law on allied offenses not to run the sentences on Count 2 with Counts 3-9 as concurrent.

XIII. Appellate counsel failed to argue that a superfine and costs imposed on the Defendant were contrary to law and void per se.

XIV. Appellate counsel failed to argue that the trial court's sentence was contrary to Ohio law, and to the equal protection and due process clauses of both Constitutions because it failed to make a singular review of consistency and proportionality with the co-Defendant's sentence. Alternatively, if the underlying argument is rejected, or not heard on Re-Opening because Blanca Contreras' cases are not part of the record herein, thus causing Appellant to lose this claim, Appellate counsel, by not moving for inclusion, caused Appellant to suffer the prejudice described in the supporting Affidavit.

For the above assignments of error, Appellant respectfully requests this Court to re-open the direct appeal to permit briefing, and to appoint him counsel.

Pursuant to the holdings of Carter v. Mitchell, 693 F. 3d 555 (6th Cir., 2012), citing Harrington v. Richter, 131 S.Ct. 770, 784 (2011), Appellant explicitly requests this Court to make a merits review of the substantive-at-law claims underlying the claim of ineffective assistance of appellate counsel.

Respectfully Submitted,

John Cody a.k.a. Bobby C. Thompson A651040 Appellant pro se
P.O. Box 8107, Mansfield OH 44901

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on November 21, 2013 I sent U.S.P.S., 1st class, postage prepaid the original of the foregoing Application and attached supporting Affidavit, with all pages attached in the upper left-hand corner, to the Clerk of the Cuyahoga County Court of Appeals, 1 Lakeside Ave., Cleveland OH 44113 for filing, with a copy thereof to the Clerk, designated for service upon the prosecutor, Brad Tammaro, OAAG, 150 E. Gay St. #1600, Columbus OH 43215, by depositing the same in the O.D.R.C. Ri.C.I. prisoners' outgoing mailbox that date.

John Cody a.k.a. Bobby C. Thompson Appellant pro se

ORIGINAL

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, Plaintiff/Appellee, Vs., BOBBY THOMPSON, Defendant/Appellant.	Case N. CA-13-100797 App. R. 26(B) Appeal Cuyahoga C.P. No. CR-565050-A

ooo

SWORN STATEMENT STATING BASES FOR CLAIMS
PURSUANT TO APP[redacted] RULE 26(B)(2)(a) AND APP[redacted] RULE 26(B)(4)

Bobby Thompson a.k.a. John Cody) Appellant Pro Se
Inmate No. 651-040
P. O. Box 8107
Mansfield, Ohio 44901
[redacted]

Bradford L. Tammaro Counsel for Appellee
Assistant Attorney General
[redacted]

AFFIDAVIT

Affiant makes the following factual statements as the bases for his claims in the Application proper, adds citations and record references to those statements as appropriate and available and describes the manner, if necessary and not already accomplished in the Application proper, in which the omission prejudiced the outcome*.

Appellant advised Appellate Counsel Lüttecke of all the arguments and issues contained in the Application, and these facts related thereto, in one oral conference with him and in numerous and voluminous correspondances sent to him by Appellant, sufficiently in advance of the filing date of Appellant's opening Merit Brief, for inclusion therein.

Statement of the Case

Defendant was tried on 24 counts. These were: Ohio RICO (Count 1), Aggravated Theft/Complicity (Count 2), Money Laundering (Counts 3-9), Tampering With Records (Counts 10-11), Identity Fraud (on one Bobby Thompson of Whatcom county, Washington ("Whatcom Thompson") (Count 12), Identity Fraud (On 11 individuals other than Whatcom Thompson (Counts 11-23)), and Possession of Criminal Tools (Count 24). After introduction of all evidence and counsel summation, the trial court dismissed Count 24 for lack of subject matter jurisdiction. The jury convicted the Defendant of the remaining 23 counts in 1/2 hour. Defendant was adjudged guilty and sentenced, 12.16.2015, to a term of 28 years, solitary confinement each Veterans' Day for the duration, and fines and costs totalling over $6.5 million. He timely direct appealed and was represented by appointed appellate counsel. On that appeal, decision on (6.11.2015) this Court dismissed Counts 13-23 for lack of subject matter jurisdiction; reversed the trial court's sentence of Veterans' Day solitary confinement for the sentence's duration as outside the parameters of statutory permissibility; held that the introduction of evidence on two religious charities even if hypothetically prejudicial [redacted] was not consequential to the remaining convictions, and made no prejudicial spillover review based on the dismissal of Counts 13-24.

* After preparing the Affidavit, Affiant went through it with a view toward deleting any argumentative or value-laden words or phrases, excepting the 3 [redacted] noted above.

Standard for Review - Generic

With approximately 5,000 pages of hearing and trial transcripts, close to 300 pre-trial pleadings by both parties, and 200,000 + pages of State's discovery, Appellant's appointed counsel, after 197 days granted him by this Court to prepare the Opening Merits Brief, presented two (2) arguments to this Court: (1) a winning argument causing the dismissal of Counts 13-23 of the tried-upon Indictment for lack of subject matter jurisdiction, (and a rejected sub-argument that a new trial should be granted because evidence on the formation of two religious-oriented charities, Plymouth's Rock Society and Quakers' Penn's Landing, was introduced on Count 24) and (2) a granted argument rejecting the trial court sentencing the Defendant to solitary confinement on each Veterans' Day for 28 years, until he would have been 93 years of age.

Appellant asserts the cumulation of error doctrine as applied to the Application's Assignments of Error.

As to Assignment I-State Suppression of Evidence, Violations of Due Process, and Forced Ineffectiveness of Trial Counsel

A. CIA File(s)/Full Military Files/Files of Federal Agencies showing CIA/White House Involvement with Defendant[1]

1. The items of U.S. Department of Defense documentary evidence Defense Counsel is cross-examing state's witness Bansky, the chief BCI investigator into the matter of Bobby Thompson, John Cody and the USNVA, about as follows were produced originally in the State's Brady disclosures: (Defense Counsel Q; State's Witness-A)

"Q: What we have before you is an order from the Department of the Army... .
A: Yes, it is.
Q: To John Donald Cody?
A: Correct
Q: And he's being ordered to ... Joint Intel CORD STF; is that correct?
A: ... You are correct.
Q: And security clearnce, top secret?
A: Correct [Tr., 3966: 13-22].
...
Q: Labelled here in Box 3, Cody, John D. ... P.O. Box, Fort Myers STA, Arlington, Virgina?
A: Correct.
...
Q: Description of duties, what are the duties described?
...
A: U.S. government, duties classified [Tr. , 3467 : 5-6; 21-25].

1. The documents referred to are two of a number of similar documents found in the State's DAFILES discovery, Appellant moved herein, 12 F.4.2015, for that discovery to be received in the record. That motion, inter reference to the discovery requests was denied, 12 F. 9.25. 2015.

...
Q: After this investigation he received a clearance again which was top secret?
A: ... correct.
Q: ... There is a paragraph, what does it say?
A: "Investigation conducted by federal agencies other that the Department of the Army."
A: Copy of the scope of the investigation may be obtained upon request to counter intelligence and security division, director of operations, office of assistant chief of staff for intelligence."
Q: Do you know the director of operations is and who he works for, which federal agency the director of operations works for?
...
A: No, I don't.
...
Q: If you flip another two pages, another cledrance dated 26 October '84... . This is again, for my client, Bobby Thompson, or John Donald Cody?
A: Correct
Q: ... this one is labelled... a special background investigation, correct? ... Security clearance?
A: Correct. [Tr. 3968: 13-14, 19, 22-23; 3964: 3-8, 12-18, 21-25].
Q: And the date ... this top secret clearance was granted was October 25, 1984, correct?
A: ... correct. [Tr. , 3970: 25-3971 : 2].
...
Q: Now, this letterhead seal, Department of Defense, United States of America in upper left-hand corner?
A: Correct
Q: Now, titled Department of the Army, U.S. Army Element Geographical Evaluation and Analysis Group is what it says?
A: That's what it says.
Q: Room 6 F 037 Forrestal Building, Washington DC?
A: Correct. [Tr. , 3972: 5-11].
...
Q: Have you ever done any research to see if that is an actual Army unit?
...
A: I did not look into this.
Q: Are you aware that is, in fact, a fictitious organization?
Mr. Tammaro: Objection.
The Court: ... Sustained
Q: You have no reason to believe, ... just like your report [on USNVA], that this is a real group?
Mr. Tammaro: Objection.
The Court: Sustained. [Tr., 3972:15-3973:6].
...
Q: It says: "Dear Mr. Cody, this office is pleased to inform you that your application as an international relations officer, a GS-9." Sounds like he got a job in Washington?
A: Correct [Tr. , 3972:15-18].
...
Q: What page do you have there in front of you?
A: ... April 11, 1994.
Q: ... It's going to be a list of residences? [Tr., 3975:9-12].
Q: It starts ... Trenton? [Tr., 3976:15] A: Yes ... . Clearwater, Florida? [Tr., 3976: 18] ... A: Correct... Manila ? [Tr. , 3977:2] ... A: Correct.Sierra Vista [Arizona]? [Tr. , 3977:5] ... A: Correct ... Honolulu?... A: Correct,Fort Benning, Georgia?... A: Correct... Sullivan & Cromwell... 48 Wall Street, New York?... Forrestal Building, Washington D.C.?... A: ...Correct... Barnett & Collins in New Orleans? A: Correct... Weyerhaeuser Company? ... A: Correct. [Tr. , 3976:14-3979:6]

...

Q: We can agree he was honorably discharged?
A: Correct. [Tr. , 3979:16-17].
Q: Now, on Thursday you testified that one of the reasons a mistake was made regarding the [Defendant's] fingerprint card was that you thought he was in trouble in other places, and that's one of the things that led to your confusion ... ?
Q: If an individual is in all of that trouble, how does he on multiple different occasions have his picture taken with the President of the United States?
...
A: Do I know? No, you have to ask Mr. Bush, President or Mr. Bush.[1] [Tr. , 3980: 4-11].
...
Q: Can you explain to the jury how the man who was subject of security clearance at least four times has no fingerprints in his Army file?
...
A: I can't answer ... . I can't give explaination at all. [Tr., 4021:3-15]. [Doc. dated 3-20-86] [Tr. , 4021:19-21].

Appellant [redacted] contended below, in his motions for discovery, infra, the [redacted] above evidence, [redacted] the standpoint of the analysis of State's chief BCI investigator on the case, [redacted] without more, established that a reasonable and objective reader of that State's discovery [redacted] would conclude the Defendant's discovery motion-made assertion [redacted] meets the threshold of requiring the State to have searched CIA/Department of Defense and White House files, and the secret "Director of Operation" file referred to in the testimony, a threshold established by McVeigh, Poindexter, and Wilson, infra.

3. See D'Ambrosio v. Bagley, 2006 U.S. Dist. LEXIS 12794, n. 14 (N.D. Ohio, 2006) for the proposition that to suceed on a Brady claim, the defendant needs to demonstrate merely that with the suppressed evidence there is a reasonable probability of a different result.[2]

4. In U.S. v. McVeigh, 954 F. Supp. 1441 (D.Colo., 1997), HN 6, the court held evidence of any defendant's involvement with American intelligence agency had to be produced on the defendant-requester's mere colorable assertion such evidence existed.

1. Defendant moved for service of a subpoena sub duces tecum upon former President Bush, and a number of other former and active U.S. intelligence community officers. Those motions were never ruled upon. See, Affidavit, on Assignment VII and Affidavit on Assignment II-Denial of Defense witnesses at trial. The same [redacted] applies to Mike DeWine, who the Defendant asserted, when DeWine was served with a subpoena, had personal knowledge in 2001-2006 of intelligence agency involvement with the Defendant and USNVA. Personal knowledge of one prosecutor, [redacted] is imputed to the entire prosecution. Santobello v. New York, 404 U.S. 257 (1971), and to:

> "[The] Defendant is entitled to discover documents regarding the knowledge of other high government officials,... Their authorizations thereof, or their participation therein. Such evidence may be materiel to a defense of specific intent...." U.S. v. Poindexter, 727 F.Supp. 1470 (D.D.C. , 1984).

2. Defendant argued below in his motions for discovery, this Affidavit, infra, that the production of even one document from any one of these federal sources explicitly identifying him as CIA would be an outcome determinative. See, McVeigh, Poindexter and Wilson, infra.

5. The Defendant made repeated requests for Discovery of his CIA and Intelligence Community files. See, Assignment VII [redacted] and Affidavit on Assignment VII-Failure to Rule on Pre-Trial Motions.

6. See, Brady v. Maryland, 373 U.S. 83 (1963), U.S. v. Bagley, 473 U.S. 667, 669 (1985), followed, Kyles v. Whitley, 514 U.S. 419, 434 (1995) for the proposition the suppression of evidence favorable to the accused violates due process where the evidence is material to guilt or punishment.

7. See, Kyles; McVeigh; [redacted] U.S. v. Wilson, 289 F. Supp. 2d 801 (S.D.Tex., 2003); and U.S. v. Poindexter, 727 F. Supp. 1470 (D.D.C. , 1989) for the materiality standards applicable to a defendant's request for U.S. intelligence agency files. [redacted]

8. The prosecution asserted throughout the case and on appeal (1) it had no Brady information on the Defendant's intelligence agency affiliations other than what it gave the Defendant; (2) that it had no obligation to make any further inquiries; and (3) that the Defendant was never affiliated with the CIA.[1]

9. On the third point, the [redacted] evidence supra [redacted] indicates the Defendant has established a threshold showing the prosecution is maintaining a fundamental falsehood which involves the heart of materiality and necessity in the Defendant's case. On the first point, See Kyles and Morales for the proposition the prosecution has the duty to learn of favorable evidence of any agency acting on the government's behalf where a specific request for discovery is made. See Bies v. Sheldon, 2014 U.S. App. LEXIS 24242 (6th Cir. , 2014), HN 4 for the proposition on a suppression issue in an acting on the government's behalf case, the defendant need not show that he would have been acquitted had the requested information been provided in order to achieve reversal after conviction.

1. That Appellant was ever CIA was "a bizzare ... fantasy;" an "imaginary" statement reflective of an "alternate universe" (PCRP appeal, State v. Cody, 2015-Ohio-2764 (Cuyahoga cty., 2015), jur. declined, 2015-Ohio-4468 (S.Ct. , 2015), Appellee's Reply Brief, pp. 9-10. To the State's personal knowledge ... no ... material showing Appellant was CIA existed in federal files. Reply Brief, p. 21. By involving the CIA operational tack of plausible denial, the Agency and the State of Ohio may consider this issue moot. [redacted]

10. Federal Constitutional rights, as well as procedures under R. Crim. P., are implicated. On the second point above, See U.S. v. Diaz-Munoz, 632 F. 2d 1330 (5th Cir., 1980); State v. Morales, 1985 Ohio App. LEXIS 7528 (Cuyahoga cty., 1985), HN 7. A sovereign cannot bring a prosecution in which evidence in the possession of another sovereign or government agency is avoided for discovery by reason of the fact it is not in the actual possession of that prosecution, where it used the agency as a principal witness in its case. Poindexter, supra, citing U.S. v. Deutsch, 475 F. 2d 55, 57 (5th Cir., 1973). The State used the IRS for a principal witness in the case (IRS Special Agent Ross Spencer, Tr., 1720-1736) and denied the Defendant discovery of the IRS files relating to the Defendant's CIA involvement. [Tr., 1734:16-1736:8]. See, McVeigh, HN 4 supra, aff'd, Nichols v. Reno, 124 F. 3d 1376 (10th Cir., 1997) for the proposition that an intelligence agency not being "aligned" with the criminal prosecution, and that they "did not provide information

> "does not limit the duty to inquire of such agencies for information which may be exculpatory ... or material to the preparation of the defense."

The IRS had knowledge the defendant was CIA if for no other reason, "CIA NOC individual" tax returns are not filed with the IRS. [Appellant contends] State accounting expert Palaibis testimony [Tr., 2172-2643] at trial that he had no idea how USNVA received an IRS § 501 (c) (19) exemption in a record 35 days, and passed an IRS audit of record with what Palaibis described as multiple fraudulent receipts for expenses also establishes that presumption. The State at trial put on IRS Special Agent Ross Spencer [Tr., 1720-1736] to testify about the Federal investigation. After doing so, in detail, Spencer, the IRS' and the federal government's only representative to testify, [redacted] invoked an asserted [redacted] privilege, in refusing to provide to a cross-examining defense counsel the exact information Defendant was asking for in the discovery motions cited in this Assignment I (C), inasmuch as the IRS had it. It is only when the separate sovereign is totally uninvolved in the investigation that imputation of

1. The lead prosecutor, Brad Tammaro, had flown to Florida at least twice of record (during his testimony at a hearing on the St. Petersburg Time's action to quash the subpoena of Jeffery Testerman; and subsequently, during the Cody plea bargaining phase, to confer with the U.S. Attorney's office in Tampa on the facts of a federal case). [Tr., circa 8.26.2013].

* A CIA NOC officer is a non-official cover officer who serves for the CIA under a entity cover. [redacted] which is an official agency of the United States Government.

knowledge cannot be made. U.S. v. Morgan, 2014 U.S. Dist. LEXIS 119743 (S.D.N.Y., 2014).

The State admitted it was "receiving" investigatory information from the Department of Defense, the NPRC and the FBI. From the record presented on this Assignment, it is obvious that although these three agencies were not "totally uninvolved" in the investigation, the entirety of the DOD files (including those showing the Defendant as CIA), and the entirety of the FBI files on the Defendant (including those showing him as CIA) were not presented in discovery. [Tr., 4018:24-25].

Affidavit "Appendix 12" attached and hereby incorporated by reference.*

B. Navyvets.org website:

1. In the Application proper, Appellant, in arguing the outcome-determinativeness of www.Navyvets.org, lays out the necessity and materiality of the full site to the defense.

2. The record on this matter below is contained in the Defendant's discovery motion for the site, and the State's response.

3. The State subpoenaed all records and [redacted] materials in the possession of Lycos, Inc., the [redacted] host of Navyvets.org. [State's discovery]. It received the full electronic and the full print, versions of the site. See D'Ambrosio, supra, for the proposition that the defendant being able to obtain State's required Brady material through his own devices is irrelevant to the State's Brady requirements. In support, with respect to Crim. R. 16, State v. Athon, 2013-Ohio LEXIS 1245 (S.Ct., 2013), HN 1, followed, State v. Kessler, 2014-Ohio-3376 (Seneca cty., 2014), cited by State ex rel Podelsky v. Weininger, 2014-Ohio-3288 (Brown cty., 2014).

commercial

C. Failure to provide Defendant with Constitutionally Mandated Adequate Counsel: Insufficient Resources:

1. First appointed defense counsel Mark Stanton, Esq. withdrew when, and because, his motion for additional counsel and for investigatory resources, estimated at a cost of over $300,000, was not granted. [Citations, Application, p. 7].[1]

2. From the transcripts, it can be seen state investigators, or their agents contacted and interviewed Counts 11-24 witnesses in Oregon, Arizona, New Mexico and Montana. State's agents made trips to Washington D.C. Mr. Tammaro, the lead prosecutor, is on record travelling a number of times to Florida and to New Mexico at a minimum. State's discovery

1. "I can't think of any attorney... there's no one individual that could provide this man with the assistance to which he's entitled and still maintain a proper representation of all his or her other clients." [Hearing Transcripts, CR-10-545577A, 12:23-25, 1-3].

* This exhibit was originally attached by the State to a State's response to a Defense motion for discovery in pre-trial.

and evidence at trial showed contacts and interviews with the U.S. Marshall's Office, the U.S. State Department, FBI, CIA, U.S. Department of Veterans Affairs and federal and state law enforcement officials in over 10 states. State agents Bansky and Palaibis testified they made efforts to track down USNVA officials and officers in over 20 states, at a minimum.

3. USNVA operated in over 40 U.S. States, Canada, Latin America, Europe, Iraq and Afghanistan. It fundraised in at least 40 U.S. States. All listed members and officers by name operating in at least 40 U.S. States.

4. The issues raised in the 24 count indictment at trial, based on the transcript, and the elements of the different crimes read to the jury by the trial court, were numerous and complex. The Defendant's CIA claims alone required extensive and difficult investigation.

5. Defense counsel Patituce's motion for investigators was denied. [JE:8.28.2013]. Patituce remained as the sole defense counsel of record.

6. Defendant pro se's motion for additional counsel this Court directed the trial court to rule on (see Affidavit on Assignment VII) was never ruled upon.

7. See, Caldwell v. Lewis, 2011 U.S. App. LEXIS 5380 (6th Cir., 2011) for the proposition "counsel has a recognized duty to investigate and subpoena crucial witnesses."

8. See, Wilbur v. Mt. Vernon, 989 F. Supp. 2d 1122 (W.D. Washington, 2013), HN 6 citing Avery v. Alabama, 308 U.S. 444 (1940), U.S. v. Cronic, 466 U.S. 648 (1984) for the proposition

> "Mere appointment of counsel to represent an indigent defendant is not enough to satisfy the 6th Amendment's promise of the assistance of counsel... . Circumstances will ... give rise to a presumption that the outcome was not reliable. For example ... circumstances exist that make it highly unlikely that any lawyer no matter how competent, would be able to provide effective assistance, [then] the appointment of counsel may be little more that a sham and an adverse effect on the reliability of the trial process will be presumed."

8a. See also, State v. Dobson, 2010-Ohio-2339 (Cuyahoga cty., 2010) citing to Cronic, supra:

> "When the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small, [a] presumption of prejudice is appropriate without inquiry into the actual conduct of the trial... ."

9. Appellant believes the statement of the factual bases and authorities above for this Assignment I (C) can be categorized as the forced suppression of evidence exculpatory to the Defendant by the trial court not providing sufficient legal resources to him to develop and present an adequate defense case in violation of due process of law under both Constitutions, and of the forced ineffectiveness of counsel by the trial court.

10. The Defendant's life savings of $901,500 were seized by the State, leaving him with no personal resources to mount a defense. [Tr. 4539:16-19]. He has repeatedly been found indigent by Ohio courts, a finding unchallenged of record by the State. The prosecutor's statement that the defendant "sits on silence and let's [millions] sit somewhere" [Tr. 4539:22-23] is just one more preposterous State's misrepresentation of fact filed in a case with them, and cost the Defendant over $5 million in excessive superfines. [See Assignment XIII]. If the Defendant had personal access to any portion of that amount, he would have spent it long ago on retained legal and investigatory resources of his own, as his continued, and substantial, complaints about his appointed representation in this case make self-evident.

11. The State spent a minimum of $330,000 on its own investigation in the case. [Tr. 4546:20-23]. Based on the testimony of State paid investigators and experts (Bansky, Bonnett, Palaibis, et al) at trial, in actuality, the figure was probably much higher. The Defendant was made liable at sentencing for the State's huge investigatory costs, while being denied any investigatory resources of his own. Cf., Equal Protection Clause, both Constitutions.

As to Assignment II-Denial of Defense Witnesses:

1. Defendant pro se moved repeatedly for subpoenas to issue, and for subpoena forms, for identified defense witnesses. [JEs, 3.1.2013, 3.6.2013, 7.17.2013, 7.18.2013, 7.26.2013, 7.26.2013 II; 7.26.2013 III].

Patituce did not withdraw any of these motions post 8.26.2013; in fact, he added to them with a subpoena he had served on Mike DeWine, Ohio Attorney General, and with a motion for defense experts on the CIA Defense [JE, 8.28.2013], a motion the lie to the State's contention made in its PCRP's Brief, CA-14-102213, State v. Cody, p. 9, that Patituce had a strategy of not producing any witnesses at trial because the Defendant had no defense. The trial court did not rule by journal entry on any of the pro se defense motions for subpoenas;[1] the Defendant was not issued any subpoenas sub duces tecum he requested for service; and all Defense subpoenas issued by Patituce were quashed, or denied. [JEs, 9.27.2013, 9.27.2013II - the JEs stated the quashings (of the DeWine and Betty Montgomery subpoenas) were grants of the State's motions to quash, but the record shows those motions were not filed until 9.30.2013 [JEs, 9.30.2013, 9.30.2013II].

1. Although meeting the requirements of Crim. R. 17 (B), they were presumably all denied upon judgment pursuant to Kostelnick v. Helper, 2002-Ohio-2985.

Those pro se requested witnesses were American intelligence community witnesses,[1] including DeWine, expected to testify as to the Affirmative Defense to all the Identity Fraud Counts 12-23 [R.C. 2913.49 (F)(2)(b) "lawful purpose"-Notice of Affirmative Defense, JE 2.4.2013], and as to Thompson's staff and contract relationship with the Central Intelligence Agency [redacted] and other agencies of the intelligence community, in order to establish, along with the documents requested by the subpoenas sub duces tecum, CIA involvement in the activities of USNVA to the extent criminal intent of the Defendant under Counts 2-11 would have been negated.[2]

2. The CIA Defense thus, as explained by Wilson and Duncan, infra, posits that the relationship of the defendant with an agency of the American intelligence community related to an intelligence activity can explain what otherwise may appear to be a criminal

1. As defined by the National Security Act of 1947, as amended, and [redacted] Presidential Executive Order ("E.O.") 12333. DeWine had membership on the U.S. Senate Select Committee on Intelligence.

2. This, then, is the "CIA Defense" enunciated in U.S. v. Wilson, 289 F.Supp. 2d 801 (So. Dist., Texas 2003), vacating Wilson's 20 year old conviction for smuggling C-4 explosives to Muammar Quadfi's Libya; the Intelligence Community had a relationship (in Wilson established by documents despite government denials) with the Defendant, which relationship was "favorable evidence [which] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." CF. U.S. v. Wilson, 721 F. 2d 967 (4th Cir., 1983). The defense (absent reference to the "lawful purpose" affirmative defense established by R.C. 2913.49 (F)(2)(b) to the Identity Fraud counts 12-23, which appear to be unique as a matter of Ohio appellate case law) is further explained by U.S. v. Duncan, 34 M.J. 1232, 1992 CMR LEXIS 582, HN 14. In Duncan, Duncan was a covert operative and officer with a covert military intelligence related organization ([redacted] operating during the Reagan and George H.W. Bush administrations, Business Security International operating out of Annandale, Virginia), a "[redacted]". He was charged with (1) conspiracy to obstruct justice; (2) 13 counts of larceny; (3) forgery; and (4) failure to account for public funds; Duncan was convicted and sentenced to 10 years imprisonment and a $50,000 fine. The military court of appeals found that, given Duncan's relationship with the intelligence community, intelligence community protocols and policies mandated that Duncan "live [his] cover," "accomplish [his] mission" and that there was to be "no accountability" for funds' expenditures, CF. Defendant's case, where the factual basis for the money laundering counts 3-9, and undoubtedly the theft by deception count 2 as well, was established by the testimony of Leo Palaibis (Tr. T., testimony of Palaibis) to the effect that, because he could not find any records of or receipts for, USNVA expenditures, it was his opinion money laundering had taken place. The intelligence community witnesses Thompson named for subpoenas sub duces tecum (not including DeWine), along with the documents subpoenaed, had the witnesses testified truthfully, would have presented evidence which should not be records and receipts for covert operations, including "records and receipts for [redacted] purposes" where some expenditures are for overt legitimate purposes, such as gifts for [redacted] cover organization and [redacted] covert purposes; such as payments to personnel for the [redacted] war and military purposes of the President of the United States are either not [redacted] or forwarded to Intelligence Community accounting Washington for safekeeping, according to protect the sources, and methods of the operations the primary function of the CIA under the National Security Act and E.O. 12333, and its lawful purposes. The forensic accountant expert witness moved for by the Defendant, JE 8.28.2013, motion denied, JE, 9.5.2013, would have testified

Fn. 1. Cont'd on next p.

Fn. 2. contd from previous p.

accordingly, and, at a minimum, that if the Duncan [redacted] authorized rules were operative, no reasonable forensic account, given the basic facts as to money movements and lack of records testified to by State's forensic accounting expert Palaibis [Tr., supra] would opine that money laundering, or theft for that matter, had occurred. Finally, DeWine,* had he testified truthfully, would have said he knew Thompson (as "Bobby Thompson") in Washington; knew he was a CIA; knew USNVA was in part an intelligence operation of the George W. Bush White House [redacted] infiltration and national security interests of other [redacted] Terrorist [redacted] and policy maker) [redacted] personally on behalf of USNVA (and its Ohio Chapter leaders, Dick Platt and Don Gillespie) in Ohio to promote its interests here including its public fundraising interests [redacted] In order to empower its [redacted] partial clandestine intelligence agency missions, one of the ranking Republican members of the United States Senate Select Committee ("select") elected by the President of the United States [redacted] intelligence concept of this USNVA - related episode; proof from his testimony would then have shown his 2006 Comeback for Re-election as U.S. Senator in which he was defeated in a close election by the now sitting U.S. Senator for Ohio, Sherrod Brown, demanded campaign contributions from USNVA, Dick Platt, Don Gillespie, Bobby Thompson (the defendant) and Jack Minter (Board Chair and CEO of the USNVA national organization) [redacted] Minter's less than satisfactory (since DeWine [redacted] lost) contributions from USNVA's political action committee. [redacted] Thompson, Duncan was a non-officer employee (NNOCE) intelligence officer with USNVA. Business Security International was a NOC organization. It should be noted [redacted] the State's blatantly continuing misrepresentations to the trial court and [redacted] to this Court that the Defendant had no relationship to or with American intelligence or the CIA, is identical to those representations of the prosecution cited by the District Court in U.S. v. Wilson, 284 F. Supp. 2d 801 (S.D., Tex. 2003) as justifying dismissal of the case on a motion for new trial, with prejudice.

* All the other [redacted] defense experts requested by Patituce (JE, 8.28.2013, denied, JE 9.5.2013) were also denied by the trial court: an expert on income tax and income tax law to explain how USNVA fit into the Income Tax laws of the United States per se, and how USNVA fit into the Income Tax laws of the U.S. as an in-part American intelligence operation; forensic computer expert to testify on how many people went on the USNVA computers seized and who they might have been; and an investigator to, at a minimum, locate the many addresses of the many identified defense witnesses the Defense needed on such a massive case.

act of the defendant, so as to negate a required element of criminal intent or establish an affirmative [redacted] defense allowed by law. No other state, or federal jurisdiction has brought charges against Cody related to USNVA activities because of the validity of his CIA's defense.

"[T]he normal rules involving accountability and fiduciary duties did not seem to apply and the appellant's conduct did not evidence the necessary mens rea." Duncan, supra, HN 14.

All charges were dismissed outright.

"Evidence establishing intent ... is always material because it tends to show only one version of events should be believed over another." State's Reply Brief, Direct Appeal, p. 14, citing to State v. Crotts, 104 Ohio St. 34 432 (2004).

Both Duncan and Wilson are saying the relationship with an agency of the American intelligence ("intel") community of a defendant facing similiar (almost identical, in Duncan's case) charged to those faced by Thompson instantly is relevant and material.

In Duncan, the government said the "CIA defense" was not a defense. The court said the government was wrong.

In Wilson, the government suppressed the relationship; said it did not exist, for 20 years[1], leaving the Defendant Wilson himself to be the only defense witness to testify at trial as to the relationship, and the jury voted to convict. The District Court said, clearly, the Defendant being left in the situation where only his testimony as to the relationship was not enough to guarantee a fair trial, and that the suppression of the other CIA relationship evidence (in Wilson, documentary evidence) undermined the confidence in the verdict to the extent all the charges had to be dismissed outright. [redacted]

3. Instantly, every one - one-by-one - every defense witness requested, expert, non-expert, every one - was suppressed in this case, along with the identified documents requested as part of the subpoenas sub duces tecum, by the trial court at the prosecution's urging, leaving Thompson with no witnesses, no defense evidence at all, save his own potential testimony. This result was not a strategic decision of the defense counsel.

4. Under both the Ohio and the United States Constitutions, the defendant has no right to present every witness he might wish to, but he does have a 5th and 6th Amendment right

1. Unlike Edmund Wilson, Mr. Thompson is at this point only about 3-4 years into his sentence. Wilson's conviction was reversed and the charges dismissed. [redacted] Thompson is only asking, by comparison, for a new trial.

to compulsory process of necessary witnesses he can summarize the testimony of.

> "The 5th Amendment right to equal protection and the 6th Amendment right to compulsory process require that the trial court give due consideration to the constitutional rights involved in denying the request for a subpoena." U.S. v. Greschner, 802 F. 2d 373, 378 (10th Cir., 1986), followed, U.S. v. Vigil, 2013 U.S. Dist. LEXIS 90264 (D.N.Mex., 2013), HN 16.

5. In the 6th Circuit, the Defendant must make in his Motion for subpoenas[1] as a constitutional matter:

(1) A statement that the witness [redacted] is necessary.

(2) A summary of the witness' testimony.

U.S. v. Barker, 553 F. 2d 1013, [redacted] 1020-21 (6th Cir., 1977); U.S. v. Beaven, 1999 U.S. App. LEXIS 25110 (6th Cir., 1999).

> "Any...motion [other than R. 12 (C)(1)-(5) motions, [which a motion for subpoenas is not] shall be determined before trial wherever possible ... . [Moreover] Where factual issues are involved in determining a motion, the court shall state its essential findings on the record." Crim. R. 12 (F).

6. The Defense Expert Witnesses

On 1.11.2013 [JEs, 1.11.2013, CR-12-565050-A] Petituce moved for 4 Defense expert witnesses: a forensic accountant; and investigator; an IRS Litigation expert and a computer expert. The forensic accountant would have testified that under controlling legal authority of the National Security Act of 1947, E.O. 12333, rules, policies and procedures of the American Intelligence Community and its agencies, and the pronouncements of Duncan, supra., as applied to intelligence - related operations, it was quite proper for any person possessing intelligence classificational powers to consider USNVA receipts, in whole or in [redacted] part for intelligence-related purposes, as classified, and to destroy the same, or forward them to a higher intelligence agency authority for classified, i.e. secret, safe keeping or disposal, or not retain them at all, and not standard accounting procedure, or otherwise, of normal U.S. accounting procedures (e.g. of the AICPA) took precedence over those rules, policies or procedures. The IRS Litigation Expert would have testified to the same as to IRS rules, and also would have testified that the receipts USNVA did retain, and did present to

1. Defendant did not have a requirement to move for the subject defense subpoenas and witnesses. He did so because [redacted] the State had done so ex parte [Thompson received no copies of their Motions, see record, JEs, 12-565050-A, to challenge them] (see, JEs, 10.15.2012). All the State's witnesses were allowed as "necessary and material."

the IRS during the USNVA tax audit the State put into evidence[1] would have sufficed to any reasonable forensic accountant to conclude lack of probable cause to believe any "deficiency of/quantity of receipts" - related economic crime had been committed[2]; and have testified that given the evidence of USNVA's far-flung geographical operations and multi-functional purposes, the movement of funds from one account to others, the same basis Palaibis used to opine Money Laundering had occurred, was normal, reasonable, proper and consistent with the normal business practices of similarly - situated organizations and their lawful financial operations.

The investigator would have testified that the USNVA officers State's witnesses Leo Palaibis and Al Benaky testified they could not find had explicit [redacted] indicated all of them and that the failure of BCI to locate them evidenced that Excellibar, being investigative were CIA non-official cover operatives sources and methods neither Patituce nor Thompson personally had access to, the investigator would have testified it was reasonable to believe Thompson was CIA and unreasonable to conclude otherwise.

The computer expert would have testified that there was no reason to disbelieve that multiple individuals had inputted and extracted and used information and data on the USNVA computers seized, but denied production for inspection; and that, having been told where to look, that those computers, buried in a niche of a computer ready to install on the hard drive software program was an encrypted program for ethernet transmission, reception, and written-over storage dovetailing with the brand source code and virtually impossible for a line-by-line manual inspection to detect, or for any commercially available to BCI SPT program to detect, and that the computers contained data indicative of multiple transmissions to and receipts of data from government sourced hard drives located in the Washington, D.C. area and that the computers contained other overtly stored information and data bearing the indicators of encryption for decryption, a one-time-pad methodology common to intelligence agencies.

The history of the case with regard to the Defense experts with [redacted] reference to [redacted] the bases for the claims made herein as to their denial to the Defense, is as follows:

JE 1.11.2013: Ex parte Motion for Expert Witness [and] fees filed under Seal, Forensic Accountant, by Patituce.

JE 1.11.2013: Ex parte Motion for Expert Witness [and] Fees filed under Seal, Investigator, by Patituce.

1. The State put the tax audit into evidence via the testimony of MacMurray, who testified as to it on direct and via the testimony of the IRS agent, [redacted] who testified to it on direct, and in the testimony of State's forensic accounting expert Leo Palaibis.

2. This conclusion would have been obvious to make from simply reading the IRS determination letters on the audit, or from studying GC Mac Murray's emails to USNVA and USNVA Special Counsel Samuel Wright that USNVA had passed the audit "with flying colors." [State's Disclosures CD-ROM # ___].

by Patituce.

JE 1.11.2013: Ex parte Motion for Expert Witness [and] Fees filed under Seal, Computer Expert, by Patituce.

JE 2.5.2013: "Motion to Withdraw Specific Ex Parte Motions" for Defense Experts filed by Patituce over Defendant's outraged objections made to Patituce.

JE 2.14.2013: Defendant pro se remakes the motions for Defense expert witnesses in "Defendant's Opposition to Defendant's Motion to Withdraw Specific Ex Parte Motions; Counter-Motions."

JE 4.15.2013: Patituce's 2.5.2013 motion to withdraw defense experts is granted by the trial court, effectively denying Defendant's pro se Counter-Motion filed 2.14.2013.

JE 5.13.2013: Defendant pro se renews and remakes the Motions for Defense experts. These renewed Motions are never ruled on by JE of the trial court.

JE 8.28.2013: Patituce, now re-appointed as Defense trial counsel, remakes his "Ex Parte Motions for Expert Witnesses filed Under Seal."

JE 9.5.2013: The trial court denies Patituce's 8.28.2013 Motions on substantive grounds.

7. **The IRS Special Agent-In-Charge**

There is one more witness not mentioned heretofore the Defendant contended below he was denied at trial: the IRS Special-Agent-In-Charge Spencer Ross of the Tampa investigation of USNVA and the Defendant. He was called by the State at trial and testified extensively as to what the State wanted him to say (many of the questions were leading) about the Tampa investigation, USNVA and the Defendant. [Tr. 1720-1736] The IRS SAIC had personal knowledge of the existence of the Defendant's CIA Defense. See, supra. Aff. Assignment I (A). He certainly had knowledge of the files and information developed as part of the Tampa investigation and suppressed from the Defendant in CR-12-565050-A because he had just concluded extensive-in-scope testimony on direct about the Tampa investigation. When Defense Counsel Patituce immediately began cross-examination designed to elicit substantive testimony on the CIA Defense, the suppression of evidence, and on the Tampa investigation itself, the IRS Special Agent-In-Charge ("SAIC") invoked a privilege against testifying further about "an ongoing investigation" after doing just that, extensively, on direct examination. [T. Tr., testimony of IRS SAIC, 1734:18-19].

The prosecution raised no objections to Patituce's questions. Patituce, shocked rephrased the question he was asking. [Tr., 1734:20] He received the same response: "I'm not authorized to comment on any part of the federal investigation." [Tr. 1734:21-22]. The trial court, rephrased Patituce's question [Tr. 1736:4-5], and got the same response: "I'm not authorized to comment on the status of any civil tax case either." The witness was dismissed.

[redacted]

The evidence Patituce sought to elicit on the CIA DEfense and the suppression of evidence about the Defendant and USNVA[1], which question he never got to, was outcome determinative in [redacted] cf. the Court, Tr. 1073 21-24.

1. Patituce had no other reason or reasons to cross-examine this witness.

both cases to the CIA Defense: it would have established that defense as applicable to [redacted] Counts 2-12; it would have explained USNVA's IRS audit issues [redacted] raised by the Prosecutor via other State's witnesses (T.Tr., Mac Murray, Palaibig) under Evid. R. 404 (B); it would have established what was deleted from Brady disclosures in the joint sharing of information on the Ohio/IRS investigation, and thus made a different outcome, even if that were only on one or more Identity Fraud counts, reasonably probable.

The Defendant, however, does not need to show prejudice, or cause and prejudice, where he is denied such material witness on these grounds, in violation of due process, based on a sustained assertion of government privilege, whether valid or not, not to testify on cross-examination. Reversal with dismissal is Mandatory; [redacted]

> "In criminal causes, the government can invoke its evidentiary privileges only at the price of letting the defendant go free. Since the government which [redacted] prosecutes an accused also has duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then ... deprive [redacted] the accused of [redacted] anything which might be material to his defense." Jencks v. U.S., 353 U.S. 657, 1957 U.S. LEXIS 1623 (1957).[1]

As to Assignment III-Defendant Tried While Incompetent:

1. Subsequent to a stipulation[2] of the Defendant's competency, defense counsel Patituce filed an Ex Parte Motion for Medical Attention of the Defendant [JE, 8. 24.2012, CR-12-565050-A] in which he stated:

> "... [the] Defendant cannot competently follow these proceedings against him for substantial periods of time ... [because of] acute and chronic nerve tissue fibrosis of the right leg and acute and chronic corrosion of the right knee." Id., p.1.

1. The 7-1 U.S. Supreme Court Jencks decision, written by Brennan, J. was amended by the Jencks Act, but only as it applied to the suppression of statements from a confidential informant. The IRS Special-Agent-In-Charge, Tampa was not a confidential informant. The Classified Intelligence Protection Act, a more recent federal statute, applies in a federal case today where the government invokes a privilege based on the secret classification of evidence vs. its materiality to the defense, to be decided be a CIPA court. State v. Thompson, CR-12-565050-A is not a federal case, and no government has invoked CIPA. The remainder of Jencks is as applicable today, and instantly, as it was in 1957.

2. The stipulation never resulted in a JE. After a "calling into doubt" [Fn.2 contd next p.]

2. The trial court [Judge Butler, term exp. 12.2012], in response, made a written Judgment Entry[3] attached hereto as "Plaintiff's Exhibit Q" and hereby incorporated herein by reference.

3. The Defendant never received a continuance of the proceedings until he was medically able to stand trial, and never received any of the treatment[3] directed by the Judgment Entry so that the temporal incompetence could have been overcome.

4. When the Defendant brought a Motion to enforce the Judgment Entry [JE, 5.31.2013], it was opposed by the State on the grounds the Defendant was lying about his incompetency, and the underlying physical conditions. The trial court never ruled by JE on the OSC Motion, or the State's request to deny it.[4] See, Fraley v. Cross, 2007-Ohio-7030 (S.Ct., 2007), State ex rel Marshall v. Galvas, 98 Ohio St. 3d 297 (S.Ct., 2003) on trial court's speaking "only through" their "journal entries" and not through mere oral pronouncements.

5. See [redacted] v. Robinson, 383 U.S. [redacted] 375 (1966) (opinion of Harlan,J.); Dusky v. U.S., 362 U.S. 402 (1960); Ryan v. Gonzalez, 2013 U.S. LEXIS 589 (2013); and State v. [redacted] 72 Ohio St. 3d 354 (S.Ct., 1995) for the federal and Ohio constitutional tests for incompetency.

As to Assignment IV-Solitary Pre-Trial Confinement:

1. On 3.19.2013, the trial court, sua sponte, issued the following JE:

> "Defendant is restricted to have no contact by phone, mail or social visits." [redacted]

2. Defendant was thrown into solitary confinement in the Cuyahoga County Jail, into what is called "administrative confinement" to distinguish it from "disciplinary confinement." [Cuyahoga County Sheriff, Regulations].

3. When he attempted to smuggle a request to an inmate's counsel to see him about potential representation, he was apprehended and placed in solitary disciplinary confinement, Docket Entry, CR-12-565050-A, 3.19.2013. [Emphasis added.] He remained in solitary confinement through sentencing and transport to the Lorain Correctional Institute on 12.19.2013. He had previously been "appointed" counsel pro-se circa February, 2013 [Thompson v. State, infra], a status he retained until 8.20.2013 [see, Assignment VII, Affidavit on VII]. This period included most of the pre-trial motion practice, and the plea-bargaining phase, of [redacted] CR-12-565050-A, even

Fn. 2. [cont'd] of the defendant's competence takes place, [redacted] when a defendant is competent, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Dropes v. Missouri, 420 U.S. 162 (1975). There must be a hearing after the issue is raised, and the court must make "a formal finding" of competency, State v. Jirosek, 2013-Ohio-4796 (Cuyahoga cty., 2013). No such finding was ever made.

3. For the definition of a judgment", see State ex rel Curran v. Brooks 50 N.E. 2d 995 (S.Ct., 1943); Harkai v. Scherba, 136 Ohio App. 3d 211 (9th Dist., 2000); In re Frey's Estate, 139 Ohio St. 354 (S.Ct., 1942); Dasias v. Columbia, 37 N.E. 2d 675 (2d Dist., 1941).
The treatment was as prescribed by R.C. 2954.38 (B)(1). "Incompetency" in Ohio is not dependent on a psychiatric condition or disease, State v. Bock, 28 Ohio St. 3d 108 (1986), HN2.

4. On the trial court's [Judge Gall, term began 12.2012] subsequent oral pronouncements from the bench on the Defendant's competence, see additional to Fraley, supra, Van de Ryt v. Van de Ryt, 215 N.E. 2d 698 (S.Ct., 1966); Melton v. Baylor, 118 N.E. 2d 230 (Cuyahoga cty., 1954); Stillpass v. General Accting, 139 N.E. 2d 687 (1st Dist., 1956); Cupicha v. Safchick, 173 N.E. 2d 901 (Cuyahoga cty., 1961); In re Gersteneck, 139 N.E. 2d 64 (Cuyahoga cty., 1956).

4. Appellant need not go beyond the face of the order in explaining it. He was permitted no contact with any other human being (except for jail guards) not to be confused with Cuyahoga County deputy sheriffs who delivered his food and prescribed pain and psychiatric medications to him (in the latter case, accompanied by a jail nurse), other than advisory counsel Patituce (through 8.26.2013 only during courtroom appearances - see Washington, 7, Keiser, Morrison, Edmonds and Childress, infra, on advisory counsel being a constitutional, and actual, nullity. He had no access to any legal research material; no outgoing or incoming mail was permitted him other than correspondence with advisory counsel; no telephone calls were permitted him other than a series of non-accepted calls to advisory counsel; his indigency is of record: he had no access even to writing material, other than paper and pens which were anonymously shoved under his door (presumably by jail guards who had never before witnessed this treatment of a pro se, crippled defendant).

5. Defendant filed motions requesting the restrictions be lifted for the explicit reasons cited in Application/Proper Assignment IV. [JEA 6.12.2013, 7.17.2013, 7.18.2013, 7.26.2013] None of these motions were ruled upon by JE.

6. His windows in his cell were totally blacked out other than one, submarine like, perspex "peep" window, which merely gave him the effect of being underwater. He had no clock, and never knew what time of the day or night it was other than by a rough estimate of feeding times.

7. As a result of this confinement, and during the period he was so confined, Defendant, at a minimum, suffered from extreme sensory paralysis, frequent bouts of vertigo, lack of desire to eat, uncommunicative depression, thoughts of brutality, and engaged himself in a daily battle to maintain psychological equilibrium, for which he was, after trial began, prescribed the psychiatric control drug cylexa by jail mental health officials. These conditions exacerbated the incompetence defense counsel Patituce referred to in the latter's [redacted] 8.24.2012 Motion. [See, Aff. Assignment III], and contributed to his attempted suicide.

8. Authorities for this Assignment include: Federal:

U.S. v. Blount, 479 F. 2d 650 (6th Cir., 1973); Bounds v. Smith, 430 U.S. 817 (1977); Brady v. Maryland, 373 U.S. 83 (1963); U.S. v. Bagley, 473 U.S. 667 (1985); U.S. v. Agurs, 427 U.S. 97 (1967); Kyles v. Whitley, 514 U.S. 432 (1995); Keenan v. Bagley, No. 1:01 CV 2139 (N.D. Ohio, 2012); Bullcoming v. N.M., 2011 WL 2472799 (S.Ct., 2011); Cobb v. Warden, 2012); D'Ambrosio v. Bagley, 527 F. 3d 489 (6th Cir., 2008); D'Ambrosio v. Bagley, 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio, 2006); Ex Parte Hull, 312 U.S. 546 (1941); Johnson v. Avery, 383 [redacted] U.S. 483 (1969); U.S. v. Johnston, 318 F. 2d 288 (6th Cir., 1963); Knecht v. Collins, 903 F. Supp. 1193 (S.D. Ohio, 1995); Lemaster v. Ohio, 119 F. Supp. 754 (S.D. Ohio, 2000); Roberts v. Mahoning, 495 F. Supp. 2d 670 (N.D. Ohio, 2005); Sullivan v. [redacted], 1995 U.S. App. LEXIS 15398 (6th Cir., 1995); Wilson v. Mintzes, 761 F. 2d 275 (6th Cir., 1985); U.S. v. Keiser, 578 F. 3d 897 (8th Cir., 2009); U.S. v. Morrison, 153 F. 3d 34 (2d Cir., 1998);

Childress v. Johnson, 103 F. 3d 1221 (5th Cir., 1997); and U.S. ex rel George v. Lane, 718 F. 2d 226 (7th Cir., 1983).

Ohio: State v. Chambliss, 2008-Ohio-5285 (S.Ct., 2008); Kostelnick v. Helper, 2002-Ohio-2985 (2002); State v. Miller, 2015-Ohio-279 (Summit cty., 2015); State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012); Thompson v. State, 2013-Ohio-1907 (Cuyahoga cty., 2013); Vignal v. Cleveland Clinic, 1996 Ohio App. LEXIS 4194 (Cuyahoga cty., 1996); State v. Washington, 2012-Ohio- 1531 (Cuyahoga cty., 2012); State v. Edmonds, 2011-Ohio-1282 (9th Dist., 2011); and State v. Jackson, 145 Ohio App. 3d 223 (Cuyahoga cty., 2001).

Constitutional Provisions include: 6th and 14th Amendments, U.S. Constitution; § 5, Art. I, § 10, Art. I, and § 16, Art. I, Ohio Constitution.

As to Assignment V- Denial of Right to Testify/ Ineffective Assistance of Trial Counsel:

1. At trial: 11.12.2013: The Court: "Mr. Patituce has indicated that you were wanting to testify." [Tr., 4314:16-17] ... Mr. Patituce: "your honor, my client indicates he wishes to answer to his Complaint." [Tr., 4315:14-14]... . Mr. Patituce: "He wishes to answer [redacted] to all the charges." [Tr.,4316:6-7]... The Court: "Mr. Thompson, I [redacted] can perhaps infer from your silence that you do not wish to testify... . [Tr., 4316:20-21]. Defendant: "I would like to put myself in physical appearance state, I think is reasonable."[1] [Sic] [Tr., 4317: 17-19]... The Court: "Mr. Thompson ... was banging his head against the wall. The deputies took him down."[2] ... He was looked at ... by the jail medical staff, and I was advised he refused medical attention... .[3]

1. Defendant: "Have my hair combed, have it washed, with my spectacles returned to me [so he could see and read]. I feel that is a reasonable request —." [Tr., 4317,21-24]... . The Court: "Why don't we reconvene at 11:30. That's almost 45 minutes." [Tr.,4319:4-6]. The Defendant had to wait 20 minutes for armed guards from separately, the "courtroom side" and the "jail side" to transport him back to his cell, was given no tools or aids to put himself together, his glasses were not returned to him, and he was transported in cuffs, still incoherent mentally, back to the courtroom 23 A as pictured in Affidavit Exhibit A, incorporated herein by reference, to re-stand for trial, the bloodstrain and gash in his forehead still visible.

2. Indeed, the deputies did take him down, one of them slamming his head into the wall in the process, [redacted] a handcuffed inmate having just attempted suicide, head gushing blood with injuries leaving a now-permanent, physically observable indent in the frontal brow of the skull. Defense counsel described the incident before the deputies "took him down" in his own words: "we went back in the holding cell and found Mr. Thompson banging his head against the wall, the brick wall now, leaving a blood stain on the wall." [Tr., 4271:12-15].

3. He was suffering from a concussion and bleeding suffusely from a head wound. He was in no state to knowingly or intelligently refuse medical assistance.

We have been advised that Mr. Thompson is not taking any type of medication." [Tr., 4320:21-23] ...

Mr. Patituce: " ... I do believe he will not be taking the stand... ." [Tr., 4322:4-5] ... Mr. Patituce, " ... I certainly believe that direct would be difficult, but I do believe that he would not be [redacted] able to survive the prospects of a seasoned prosecutor such as Brad Tammaro ... Cross-examining him." [Tr., 4322:12-18] ... Mr. Patituce: [redacted].. "Based upon the evidence we've heard at this time, the defense rests subject to admission of the exhibits." [Tr., 4370:25 - 4371:2].

2. The Defendant, repeatedly through counsel, expressed his desire and intent to testify. See, Hodge v. Haeberlin, 579 F. 3d 627, 639 (6th Cir., 2009), for the proposition the trial court was put on notice of the defendant's intent and wishes to testify.

3. Defense Counsel had previously raised the Defendant's continuing incompetence to stand trial in his Motion for Medical Attention [JE, 8.24.2012], stating that, because of the constant, unbearable and excruciating pain emanating from his right kneecap,

> "... that Defendant cannot coherently follow these proceedings against him for substantial periods of time." [Motion, id., p. 1].

4. See State v. Berry, supra, as to defendant being physically and mentally unable to testify [redacted] vitiating the competence of the defendant without which any waiver of the right to testify is a nullity. See, also, U.S. v. Stover, 474 F. 3d 904 (6th Cir., 2007) as to defense counsel alerting the Court [redacted] that a waiver cannot be either knowing or intelligent.

5. The defendant's constitutional right to testify is fundamental. Sheets v. Haskins, 4 Fed. Appx. 236 (6th Cir., 2001). It cannot be waived by defendant's counsel. U.S. v. Stover, 474 F. 3d 904 (6th Cir., 2007). The right to testify is guaranteed by the U.S. Constitution. Rock v. Arkansas, 483 U.S. 44 (1987).

6. Had the Defendant been permitted to testify, he would have testified that:

> He was CIA since 1967; he was assigned the cover name, and later the cover identity, of Bobby Charles Thompson; going back to 1972, as part of the CIA's lawful purpose in protecting its own "sources and methods;" that the CIA, Department of Defense and the IRS, at a minimum, knew of his covert involvement with the CIA;

1. The Defendant had been prescribed "by the jail medical staff" and the "jail psychiatric staff" and was taking, the maximum allowable prescription of Indocin for the excruciating pain in his right kneecap [redacted] causing him not to be able to think, reason or comprehend clearly; and the maximum allowable prescription of the psychiatric drug Cylexa, a stabilizer for severe mood swings. He had been placed, by the "jail psychiatric staff," wearing a straight jacket, into a psychiatric ward solitary cell. He did not comprehend why he should be addressing personally a trial court making these mischaracterizations of fact, and was, in fact, incoherent mentally and verbally, Tr. 4317:17-19, supra.

The United States Navy Veterans' Association was, in part, a CIA and Intelligence Community sponsored and funded lawful purpose operation planned originally to generate public support abroad among U.S. allies for, initially, operation Desert Storm and, subsequently during the 2nd Bush Administration, the Global War on Terror ("GWOT"), especially the wars in Iraq and Afghanistan, and to provide cover to gather foreign intelligence in furtherance of the War policies of the George W. Bush Administration; that concomitantly, other purposes of the Association, desired by its individual officers and leadership as individuals and in [redacted] and supported by the Agency and Mr. Bush (White House, Office) acted in that capacity, but U.S. Armed Forces personnel fighting the GWOT, GWOT veterans, and the veterans of America's other conflicts. All funds raised from the public went to these purposes, less normal and reasonable, and lawfully approved, expenses; to his personal knowledge as a CIA operative, employee and contact agent:

(a) The Agency used, acquired and possessed the identifiers of living and deceased Americans and foreigners to provide cover to its officers, as the most professional, and [redacted] Protected secure, way of [redacted] them and their missions, from scrutiny and/or disclosure;

(b) Lobbying of State legislatures occurred, at least from the 1970's to the Defendant's personal knowledge, by the Agency to promulgate lawful purpose affirmative defenses for Agency operatives from identity theft and identity fraud charges such as the one found in R.C. 2913.49 (F)(2)(b); that disposition of the books, records and receipts of USNVA [redacted] reflecting documents concerning "mixed purpose" expenditures - some overt, some simultaneously [redacted] covert - took place so as to preclude them from coming into the investigative acquisition or control of the Ohio [redacted] Bell Investigation, in accordance with the lawful National purposes of the [redacted] Security Act of 1947, as [redacted] amended, and E.O. 12333, and as explained by U.S. v. Duncan, 1992 CMR LEXIS 582, HN 14, Transfers of funds (all within the U.S., and all subject to law enforcement access) from one bank account to other bank accounts flowed from (a) the normal complications of a large, nationally and internationally organized entity having many lawful administrative, operational, geographical and mixed administrative and operational expenditures, and (b) from the lawful, but covert purposes above, that there was no theft by deception or otherwise, from any member of the public donor or otherwise. Going item-by-item through [redacted] named or testified about expenses, mostly foisted on USNVA by the

public fundraisers, [redacted] the [redacted] Defendant would have detailed how those net funds went exactly where they were promised to go; that he and USNVA were reasonably noticed that Tom Barkenbusch's fundraiser, [redacted] was the de facto successor-in-interest to Mark [redacted] Gelman's fundraiser, All Pro Rel[redacted] the intentional statement of Defendant Thompson on the OAG Charitable [redacted] Registration Forms was the basis of the State's theory of the case as to the Tampering with Records Counts 10 and 11; that he had no intent to commit theft, money laundering or tampering with records as defined in the relevant statutes; that Mike DeWine had personal knowledge of the Bush, White House's and the Agency's involvement with USNVA during USNVA's years of operation;

7. Appellant believes that the above statement of factual bases establish, as a [redacted] underlying claim of [redacted] ineffective assistance of trial counsel in not moving for a sufficient continuance for the Defendant to repair himself, and in not calling the Defendant to testify, and [redacted] of the underlying claim to categorization as the denial of right to testify.

As to Assignment VI - Failure to Meet Requirements of Faretta v. California and State v. Smith:

1. Relevant transcript record for the Application propositon is: [Tr. 1.14.2013, 76-105; 1.23.2013, 106-124; 1.30.2013, 125-145; 8.26.2013, 485-500]. See, also, Defendant's filed "Waiver of Attorney" Form [Tr. 132:16-133:23].

2. Authorities relevant are Faretta, supra, Application proper, Assignment VI and State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012).

3. While Appellant concedes he met the voluntariness standard of Faretta and Smith, he contended below [redacted] he did not meet the intelligentliness of knowingliness prongs of either decision because he did not understand, know of, or agree to the conditions of his preparatory activities for trial as pro se counsel the trial court actually imposed, as factually presented in this Affidavit, supra.

As to Assignment VII - Failure to Rule on Pre-trial Motions:

1. The docket sheets show that for CR-12-565050 A, there were 262 pre-trial motions[1] filed, 176 for the Defendant, 86 for the State. Of the Defendant's motions, 15 were denied by JE, 1 was granted in part (clothing at trial) by JE; 2,[2] one made by Defense counsel to deny Defendant access to the media, and the second made by Defense counsel to withdraw his first motion for experts, were granted by JE; and 158 were unruled on by JE. Of the State's motions, 0 were denied by JE; 5 were granted by JE; and 81 were unruled on by JE.

2. Of the Defense Motions: [redacted]

53 were for Discovery (Request for State's Brady disclosures or filing of Defense Brady disclosure): JE/Mo's: 8.21.2012, 9.20.2012, 1.11.2013 (8 motions), 2.4.2013, 2.20.2013 3.5.2013 (5 motions), 3.6.2013 (2 motions), 3.13.2013, 3.15.2013 (11 motions), 3.20.2013, 3.25.2013 (2 motions), [redacted] 7.17.2013, 7.26.2013 (2 motions), 8.1.2013, 9.23.2013.

Of these 53, none (-0-) were ruled on by JE. Cf. Crim. R. 12 (F), motions made pursuant to Crim. R. 12 (C)(4), for the proposition mandating that a determination by JE before trial. Factual issues were in play in these motions, See, Crim. R. 12 (F). 21 were Motions to Suppress (including one for subpoenas to [redacted] issue for a suppression hearing): 2.27.2013, 2.28.2013, 3.1.2013, 3.5.2013 (3 motions), 3.6.2013 (2 motions), 3.13.2013 (2 motions), 3.15.2013, 3.19.2013, 4.1.2013, 8.1.2013, 9.11.2013 (3 motions).

Of these 21, none (-0-) were ruled on by JE. The State made 1 Motion to Suppress (all evidence related to the CIA Defense) (see also infra, Affidavit Assignment II [redacted] on Denial of Defense witnesses at trial), [redacted] JE 3.21.2013. It, too, was never ruled on by JE. See, [redacted] Crim. R. 12 (F), as applied to a Crim. R. 12(C)(3) motion.

[redacted]

1. Appellant uses the definition provided by R. Crim. P. 12 (A) and 12 (C): all pleadings filed by a party requesting relief are a "motion."

2. These do not include Defense counsel's 8.24.2012 Motion on the Defendant's incom- [redacted] Hall's refusal

[redacted]

3. See, U.S. v. Ruiz, 536 U.S. 622, 628 (2002) for the propositions that the mandates of Crim. R. 12 cited are grounded in the protections and rights of the 5th, 6th and 14th Amendments to the United States Constitution that the defendant have reasonable notice prior to trial of whether serious State's evidence is arguably prejudicially inculpating is or is not going to be suppressed under law, or whether the Court intends to have the evidence offered at trial, and then rule on the suppression, of specifically identified evidence, in order to prepare for trial.

4. See Kostelnick v. Helper, 2002-Ohio-2985 for the proposition that a motion not expressly decided by a trial court when the case is concluded is ordinarily presumed to have been overruled as of the date and time of entry of judgment.

5. See, Thompson v. State, 2013-Ohio-1907, (Cuyahoga cty., 2013), ¶15 telling this trial court pending pre-trial proceedings it had to rule on Defendant's pending motions regarding counsel.

6. See, Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012) and Padilla v. Kentucky, 130 S. Ct. 1473 (1970) for the proposition pre-trial proceedings and plea bargain - proceedings are critical stages of the proceedings to which due process rights apply.

7. The remaining Defense Motions unruled on by JE contained a large number of substaive or procedural pre-trial issues dealing with reasonable preparation for trial and/or for plea bargaining:

Motions to:

(1) Be permitted the opportunity to acquire retained counsel - JE 7.26.2013;

(2) Be permitted access to the Cuyahoga County Justice Center law library to conduct legal research, just as other inmates were, or to some other legal research facility- JE's 2.4.2013, 2.22.2013;

(3) Access to a legal cart to transport huge amounts of Defense paperwork to trial and for storage at trial - JE's, 2.20.2013, 3.28.2013;

(4) Access to ways and means of accessing the trial court, postage, writing implements paper, pattern jury instructions, etc. - JEs 2.4.2013, 3.28.2013.

(5). Provide co-counsel [J.E. 11.2.2012] and advisory counsel functions -JE 7.18.2013;

(6). Provide an easel at trial - J.E. 2.4.2013;

(7). Inspect the State's physical evidence - J.E. 1.11.2013, 2.20.2013.

(8). Obtain physical access to the State's paper Brady materials (over 200,000 8 1/2" x 11" pages)- JEs 2.4.2013, 2.20.2013, 3.5.2013, 3.6.2013, 3.15.2013, 3.20.2013, 3.25.2013;

(9). Dismiss - JEs, 2.22.2013 (2 motions), 3.28.2013 (2 motions);

(10). Provide subpoenas sub duces tecum - JEs, 4.15.2013, 7.18.2013, 7.26.2013;

(11). Provide experts - JEs 5.31.2013, 8.28.2013.

(12). Re Medical Order to Show Cause - JEs 5.31.2013.

(13) Provide Jury Sequestration - JE 7.26.2013.

8. See, Fraley v. Cross, 2007-Ohio-7037 (S.Ct., 2007), J.K. v. M.K., 2015-Ohio-434 (Medina cty., 2015), HN 3 and State ex rel Marshall v. Glaves, 98 Ohio St. 3d 297 (2003) for the proposition that an Ohio court speaks only through its journal entries and not through mere oral pronouncements."

9. On the prospective issues that the Defendant's pro se motions were frivolous and/or veratious, see, Tr., 498:24-499:1, the Trial Court: "I think Mr. Thompson has done a pretty reasonable effort and filed motions... on behalf of himself."

10. Outcome-determinativeness: In these overwhelming and amazing failures to rule there is nothing short of the total breakdown of the trial court's role and responsibilities pre-trial on a scale so massive there are very few, if any, comperable cases. It would beg the question to ask if an otherwise fair trial cured these errors: these errors by themselves caused a denial of a fair trial requiring reversal.

As to Assignment VIII - Required Dismissal of Count 12:

1. No evidence introduced at trial showed the Defendant used any "identifier" of Whatcom Thompson in Ohio other than, arguably as it being an identifier, the name "Bobby Thompson."

2. The name "Bobby Thompson" is so generic there was no natural, logical, inherent or other reason any person in Ohio Defendant had contact with had any notice Defendant was, arguably, using an identifier of Whatcom Thompson, or that an identifier of

"Whatcom Thompson", the victim of Count 12, was implicated in any element of the identity Fraud statute in Ohio. See R.C. 2913.49 on the required intent to hold oneself out to be the "other" person; in support, State v. Marcella, 2008-Ohio-569 (Cuyahoga cty., 2008).

3. See, Strassheim v. Daily, 331 U.S. 280 (1911) for the proposition the United States Constitution requires such a nexus, and State v. Cody a.k.a. Thompson, the direct appeal decision, infra, for the proposition Ohio statutory law requires such a nexus, for subject matter jurisdiction to apply.

As to Assignment IX- Lack of Quick and Speedy Trial;

. The Defense Count on the expiration of an applicable 90 day limit is:

Date of Arrest, 4.30.2012 [JE, CR-10-545557 A; States Reply to Defense 8.24.2012 motion]

	Non-Tolled Days	
May, 2012	31 days	Defense Counsel argued no carryover of tolling events to 565050-A (JE, 8.24.2012)
June, 2012	20 days	
thru 7.25.2012, date of filing CR-12-565050-A	25 days	
Subtotal:		86 days
7.30.2012-One day defense requested continuance	5 days	
tolled to 7.31.2013		
Subtotal:		91 days
8.10.2012 Motion for Bill of Particulars	10 days	
Subtotal:		101 days
8.17.2012 Request for expanded Bill of Particulars	6 days	
TOTAL:		107 days

[Source: JEs, CR-10-545577A, CR-12-565050A]

2. Defense counsel made a Motion to Dismiss the entirety of CR-12-565050A on [redacted] the grounds of denial of quick and speedy trial [JE, 8.24.2012, denied 9.12.2012, CR-12-565050 A]. Defense counsel argued motions attributable to the defendant in CR-10-545577A did not carry over as tolling events into CR-12-565050 A. See State v. Canty, 2009-Ohio-6161 (Mahoning cty., 2009), State v. Johnson, 2013-Ohio-856 (Butler cty., 2013) and State v. Sloane, 2009-Ohio App.LEXIS 1022 (Mahoning cty., 2009). [redacted]

As to Assignment X-Failure to Hold Any Mental Competency Exam In and For CR-12-565050-A;

1. The trial court in CR-10-545577 A, a predecessor case to CR-12-545577 A involving different felony charges, and different specified dates of offenses for those offenses which were contained in both indictments, issued sua sponte orders for an R.C. 2945.371 competency exam. [JE, CR-10-545577 A, 7.12.2013, 7.13.2013]. No separate order ever issued for CR-12-565050 A.

2. The orders directed the psychiatrist, inter alia, to examine the Defendant with respect to possible insanity with respect to the commission of the offenses, and the dates of the offenses, of CR-10-545577 A.

3. See Pate v. Robinson, 383 U.S. 375 (1966) and State v. Were, 94 Ohio St. 3 173 (2002) for the [redacted] constitutionally mandated under the due process clauses pro-se position that where there is even an implicit yet reasonable assertion as asserted by the court or counsel that the defendant is, was or might have been legally insane at the time of commission of the offenses for which he is charged, he is entitled to an examination of that prospective insanity with respect to those crimes and those charges and not with respect to others, and that the failure to give a defendant a competency examination under those circumstances requires automatic reversal. See, further, in support, State v. Berry, 1997 Ohio-336 (S.Ct., 1997).

As to Assignment XI-Improper Admission of Defendant's Medical and Dental Information:

1. Inherent in the making of a State's case based on a theory of the defendant's greed is evidence of the defendant spending the ill-gotten gains, especially on purposes involving excesses of personal pleasure the average juror will be offended by critically in his vote for guilt.

2. In the instant case the State had no such evidence for the Defendant : No call girls, no gambling, no trips to Las Vegas or even amusement parks; no boats; no motor vehicles, the Defendant did not even own real property, no less luxury real property, and lived where he worked for USNVA in Tampa in a rented house the State's discovery uniformly described as low-income and even "rodent infested." These living conditions applied [State's discovery] even after Defendant supposedly acquired his "millions" from USNVA donations.

The State had two exceptions to this non-existent laundry list for the introduction of such evidence at trial: Defendant's medical expenses of $3,100 to a Tampa hair restorative specialist and dental expenses of about $25,000 over 3 years:

[Pertinent record: On hair restoration: Tr. 1235:20-1251:2; On dental expenses: Tr. 1265:25-1267:15-19, 1268:22-1269:12-16].

2. Defense counsel professionally and effectively objected of record to the introduction of this evidence [Tr. 1255:4-1264:20].

3. The trial court was independently aware of the bar against "HIPAA-type information" being introduced [Tr. 1264: 12-20]. The trial court stated "HIPAA-type information" was not involved.

4. See [redacted] HIPAA, and the O.R.C. adopting the provisions of HIPAA in Ohio judicial processes, for the proposition HIPAA bars the giving by Dr. Rieger or Dr. Steen of the cited information to the state, and the introduction of the cited testimony at trial.

5. See, R.C. 2317.02 and 2317.02 (B)(5)(a) for the proposition that privileged communications made to a physician or dentist, including financial records, shall not be admitted into testimony by the physician or dentist.

6. See, Vanderhaute v. Filer, 2002-Ohio-3640 (Cuyahoga cty., 2002) for the proposition that it is only when the patient puts his medical condition [redacted] at issue in trial that the privilege is considered waived. The [redacted] patient did not put his medical or dental condiction at issues in this trial.

7. See, Barker v. Industrial Commission, 135 Ohio St. 491 (S. Ct., 1939) for the proposition written information qualifies as a communication.

8. See, In re Loewenthal, 134 N.E. 2d 158 (S. Ct., 1956) for the proposition a "... physician may testify [as to such a communication, only] by express consent of the [redacted] patient." The Defendant gave no such consent.

9. In 7 weeks of State's direct presentation of evidence at trial, the above cited medical and dental treatments were the only evidence the state submitted as to personal benefit inurement to the Defendant of the "millions" he stole.

As to Assignment XII-Allied Offenses/Double Jeopardy on Counts 2, Theft and Counts 3-9, Money Laundering:

1. The prejudice to Appellant was that he received an 8 year sentence on Count 2, Theft, and a 2 year (24 mos.) sentence on Count's 3-9, as consecutive sentence's instead of a concurrent sentence of 8 years if count 2 were used as the base offense of choice.

2. The act of the deprivation of the donors' money was consummated by the deposit of the money into bank account(s).

3. Money laundering is defined as engaging in even one financial transaction in furtherance of a crime. One single act-the deposit of the money to one account - could lead to the commission of both offenses.

4. The State argued consistently and vehemently throughout the direct appeal that the Defendant committed all the acts of each count of the Indictment as "the same course of criminal conduct" [redacted] with a single state of mind, to steal by fraud, one single animus. [Appellee's Merit Brief, CR-13-10079]

5. See, State v. Thompson, 2014-Ohio-202 (Cuyahoga cty., 2014 (holding telecommunication fraud and forgery as applied to the facts , to be allied offenses requiring concurrent sentences) for the proposition that if a single act could lead to the commission of separately defined offenses, but [redacted] separate offenses were committed with a state of mind to commit only one act, then the offenses were allied requiring concurrent sentences. See, also, State v. Johnson, 128 Ohio St. 3d 153 (2010) for its holding [redacted] double jeopardy clause of the Ohio and U.S. Constitutions.

As to Assignment XIII: Superfine and Costs:

Superfine:

1. See, R.C. 2929.18, 2929.18 (A)(2) and (3), and 2929.32 for the proposition that there is a cap of $ 1 million on fines in Ohio (R.C. 2929.32) which may be exceeded [redacted] only if exceptional circumstances are (a) found and (b) explained as a matter of record so that they can be meaningfully [redacted] from.

2. None of the exceptional circumstances [redacted] apply instantly.

3. The trial court made no such explanation of record. [Judgment Entry, 12.17.2015].

4. Defendant was prejudiced approximately $5,345,114.57 in excess fines as a result of Appellate Counsel's failure to raise or argue this Assignment.

Costs:

1. Defendant was assessed court costs "of prosecution" at sentencing [Judgment Entry, id.] of $330,778.70.

2. See State v. Durand, 2003 Ohio App. LEXIS 6581 (2003) and State v. Clark, 2002 Ohio App. LEXIS 6684 (Pickaway cty., 2002) for the proposition, citing State v. Reil, 2001-Ohio-App.LEXIS 1552 (Geauga cty., 2001), ¶5, that "a trial court may not assess court costs against indigent defendants."

Overall as to Appellate Counsel's responsibility on Sentencing Issues:

1. See Ballard v. U.S. 400 F. 3d 404 (6th Cir., 2005) for the proposition that it is well established that failure of appellate counsel to raise issues vacating the sentence constitutes ineffective assistance of appellate counsel under Strickland.

As to Assignment XIV - Consistency and Proportionality Review:

1. The indicted co-Defendant Blanca Contreras pled guilty to the entirety of the charges of the CR-10-545577 B Indictment in a new case, CR-11-548158 A, tailored to her plea agreement.

2. Contreras did not agree to testify against the Defendant, and did not testify against the Defendant in any trial.

3. See, State v. Moore, 2014-Ohio-819 (Cuyahoga cty., 2014) HN6; State v. Thompson, 2014-Ohio202 (Cuyahoga cty., 2014), HN 8; State v. Collins, 2014-Ohio-4224 (Pickaway cty., 2014) for the [redacted] proposition the trial court must make a singular review of [redacted] record with a co-defendant's sentence as to consistency under R.C. 2929.11(B), the only situation where the requirement is non-existent being where the co-defendant pled guilty and did so in exchange for agreeing to testify against a co-defendant; and for the [redacted] proposition that simply for the trial court to state it "considered all required factors of the law" [Judgment Entry, CR-12-565050 A, 12.17.2013] does not suffice. See also, in support, the explanation of the singular review requirement as flowing from the proportionality

standard of the 8th Amendment to the United States Constitution found in Furman v. Georgia, 408 U.S. 238 (1972), concurring opinion, Brennan, J., implicating the equal protection and due process clauses of the U.S. Constitution.

4. Appellant was prejudiced by the cited failure because (a) he was not sentenced [redacted] fairly under R.C. 2929.11 (B) and pursuant to the constitutional authorities cited, and (b) he was not noticed of these aspects of his sentence from which he could make a meaningful appeal.

All the statements of fact above are true, truthful, accurate and correct.

And further your Affiant sayeth naught.

Subscribed and sworn to before me this 9th day of November, 2015.

Bobby C. Thompson A651040
a.k.a. John Cody
Affiant

P.O. Box 8107
Mansfield OH 44901

NOTARY PUBLIC

KELLY ROSE
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires
May 17, 2020

Affidavit of Deborah Nester

State of Ohio)
) ss
County of Franklin)

Now comes Deborah Nester, being first duly sworn, deposes and states as follows:

1. I am of lawful age and suffer no disability at law.

2. I make this Affidavit upon personal information and knowledge. I am a Paralegal/Legal Assistant employed by the Ohio Attorney General's Office and assigned to the Ohio Organized Crime Commission. In the course of performing my duties, I was assigned to assist in the litigation of the case involving John Donald Cody, a.k.a. Bobby Thompson and the United States Naval Veterans Association [USNVA].

3. Part of my duties involved in the litigation of this case involved the storage, organization and preparation of all discovery that was received and in the possession of the State during the course of the case. When documentary materials were received by the State during the course of the investigation, as well as during trial preparation, the materials would be scanned and placed onto disks to be provided to the defense.

4. During the course of the investigation, the State initially received military records from the FBI for John Donald Cody. The State then obtained a second copy of the same military records from the National Personnel Military Records Center. The military records obtained from the Records Center were obtained with the government seal that was considered necessary for evidentiary purposes as records under seal under the Ohio Rules of Evidence. Both sets of military records, the records received from the FBI as well as the Records Center were provided to the defense in the course of discovery.

FURTHER AFFIANT SAITH NAUGHT.

Deborah Nester

SWORN TO AND SUBSCRIBED in my presence this 17th day of July, 2014.

Notary Public

[redacted]

CR12565050-A 75894918

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

2012 SEP 24 P 3:44

STATE OF OHIO,
Plaintiff

v.

BOBBY THOMPSON,
Defendant

CASE NO. CR-12-565050

JUDGE: ANNETTE BUTLER

JUDGMENT ENTRY
ON DEFENDANT'S MOTION FOR MEDICAL ATTENTION

This matter came to be heard on Defendant's Motion. The Court, having duly considered the Motion hereby rules as indicated below:

The Court finds the Motion to be well-taken, in part, and orders the following:

1) A medical examination of the Defendant to include (A) a nerve conductivity test of the right groin and leg to be reviewed by a qualified neurologist acceptable to defense counsel, to assess defendant's physical condition and to recommend further effective treatment, if any and

(B) an MRI of the right knee to be reviewed by a qualified orthopedist acceptable to defense counsel, to assess defendant's physical condition and to recommend further effective treatment, if any;

2. Further effective treatment;
3. A continuance of these proceedings until the Defendant is medically able to stand trial;

The Court further finds that Defendant's request to have his restraints removed during all proceedings is not well taken and is hereby denied.

It is so ordered.

Judge Annette Butler 9/24/12

PLAINTIFF'S EXHIBIT "A"



Source: abcnews.go.com, 12.14.2013

Exhibit "A"

CERTIFICATE OF SERVICE

I certify under penalty of perjury that I sent U.S.P.S., 1st class, postage prepaid, the original of the foregoing Affidavit with all pages attached in the upper left corner, in support of the App. R. 26 (B) Application for filing, addressed to the Clerk of the Cuyahoga County Court of Appeals, 1 Lakeside Ave., Cleveland OH 44113, with a copy with all pages attached in the upper left corner, designated for the prosecutor, Brad Tammaro, OAAG, 150 E. Gay St. #1600, Columbus OH 43215, by depositing the same in the O.D.R.C. Ri.C.I. prisoners' outgoing mailbox the 21st day of November, 2015.

John Cody a.k.a. Bobby C. Thompson A651040
P.O. Box 8107
Mansfield OH 44901

Appellant pro se

Appendix F-3

Petitioner's
Memorandum in Support of Jurisdiction
to the Ohio Supreme Court on Appeal
from Denial of Petitioner's App. R. 26(B)
Application by the State Court of Appeals

[redacted]

In the Supreme Court of Ohio

ORIGINAL

State of Ohio,
Plaintiff-Appellee,

v.

John Donald Cody a.k.a.
Bobby Thompson
Defendant-Appellant

No.: 17-0699

On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District

CA No.: 13-100797, Judgment on App. R. 26 (B) Application

Court of Appeals Case No.: CA-13-100797
C.P. No.: CR-12-565050-A

NOTICE OF APPEAL OF APPELLANT JOHN CODY a.k.a. BOBBY THOMPSON

Bobby C. Thompson
No. A651-040
Richland Correctional Institute
P.O. Box 8107
Mansfield OH 44901-8107

Appellant pro se

Bradford L. Tammaro, Esq.
Assistant Ohio Attorney General
150 E. Gay St.
Columbus OH 43215

Counsel for Appellee

RECEIVED
MAY 24 2017
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAY 24 2017
CLERK OF COURT
SUPREME COURT OF OHIO

EXHIBIT
78

Appendix F-3

Notice of Appeal of Appellant Bobby Thompson, a.k.a. John Cody

Appellant Bobby Thompson a.k.a. John Cody ("Thompson") hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No.: 13-100797 on 4.21.2017.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

John Cody a.k.a. Bobby Thompson
Appellant

Certificate of Service

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John Cody a.k.a. Bobby Thompson
Appellant

ORIGINAL

In the Supreme Court of Ohio

State of Ohio,
Plaintiff-Appellee

v.

John Donald Cody,
a.k.a. Bobby Thompson,
Defendant-Appellant

No.: 17-0699

On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Judgment on App. R. 26 (B) Application filed 4.21.2017

Court of Appeals Case No.: CA-13-100797
C.P. Case No.: 12-565050-A

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOHN CODY a.k.a. BOBBY THOMPSON

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Proposition of Law No. I: In violation of due process of law, the State suppressed exculpatory and outcome-determinative Brady disclosures relating to the Defendant's Bush White House, military intelligence and Central Intelligence Agency affiliation and the United States Navy Veterans Association website, www.Navyvets.org; and the trial court and the State suppressed defense evidence and forced the ineffectiveness of trial counsel in violation of both the due process and equal protection clauses of both the U.S. and Ohio Constitutions; and by the trial court's failure to provide the Defendant with sufficent, necessary and reasonable legal resources to mount a defense, or for appointed trial defense counsel to perform his necessary investigatory activities, in violation of both the due process and equal protection clauses of both the U.S. and Ohio Constitutions. Appellate Counsel failed to raise or argue the above in violation of counsel's Strickland responsibilities. ...	5

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Proposition of Law No. II:

In violation of the 6th Amendment and 14th Amendment's right to due process of law (and of those rights pursuant to the Ohio Constitution), of the 5th Amendment's right to equal protection (and of that right pursuant to the Ohio Constitution), and of the 6th Amendment's right to compulsory process (and of that right pursuant to the Ohio Constitution), the trial court denied the Defendant any defense witnesses at trial by failing to provide the Defendant with requested subpoenas sub duces tecum, by denying motions for all requested defense witnesses to be served with subpoenas, by quashing all defense expert witnesses; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. 9

Proposition of Law No. III:

Automatic reversal and new trial were required because the Defendant was forced to stand trial while legally incompetent, violating the due process and equal protection standards of Pate v. Robinson, 383 U.S. 375 (1966) and State v. Were, 94 Ohio St. 3d 173 (2002)et al.; Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. This Proposition and its bases spill over into the following Proposition, and are also incorporated therein. ... 14

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Proposition of Law No. IV:

In violation of the Defendant's rights of due process of law under the 14th and 6th Amendments pursuant to Gibson v. Washoe, 290 F. 3d 1175, 1188 n. 9 (9th Cir., 2002) and Alberti v. Klevenhagen, 790 F. 2d 1220, 1224 (5th Cir., 1986), et al. (and of those rights pursuant to the Ohio Constitution) and/or in violation of his rights against cruel and unusual punishment under the 8th Amendment pursuant to Bell v. Wolfish, 441 U.S. 520 (1979) et al. (and of those rights pursuant to the Ohio Constitution), the trial court's "no contacts" order [JE, 3.19.2013] placing the Defendant, after he had been appointed counsel pro se, in solitary confinement in the Cuyahoga County Jail pretrial through 12.16.2013, and other court and jail imposed conditions pertinent to that confinement, contributed to the causation of the Defendant's mental state of dysfunctional incompetence to stand trial, to plea bargain and to relinquish his right to self-representation on 8.26.2013; contributorily caused his attempted suicide; blocked his fundamental right to access counsel of choice pursuant to Sullivan v. Louisiana, et al. and to access his courts pursuant to Bounds v. Smith, 430 U.S. 817 (1977)et al.; and to obtain discovery on his own behalf pursuant to D'Ambrosio v. Bagley, 527 F. 3d 489 (6th Cir., 2008) et al.; the order bore no stated rationale; it had no purpose and/or was overly punitive or was an exaggerated response to a fictional or perceived concern; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. ... 14

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Proposition of Law No. V:

The Defendant was denied his right under the 6th and 14th Amendments to the U.S. Constitution (and his parallel right under the Ohio Constitution) to testify on his own behalf at trial by the trial court and/or the forced or unforced ineffectiveness of trial counsel related thereto, pursuant to the holdings of Sheens v. Haskis, 4 Fed. Appx. 236 (6th Cir., 2001) et al.; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. ... 14

Proposition of Law No. VI:

Automatic reversal is required because Defendant's due process and equal protection rights pursuant to the U.S. and Ohio Constitutions were violated because a satisfactory colloquy and examination to be pro se counsel pursuant to the requirements of Faretta v. California 422 U.S. 806 (1975) and State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012) was not held prior to the appointment by the trial court of the Defendant as counsel pro se, or, in the alternative, if Defendant were effectively appointed counsel, he relinquished involuntarily and unintelligently that appointment on 8.26.2013 in violation of those same rights; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. 14

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Proposition of Law No. V:

The Defendant was denied his right under the 6th and 14th Amendments to the U.S. Constitution (and his parallel right under the Ohio Constitution) to testify on his own behalf at trial by the trial court and/or the forced or unforced ineffectiveness of trial counsel related thereto, pursuant to the holdings of Sheens v. Haskis, 4 Fed. Appx. 236 (6th Cir., 2001) et al.; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. ... 14

Proposition of Law No. VI:

Automatic reversal is required because Defendant's due process and equal protection rights pursuant to the U.S. and Ohio Constitutions were violated because a satisfactory colloquy and examination to be pro se counsel pursuant to the requirements of Faretta v. California 422 U.S. 806 (1975) and State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012) was not held prior to the appointment by the trial court of the Defendant as counsel pro se, or, in the alternative, if Defendant were effectively appointed counsel, he relinquished involuntarily and unintelligently that appointment on 8.26.2013 in violation of those same rights; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. 14

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Proposition of Law No. VII[redacted]:

There was a lack of subject (territorial) jurisdiction, insufficiency of the evidence, and verdict contrary to the weight of the evidence, all in violation of the due process of law clauses of the U.S. and Ohio Constitutions on count 12, Identity Fraud an Bobby Thompson of Washington State, because the Defendant never met any of the elements of the crime in Ohio other than the use of the generic name Bobby Thompson and that was insufficient to tie that act with the actual victim identified by the State; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

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Proposition of Law No. [redacted] VIII :

Defendant was never given a constitutionally mandated (pursuants to the due process and equal protection clauses of the U.S. and Ohio Constitution) mental health and incompetency examination as also required by R.C. 2945.371(C) in Defendant's case No. CR 12-565050-A; because he was never given such an examination tailored on the insanity issue at the times facts and specific charges of 12-565050-A and no required finding was ever made and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

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Proposition of Law No. IX[redacted]:

In violation of Defendant's rights of due process of law and of a fair trial under the U.S. and Ohio Constitutions, and of his rights pursuant to R.C. 2317.02 and 2317.02 (B)(5)(a), Defendant's dentist, Dr. [redacted] Gary Steen, and Defendant's hair restorative surgeon, Dr. Francis Rieger, gave testimony as to Defendant's protected medical and dental information, the only evidence at trial as to how the Defendant, over a 12 year indictment period of stealing "hundreds of millions" of dollars, spent any of his ill-gotten gains on what might be perceived as personal inurement, and the testimony was not stricken; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. ... 15

Proposition of Law No. X[redacted]:

It was contrary to Ohio law on allied offenses for the trial court to run the sentence on Count 2 (Agg. Theft/Complicity) with Counts 3-9 (Money Laundering) consecutively; Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. ... 15

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Proposition of Law No. XI:

The appellate court erred preliminarily to the Opinion's decision, in denying Cody's motion to supplement the record [JE: 8.4.2015; denied in pertinent part, JE: 9.25.2015] to include the items of the State's Brady disclosures not in the record, and in the same proceeding, finding that Cody was merely speculating as to what was and was not in the disclosure (as the court's basis for denying Cody's constitutional claims for reversal found in his App. R. 26 (B) application assignments: as to discovery of Cody's intelligence agency files (Proposition I herein); and in accepting a state's "affirmation", without any record reference, to what the State included on disclosure on highly exculpatory www.Navyvets.org site (Proposition I; Opinion, ¶ 9; and finding in the same proceeding (without record reference to the actual disclosure) that Cody's claims as to what was in the disclosure (which Cody saw only temporarily in his solitary confinement for reading on a computer monitor) were "incredible" (Opinion, ¶¶ 8,9), i.e. not worthy of any belief. These were violations of substantive (and perhaps also procedural) due process under the 6th and 14th Amendments, and, under the parallel provisions of the Ohio Constitution because, although occurring on a procedural motion, the onerous outcome against Cody on the application was substantively unfair; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. ... 15

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Proposition of Law No. XII :

The appellate court erred as a matter of procedural and substantive due process in violation of the 6th and 14th Amendments to the U.S. Constitution, preliminarily to the Opinion's decision, in striking Cody's first application's affidavit (the Appellate Rules stated the affidavit was to contain the factual bases for the applicant's claims and could contain citations to authorities). These Cody made in a 503 pp. long affidavit. There was no authority in Ohio for striking such an affidavit, without which the appellate court lost jurisdiction, based on its' length. New law was created uniquely, for Cody. Based upon Cody's hindsight, that, since his pretrial (commencing around October, 2012) pro se representations of record of his "CIA and Bush White House affiliation-based-defenses were being denied by the state, and the trial court was pretrial making rulings cited in this memorandum having the effect of substantially denying Cody these defenses at trial, Cody had the foresight to realize this stonewall (suppressing these affiliations at-law) posture of the prosecution and trial court would continue throughout the trial proceeding, at a minimum, Cody added to the first [redacted] affidavit on the factual bases showing that affiliation substantially greater than he had theretofore. These factual bases were [redacted] stricken, and all of Cody's other factual bases to establish these defenses were ignored by the appellate court in finding Cody's claims of CIA or Bush White House affiliations "incredible" as its basis for denying the application's assignment I (Referenced in Proposition I). ... 15

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APPENDIX.

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This is an appellate counsel ineffectiveness of counsel case. As the Opinion, ¶ 7, correctly points out, analysis thereunder requires 2 prongs for reversal: (1) the ineffectiveness of counsel, itself; and (2) prejudice to the outcome (the first great constitutional issue present is that the Opinion errs by its dispositive substantial omission, however, in ignoring well-established federal (and state) due process and fair trial constitutional question precedent holding that if an underlying valid claim of error involves denial of a fundamental constitutional right requiring automatic reversal is shown, prejudice to the outcome need not be shown to require reversal, as Cody alleged in his "automatic reversal" claims below, found in this Memorandum Propositions II (compulsory process of defense witnesses and right to fair trial denied) (claim rejected for lack of prejudice, Opinion, ¶ 10; III (right to not stand trial if incompetent, denied) and IX (right to mental health examination on tried upon charges); IV (solitary pre-trial confinement ordered by the trial court itself without stated reason, and including but not limited to, denial of requested communication by pro se defendant with private counsel for purposes of retention for trial) (claim rejected for 2d prong lack of prejudice, Opinion ¶ 12); V (right of the defendant to testify on his own benalf; VI (denial of Faretta rights; denial of other fundamental rights per trial court's interpretation of strictures of pro se incarcerated counsel, and relinguishment of right to self-representation because of denial of those fundamental rights) and VIII (lack of territorial jurisdiction for Count 12 of the tried upon Indictment).

Although this is an App. R. 26 (B) case, the appellate court, in the Opinion, as requested by Cody's application pursuant to Carter v. Mitchell, 693 F. 3d 555 (6th Cir., 2012), citing Harrington v. Richter, 131 S. Ct. 770,784 (2012) substantively reviewed the merits of many of Cody's underlying claims, in order to base its decisions (both as to Strickland prongs 1 and 2) on the substantive merit or meritless of those claims, Proposition

THUS, major constitutional and general public interest issues are implicated in

this MISJ because the appellate court erroneously misstated, misanalyzed or ignored clearly established Ohio 6th Circuit, and U.S. Supreme Court constitutional precedent on relevant underlying issues.

Stated differently, in erroneously holding meritlessness on the underlying claim, the court automatically negated appellate counsel's obligation to raise the claim. First, as to Proposition I (Opinion ¶¶ 8,9,10) if allowed to stand, the court's brand new law on requested discovery in its cursory denial of Cody's underlying claims of past intelligence community and White House affiliation as "incredible", first creates the great Ohio and national interest in the outcome of the issue (the only case, and only state or jurisdiction, to prosecute charges against Cody for USNVA activities), and erroneously ignores Brady-based constitutional law (D'Ambrosio v. Bagley, 2006 WL 1169926 at 19, n. 14, 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio, 2006); D'Ambrosio v. Bagley 527 F. 3d 489, 497, n. 5 (6th Cir., 2008); U.S. v. McVeigh, 954 F. Supp. 1441 (D. Colo., 1997) that the defendant's only burden is to show that the requested discovery, if introduced, would probably change the outcome at trial. Second, the allowance at-law by the appellate court (by, it seems, not addressing the point at all) of the denial to Cody of a cross-examination witness, one on the State's key trial witnesses, the IRS Tampa SAIC, after he had testified at length in direct on the results of the IRS investigation into Cody/Thompson, and USNVA, after he invoked non-existent privilege when defense counsel attempted to cross-examine him on indicators known to the IRS of the defendant's and USNVA's intelligence agency nexus, raises a great issue of national importance, and a constitutional one of fair trial and of intelligence related matter privilege raised in a state court, and therefore absent government FISA privilege, as explained by the Jencks case, infra (Proposition II, Opinion ¶ 10).

Third, if allowed to stand, the Opinion, ¶ 25, would overturn this court's important-on-the-great-issue-of Ohio's-statutory-version of the bar against double jeopardy holdings as to the tests for allied offenses found in State v. Johnson, 2010-Ohio-6314, as applied instantly to crimes of theft and money laundering. ¶ 25's error lies in conceptualizing all the elements of the crime of theft as being completed

at the nano -second a fundraising donor mails his check, ignoring that the defendant in Count II was not charged with "theft" proper but with "theft by deception".*

Fourth, if allowed to stand, the Opinion (¶ 16) stands for the proposition that there is no constitutional mandate, either under the Ohio or United States Constitution for criminal case subject matter jurisdiction involving some territorial nexus between the elements of the crime and the [redacted] reas of the defendant, and that such a mandate comes only from statutory law, if at all. In so doing, the Opinion heavily disparages Cody's citation (as to the frequently cited original case) by jurists and advocates alike, Strassheim v. Daily, 221 U.S. 280 (1911), for Cody's original proposition above. The Ohio constitution's basis for Cody's constitutional claim, in § 18, Art. IV, as cited in State v. Human, 381 N.E. 2d 969 (1978), is, in a parallel vein, ignored by the Opinion [Proposition VIII].

Fifth, if allowed to stand, the Opinion, ¶ 24, would expand without legal authority the notion of no "medical" privilege for a consultation with, or check written to, a medical doctor who identifies himself first, as a direct examination State's witness, as a specialist (hair restoration; dental crowns instantly), as opposed to a general practice physican who merely testified that a person consulted with him professionally, pursuant to Jenkins v. Metro Life Ins. Co. 171 Ohio St. 557, 562 (1961), who is not testifying at to a patient's desired substantive course of treatment and medical needs. A medical hair restoration specialist, or a restorative dentist, who identifies himself as such in testimony first as being consulted privately by the defendant on a certain day, is, circumstantially at least, as to the subject of the consultation.

Appellant has intended to make and has made in this "Explanation" section, to an extent permitted by Rules of Pratice limitations on overall body page limits, a substantive description or elaboration on his claims of constitutional or at-law violations and arguments pertaining thereto.

* And therefore the single intent, and actus itself, stretched in a continuum between the taking (the "deprivation" concept in the theft statuts) and the "deception" concept in the theft statute, as charged, into the money laundering movement of the funds as an actus of the deception.

The deception instantly could only be that the donations were solicited for one purpose and then used for another, even if the "another" was only Cody hoarding the cash.

Indeed, on this Proposition X, the Opinion cites to only one authority for its conclusion, State v. Dabney, 2015-Ohio 3-4142 (Hamilton cty 2015), conceding Dabney holds only that theft and money laundering may "not necessarily" allied offenses.

STATEMENT OF THE CASE AND FACTS

This action is taken to this Court on a memorandum in support of jurisdiction from a denial by the Cuyahoga County Court of Appeals (the "Opinion") on 4.21.2017 of Cody's App. R. 26 (B) Application to Reopen his Direct Appeal.

In September 2015, Cody applied to reopen the appellate court's judgment in State vs Thompson 2015-Ohio-2261 (8th Dist.) in which the appellate court vacated 11 convictions of identity fraud; modified Cody's sentence downward[1] and affirmed his conviction on Ohio RICO(1 count; 10 year sentence), theft/complicity by deception (1 count; 10 year sentence), tampering with records (2 counts; 2 years each, concurrent), and money laundering (7 counts; 2 years each, concurrent).

A total of 27 years incarceration plus 5 years mandatory PRC, plus a supreFine of approximately $6.5 million (and costs) is the comprehensive sentence, with Cody credited with having served c. 5 years of that sentence, and c. $15,00 in cost/fines payment, at this point.

Cody first filed a [redacted] page hand-written application with a 503 page sworn statement, which was struck by the appellate court, which ordered him to file a 10 page application with supporting affidavit. Cody complied with that order, and the State filed a brief in opposition.

[2]Cody, using his CIA-assigned cover identity and name Bobby Thompson, and other CIA officers, and with the support and sponsorship of high-level Republican party (former, active and future) federal government foreign, military and intelligence policymakers officials within the Department of Defense and the Department of Veterans' Affairs, and officials of both the Bush I and Bush II White House, organized an IRC § 501 (c) (19) veterans organization, the United States Navy Veterans Association ("USNVA").

The joint purposes of these government representatives with respect to USNVA, for the years 2001- January 20, 2009, were support for the Bush II administration's foreign and military policies in Afghanstan and Iraq, and in fighting the war on terror abroad, including, but not limited to, the promotion to "allied" foreign policymakers of the need for the insertion of on-the-ground "front-line" combat troops from their countries in Afghanstan and Iraq with the resultant "troop-shifting" effect of reducing U.S. Armed Forces Casualties there, and of saving U.S. service-member

1. John Cody is the defendant's birthname.* Cody has continously maintained his total and complete innocence of the remaining 12 counts, including his assertion of the lawful purpose Ohio identity fraud statutory affirmative defense (same owner's permission) for his use of the Count 12 name Bobby Thompson as an assigned cover identity issued by Central Intelligence Agency, and as a function of the intelligence mission of the executive branch of the federal government.

2. Following in the next 3 paragraphs of text is a summary of the actual facts of the occurrences comprising the subject matter of the remaining 12 count indictment, according to Cody. These facts have never been actually litigated in this case, because of the non-provision of any defense case-in-chief or closing argument at trial because of the constitutional errors summarily explicated in Cody's propositions herein. Nor have these facts been actually litigated in any other proceeding. For the State's version of the underlying facts, on the other hand, see, Opinion, ¶ 2.

* Called "true name" in CIA cablelese; "real name" in the State's pleadings.

bers' lives in the war on terror abroad.

The last filed USNVA IRS Form 990 informational tax return for non-profits for CY 2010, referred to by the State in its closing argument at trial, showed, as a summation, approximately $99 million as gross income of the organization and its predecessor received for the years, approximately 1998-2010. That form, which was the exclusive source for these comprehensive summaries, showed approximately $25 million of that gross raised by professional telefundraisers, through telephone solicitations to adult members of the public in the U.S. selected by the fundraisers, with no direct personal participation by any member of USNVA, including Thompson/Ordy. Donations to that campaign were mailed directly to UPS boxes established by the fundraisers (and to which Thompson/Ordy had neither a key or combination), collected by the fundraisers, accounted for by the fundraisers (or their direct affiliates), deposited by the fundraisers into bank accounts in Pennsylvania, Michigan and Wisconsin selected and orally opened personally by the fundraisers (with their accepted demand on Thompson/Ordy/USNVA that Thompson/Ordy provide signature cards and have account signing authority), and where the fundraisers the day of their deposit, or on the next day, personally withdrew their 85%-90% fee on the deposited amount, before Thompson/Ordy/USNVA even had actual notice of the deposited amount, no less physical access to it. Evidence at trial showed the funds raised by the fundraisers in Ohio over that same period to be less than $2 million (Opinion, ¶ 2), over which Thompson/Ordy could have had personal access to, for purposes of stealing, no more than $250,000; and no evidence at trial was presented showing any other income in Ohio to USNVA over that or any other period shifted to anywhere but the two telephone fundraisers.

Appellant has intended to make, and has made, in this "Statement" section, to an extent limited by the Rules of Practice on overall body page limits, some substantive description or elaboration on his claims of constitutional or at-law violations, and semi-argument pertaining thereto.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

I. In violation of due process of law, the State suppressed exculpatory and outcome-determinative Brady disclosures relating to the Defendant's Bush White House, military intelligence and Central Intelligence Agency affiliation and the United States Navy Veterans Association website, www.Navyvets.org; and the trial court and the State suppressed defense evidence and forced the ineffectiveness of trial counsel in violation of both the due process and equal protection clauses of both the U.S. and Ohio Constitutions; and the trial court failed to provide the Defendant with sufficient, necessary and reasonable legal resources to mount a defense, or for appointed trial counsel to perform his necessary investigatory activities, in violation of both the due process and equal protection clauses of both the U.S. and Ohio Constitutions. Appellate Counsel failed to raise or argue the above in violation of counsel's Strickland responsibilities.

A. CIA and Related Intelligence Agency Material. The state suppressed all written file material originated by federal intelligence agency authorities related to Defendant's actual contract agency relationship to the Bush White House; CIA, and Defendant's "CIA" defense, and most of Defendant's written file material showing his relationship to Defense Department and military intelligence.

That material was exculpatory (because Defendant's CIA relationship and employment, at any time, established clearly from even one document from CIA sources, laid the groundwork for proof at trial Defendant had been lawfully assigned cover identities by the CIA showing Defendant had, specifically, "lawful" purpose" in the use and/or possession of the identifiers of the Count 12 victim, the affirmative defense to that count (R.C. 2913.49 (F)(2)(b)). The introduction of even one such document was also reasonably probable to have affected the outcome at trial because, without the evidence, Defendant would have had to rely solely on his own testimony to establish the relationship (this Assignment implicates also Assignment II-Denial of Any Defense Witnesses by the Trial Court). The probability of outcome change (on counts 2-12 and, therefore on 1, or any one of them) with this evidence, as opposed to without, is made more evident given the State's knowingly false denial of any involvement of the Defendant, ever, with the CIA, and its assertion, therefore, of his lack of credibility on the subject conduct. See FOIP action, State v. Ordy, jur. declined, 2015-Ohio-4468 (S. Ct., 2015), the trial court having held there Defendant lacked credibility as to his claims of intelligence agency connection based upon the State's representations, aff., State v. Ordy, 2015-Ohio-2764 (Cuyahoga cty., 2015).

The employment of the Defendant by both Bush Administrations and their CIAs also would have been relevant to, and would have established, lack of the Defendant's criminal intent to commit theft, theft by deception (or, derivatively, complicity), money laundering, or tampering with records, all specific intent crimes, (See U.S. v. Duncan, infra., U.S. v. Wilson, 289 F. Supp. 2d 801 (S.D. Tex., 2003))[1] creating the reasonable probability of outcome change on at least one, and probably all, of the verdicts on counts 2-11, and therefore, again, Count 1, which required the commission of at least two "incidents" of predicate offenses.

B. Navyvets.org website.

Non-Outcome-determinativeness: It is an unfortunate circumstance of contemporary American criminal legal process that high profile defendants having actual intentions which others assess or might perceive as nowhere near approaching saintliness, but which are nonetheless, not, identical to the mens rea required as an element of the non-violent offense(s) of which they are accused, and who are, or have been associated with, political figures or public policy makers, are prosecuted with a view toward manipulating evidentiary facts to create a critical emotive response by inference in the jurors' minds, like it or not, against the defendant's bad character. Thus in U.S. v. Lt. Col. Oliver North, a National Security Advisor Operative, the prosecution sought to create the prejudice North was a thief pilfering government funds to buy pantyhose for his secretary, Fawn Hall (partial convictions, no real sentence); in U.S. v. Edwin P. Wilson, a CIA operative, the government sought, like wise to portray the Defendant not just as someone who had no intelligence agency connection, but also a traitor who had sold C-4 explosives to Gaddafi's Libya to satiate Wilson's greed, munitions used to kill U.S. servicemen by

1. Both cases involved covert intelligence operatives accused of financial crimes in which their alleged greed was positioned by the prosecution as evidence of the required intent.

Libyan intelligence operatives (2 convictions out of 4 trials, 1 acquittal across the board, 1 dismissal after 20 years in prison on the grounds the government supressed the evidence of CIA involvement in Wilson's business, and misled the courts by denying that involvement; Wilson supra) and in U.S. v. Duncan, infra., where the government portrayed the defendant, a U.S. Army covert intelligence officer operating a covert business in Virginia, as a greed driven person; presented overwhelming circumstantial evidence he stole government funds, including the absence of business receipts; (conviction reversed on appeal on the grounds intelligence operations inherently resulted in hidden or non-existent receipts); and in the instant case where the key emotional influence driving the jury to convict on all counts, and intended to drive the jury to convict on all counts, was the perception of the defendant's greed.

> "Indeed... it's difficult to measure ... the amount of harm your greed has caused... . The men and women who have honorably served our country who suffer and continue to suffer because of the millions ... were supposed to help them, went to your pockets." [Trial Court, Sentencing Hearing Tr., 4545; 21-24; 4546; 4-7].
>
> "Prejudice may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impediment of the deliberative process of ... reasoning from evidentiary facts resulting from an attribution to something not included in the evidence, That something has its most powerful effect if it generates strong emotional responses."
> Sotomayor, J., Concurring opinion,
>
> Skilling v. U.S., 561 U.S. 358, 463-464 (2010), quoting with approval, U.S. v. McVeigh, 918 F. Supp., 1476, 1472 (W.D. Okla., 1996).

This critical perception is caused by that manipulation or outright suppression of evidence; and the manipulation and suppression of www.Newyvets.org by the prosecution instantly, was a critical example of such a manipulation which caused an unreliable outcome.

www.Newyvets.org was the official website of USNVA on the web from at least 2000 through 2010, consisting of approximately 1 gigabyte of information[2] dealing with the organization; its history; its purpose; where fundraised monies went; Thank(you); receipts; description of government involvement with the organization; the organization's IRS information tax returns; news reporting and analysis on

1. McVeigh was decided requiring the prosecution to produce disclosure on all evidence relating to contacts of the intelligence services with Defendant McVeigh or any of his alleged co-conspirators, based upon mere allegations by the defendant such contact may have occurred; and also cited in Appellant's App. B. 26 (B) Affidavit as an authority requiring the prosecution to independently search for and produce all intelligence agency files on the defendant and his activities even though the prosecution asserted it already had produced all that was provided.

2. Printed out, Newyvets.org would have come out to approximately 3,000 8½" 11" pages. It contained many video, moving jpeg and wave files described above in the text. It was a full color site.

veterans' issues, the war on terror, national security affairs, lobbying activities of the organization[1], and news of the United States Navy[2].

In sum, the suppression of www.newyvets.org, whether considered by itself or cumulatively with other at

1. In no wise did USNVA cell donors that donation money was going to support political candidates in election races. In no wise did USNVA public donor monies go to support political candidates in an election race. Personal donations of the Defendant (and other USNVA members) did go to support candidates for office. In arguing via leading cross-examination questions that these personal donations of the Defendant came from USNVA money in support of its advocacy programs, defense trial counsel unreasonably misunderstood the fundamental legal distinction between advocacy and lobbying on the one hand, and electioneering activities on the other, and grossly and unreasonably erred in playing into the hands of a prosecution (accurately) eliciting testimony from the only two Ohio USNVA donors the prosecution could find to testify that they did not intend their donations to go to the electioneering expenses of political candidates. Trial counsel's unreasonable errors stemmed from the fact (1) the full moving electronic www.Newyvets.org website was not disclosed, and (2) Petitioner was given insufficient preparation and factual research time and resources by the trial court to investigate www.newyvets.org - related issues, only one set of complex issues in a case containing many such sets. But differently, the State's wrongful denial that Cody had had any affiliation with the Bush White House or its CIA, a denial found by both the trial and appellate courts, motivated, and caused trial defense counsel not to perform his required investigatory duties as to Cody's "CIA defense", as well as to present cross-examination at trial tending, in part, to present nonsense as part of a "CIA defense". See further, Proposition II.

2. The news and analysis sections of Newyvets.org were huge, reflective of detailed information, as any reasonable reader/viewer could deduce, coming only from classified U.S. government sources, including sources within the Department of the Navy. These sections bore the same relationship to the war policies of the Bush Administration, and were caused and motivated by the President's personal desires for his political fortunes, as the content of the official website of the Ohio Attorney General bears to his criminal law enforcement policies, and is caused and motivated by the Attorney General's personal desires for his political fortunes. Thus in CR-12-565080A, the war policies of Bush Administration were supported by USNVA, by the Administration, by the national Republican Party, by the CIA, and by the Defendant, as an aspect of USNVA's primary purpose, the support of American patriotism. ("Patriotism" is not defined in the Internal Revenue Code, or the Internal Revenue Code's Regulations, the sole authority for USNVA's tax-exempt and tax-deductible status, granted by the Bush Administration's IRS in a record-setting 35 calendar days, even though the Code authorizes tax-exempt and tax-deductible status for organizations promoting it. It is also not defined in the statutes of any state.) Thus there was a conflation, a nexus in fact, between Newyvets.org telling, as it did, the donating public that its money went to support its explicit (see, above) advocacy agenda in the cause of American patriotism, the money raised going to that purpose, war goals of the President, and the personal political agendas of national Republican policy makers. Showing that conflation was critical to a defense, and would have shown that there was no deprivation of property under Count 2; that therefore Count 2 could not have served as a predicate for Count 1; and that there was therefore, no "unlawful purpose" for any transfer of funds which, according to the State, took place per Counts 3-9. Newyvets.org would have clearly shown that conflation and all the other exculpatory factors cited in this Assignment and its statement of bases found in the supporting affidavit, and therefore its introduction would have been outcome-determinative. The Defendant did not cause that conflation. He was handed it.

trial error, would have been outcome-determinative. The publication and introduction of www.navyvets.org in its full electronic and print format to the jury at trial would have doomed the state's case. Its' publication and introduction would have established the "CIA Defense" of (1) lawful purpose to the identity fraud Counts by showing CIA involvement with USWA per se, and by showing CIA officers using cover identities, other than Thompson, were working for the organization in a variety of capacities cited on the site; (2) privilege to the Tampering Counts by showing CIA involvement; and (3) by showing CIA involvement, lack of criminal intent to the Theft, Money Laundering and Tampering Counts.

Its publication and introduction would also have shown to the jury USWA went out of its way to show every public donor the exact purpose of the organization and where their money was going, including numerous presentations made in video, and moving picture (.gif, .wave and .jpeg) formats which could not be replicated by paper copies. For calendar years 2005, 2006 and 2007, USWA's informational IRS Return Form 990's were published as part of the website, and would have been included. Encomiums and specific laudatory comments about USWA for specific activities from the Bush[43] Department of Defense; the Bush[43] Department of Veterans Affairs; a variety of State Department of Veterans Affairs (not Ohio's); the New Hampshire Department of Employment and Job Security, Veterans' Division; the Office of the Mayor, New York City; the Office of the [redacted] President, [redacted] of Brooklyn, N.Y.; and from numerous other government officers and policy makers in the area of foreign policy, national security and veterans' issues. [1]

Cody's App. R. 26 (B) Affidavit contained statements of the factual bases of the State's suppression of the site, and citations to authorities on point; his first stricken affidavit even more than the second.

Cody provided, in his first [redacted] affidavit, in his allowed second affidavit, and as factual statements in his pretrial motions, ample background to make a prima facie showing he was CIA sponsored by the Bush[43] White House intelligence apparatus. The appellate court summarily determined all these allegations to be "incredible", and this finding was the basis for the denial of this argument.

II. In violation of the 6th and 14th Amendment's right to due process of law (and of those rights pursuant to the Ohio Constitution), of the 5th Amendment's right to equal protection (and of that right pursuant to the Ohio Constitution), and of the 6th Amendment's right to compulsory process (and of that right pursuant to the Ohio Constitution), the trial court denied the Defendant any defense witnesses at trial by failing to provide the Defendant with requested subpoenas sub duces tecum, by denying defense motions for all requested defense witnesses to be served with subpoenas, by quashing all defense expert witnesses; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

(1) Defendant pro se moved repeatedly for subpoenas to issue, and for subpoena forms, for identified defense witnesses [JE, 3.1.2013, 3.6.2013, 7.17.2013, 7.18.2013, 7.26.2013, 7.26.2013 II, 7.26.2013 III]. Patituce did not withdraw any of these motions post 8.26.2013 (the appellate court erred, as a matter of procedural and substantive due process under the 6th and 14th Amendments, by holding, without any authority, that reversion of counsel from pro se back to appointed counsel nullified all pro se motions. (If this were the law, e.g. Cody unintelligently and [redacted] relinquished pro se status and because Patituce advised him as such during the plea because of this reversion because he could not be held to knowledge of subsequently created case law; Cody never would have voluntarily withdrawn his pro se motions.); in fact, Patituce talked to them with a subpoena he had served on Mike DeWine, Ohio Attorney General, and with motions for defense experts on the CIA Defense [JE, 8.28.2013]. The trial court did not rule by journal

1. Thanks for $5,000 and $10,000 contribution checks to dilapidated government veterans' facilities were common, from Hawaii, New Jersey, Alabama, Virginia, Florida and around the country - this in the face of Palaitis' testimony [Tr.T. 2549; 6. Palaitis, Forensic Accountant, RCI] that absolutely no record could be found of any contributation by USWA to veterans' benefits, and then his broad-brush statement that any contributation by USWA was a sub-terfuge. [T. Tr. 2586; 1-1]. Palaitis' testimony, more than anything else, convicted the Defendant.

.Wave (moving video testimonials) were frequently used on the site. One from a Vietnam war Phantom pilot and his wife testifying how USWA saved his life by providing an emergency medical evacuation for him after his stroke, when VA refused to help, was particularly telling. There is no way a State's sloppily photocopied, partial-page, private host manufactured replacement (non-original) site (with commercial advertisements, and lacking all motion pictures, provided adequate disclosure for the "heal McCoy", and fully exculpatory, original www.Navyvets.org site. If anything, the messy, partial paper sheets of the private host - manufactured replacement site the State in fact created in its disclosure, turned what was exculpatory, moving electronic piece of critical evidence the State had suppressed from the private host into a presentment to the defendant of a dysfunctional to the defense piece of semi-inculpatory junk.

entry on any of the pro se defense motions for subpoenas; [1] the Defendant was not issued any subpoenas sub duces tecum he requested for service; and all Defense subpoenas issued by Patituce were quashed, or denied. [JEs, 9.27.2013, 9.27.2013].

These pro se requested witnesses were American intelligence community[2] witnesses, including DeWine, expected to testify as to the Affirmative Defense to all the Identity Fraud Counts 12-23 [R.C. 2913.49 (F)(2)(b) "Lawful purpose"-Notice of Affirmative Defense, JE 2.4.2013], and as to Thompson's staff and contract relationship with the Central Intelligence Agency and other agencies of the intelligence community, in order to establish, along with the documents requested by the subpoenas sub duces tecum, CIA involvement in the activities of USWA to the extent criminal intent of the Defendant under Counts 2-11 would have been negated.[3]

1. Although meeting the requirements of Crim. R. 17 (B), they were presumably all denied upon judgment pursuant to Kostelnick v. [redacted] v. Helper, 2002-Ohio-2985, State ex rel V Cox v. Marshall, 91 Ohio St. 3d 467 (1948).

2. As defined by the National Security Act of 1947, as amended, and Presidential Executive Order ("E.O.") 12333. DeWine had membership on the U.S. Senate Select Committee on Intelligence, at pertinent times.

3. This, then is the "CIA Defense" enunciated in U.S. v. Wilson, 289 F. Supp. 2d 801 (So. Dist., Texas 2003), vacating Wilson's 20 year old conviction for smuggling C-4 explosives to Muammar Quaddafi's Libya: the intelligence Comunity had a relationship (in Wilson established by documents despite government denials) with the Defendant, which relationship was "favorable evidence [which] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict". Cf U.S. v. Wilson, 721 F. 2d 967 (4th Cir., 1983). The defense (absent reference to the "lawful purpose" affirmative defense established by R.C. 2913.49 (F)(2)(b) to the Identify Fraud counts 12-23, which appears to be unique as a matter of Ohio [redacted] law) is further explained by U.S. v. Duncan, 34 M.J. 1232, 1992 CMR LEXIS 582, [redacted] 14. In Duncan, Duncan was a covert operative and officer with a covert military intelligence related organization (operating during the Reagan and George H.W. Bush administrations, Business Security International, operating out of Annandale, Virginia), a "supervisor". He was charged with (1) conspiracy to obstruct justice; (2) 13 counts of larceny; (3) forgery; and (4) failure to account for public funds; Duncan was convicted and sentenced to 10 years imprisonment and a $50,000 fine. The military court of appeals found that, given Duncan's relationship with the intelligence community, intelligence community protocols and policies mandated that Duncan "live [his] cover," "accomplish [his] mission" and that there was to be "no accountability" for funds' expenditures. Cf. Defendant's case, where the factual basis for the money laundering counts 3-9, and unbeknownst the theft by deception count 2 as well, was established by the testimony of Leo Palaitis (Tr. T., testimony of Palaitis) to the effect that, because he could not find any record of or receipts for, USWA expenditures, it was his opinion money laundering had taken place. The intelligence community witnesses Thompson named for subpoenas sub duces tecum (not including DeWine), along with the documents subpoenaed, had the witnesses testified truthfully, would have presented evidence which showed that records and receipts for covert operations, including records and receipts for "mixed purposes" where some expenditures are for covert "legitimate" purposes, such as gifts for U.S. troops in a non-profit cover organization, and covert purposes, such as payments to persons to further the war and military purposes of the President of the United States, are either not kept, destroyed, or forwarded to Intelligence Community agencies in Washington for safekeeping, in order to "protect the sources and methods" of the operation, the primary security function of the CIA under the National Security Act and E.O. 12333, and a lawful purpose. The forensic accountant expert witness moved for by the Defendant, JE 8.28.2013, motion denied, JE, 9.5.2013, would have testified accordingly, and as a minimum, that if the Duncan authorized rules were operative, no reasonable forensic accountant, given the basic facts as to money movement and lack of records testified to by State's forensic accounting expert Palaitis [Tr., supra], would opine that money laundering, or theft for that matter, had occurred. Finally, DeWine*, had he testified truthfully, would have said he knew Thompson (as Bobby Thompson") in Washington; knew he was CIA; knew USWA was in part an intelligence operation of the George W. Bush White House to promote patriotism and the national security interests of the Global War on Terror; [redacted] (DeWine is a non-descript, non-chest-thumping politician and policymaker) to intervene personally on behalf of USWA (and its Ohio Chapter leaders, Dick Platt and Don Gillespie) in Ohio to promote its interests here, including its public fund-raising interests, and in Washington, D.C., to protect it from over-[redacted] in order to empower its partial clandestine intelligence agency mission, as one of the ranking Republican members of the United States Senate Select Committee ("sel-

[Fn. 3 cont'd on next p.]

* All other defense experts requested by Patituce (JE, 8.28.2013), denied, JE 9.5.2013) were also denied by the trial court: expert on income tax and income tax law to explain how USWA fit into the Income Tax laws of the United States per se, and how USWA fit into the Income Tax laws of the U.S. as an in-part American intelligence operation; forensic computer expert to testify on how many people went on the USWA computers seized and who they might have been; and an investigator to, at a minimum, locate the many addresses of the many identified defense witnesses the Defense needed on such a massive case.

(2) The CIA Defense thus, as explained by Wilson and U.S. v. Duncan, 1992 CMR LEXIS 582 (U.S. Ct.Mil.Rev. 1992), [redacted] that the relationship of the defendant with an agency of the American intelligence community related to an intelligence activity can explain what otherwise may appear to be a criminal act of the defendant, so as to negate a required element of criminal intent or establish an affirmative defense allowed by law. No other state, or federal jurisdiction has brought charges against Cody related to USNVA activities because of the validity of his CIA's defense.

> "... [t]he normal rules involving accountability and fiduciary duties did not seem to apply and the appellant's conduct did not evidence the necessary mens rea." Duncan, supra, HN 14.

All charges against former Army officer Duncan were dismissed outright.

> "Evidence establishing intent ... is always material because it tends to show why one version of events should be believed over another." State's Reply Brief, Direct Appeal, p. 14, citing to State v. Crotts, 104 Ohio St. 3d 432 (2004).

Both Duncan and Wilson state the relationship with an agency of the American intelligence ("intel") community of a defendant facing similar (almost identical, in Duncan's case) charged to those faced by Thompson instantly is relevent and material.

In Duncan, the government said the "CIA defense" was not a defense. The court said the government was wrong.

In Wilson, the government suppressed the relationship; said it did not exist, for 20 years, leaving the Defendant Wilson himself, at that point, the only defense witness to testify at trial as to the relationship, and the jury voted to convict. The District Court said, clearly, the Defendant being left in the situation where only his testimony as to the relationship was not enough to guarantee a fair trial, and that the suppression of the other CIA relationship evidence (in Wilson, documentary evidence), was both egregious and undermined the confidence in the verdict to the extent all the charges had to be dismissed outright.

(3) Instantly, every one - one-by-one - every defense witness requested, expert, non-expert, every one - was suppresse in this case, along with the identified documents requested as part of the subpoenas sub duces tecum, by the trial court at the prosecution's urging, leaving Thompson with no witnesses, no defense evidence, at all, save his own potential testimony. This result was not a strategic decision of the defense counsel.

(4) Under both the Ohio and the United States Constitutions, the defendant has no right to present every witness he might wish to, but he does have a 5th and 6th Amendment right to compulsory process of necessary witnesses he can summarize the testimony of.

> "The 5th Amendment right to equal protection and the 6th Amendment right to compulsory process require that the trial court give due consideration to the constitutional rights involved in denying the request for a subpoena."
>
> U.S. v. Greschner, 802 F. 2d 373, 378 (10th Cir., 1986), followed,
>
> U.S. v. Vigil, 2013 U.S. Dist. LEXIS 90264 (D.N.Mex., 2013), HN 16.

[Fn. 3 cont'd from previous p.]
act" - selected by the President of the United States) on Intelligence. To cap off his USNVA - related episode, [redacted] from his testimony would then have shown his 2006 Campaign for Re-election as U.S. Senator, in which he was defeated in a close election by the now sitting U.S. Senator for Ohio, Sherrod Brown, demanded campaign contributions from USNVA, Dick Platt, Don Gillespie, Bobby Thompson (the defendant) and Jack Nimitz (Board Chair and CEO of the USNVA national organization), and received less than requested, and less than satisfactory (since DeWine lost) contributions from USNVA's political action committee, NAVPAC. Like Thompson, Duncan was a non-official cover ("NOC") intelligence officer. Like USNVA, Business Security International was a NOC organization. It should be noted the State's blantantly continuing misrepresentation to the trial court, and to [redacted] Court, that the Defendant had no relationship to, or with American Intelligence or the CIA, is identical to the egregiousness of the prosecution cited by the District Court in U.S. v. Wilson, 284 F. Supp. 2d 801 (S.D., Tex., 2003) as justifying dismissal of the case on a motion for new trial, with prejudice.

(5) In the 6th Circuit, the Defendant must make in his Motion for subpoenas,[1] as a constitutional matter:

(1) A statement that the witness is necessary.

(2) A summary of the witness' testimony.

U.S. v. [redacted], 553 F. 2d 1013, 1020-21 (6th Cir., 1977); U.S. v. Reaves, 1999 U.S. App. LEXIS [redacted] 25110 (6th Cir., 1999).

> "Any ... motion [other than R. 12 (C)(1)-(5) motions, which a motion for subpoenas is not] shall be determined before trial whenever possible ... . [Moreover] where factual issues are involved in determining a motion, the court shall state its essential findings on the record." Crim. R. 12 (F).

(6) The Defense Expert Witnesses

On 1.11.2013 [JEs, 1.11.2013, CR-12-565050-A] Patituce moved for 4 Defense expert witnesses: a forensic accountant; an investigator; an IRS Litigation expert and a computer expert. The forensic accountant would have testified that under controlling legal authority of the National Security Act of 1974, E.O. 12333, rules, policies and procedures of the American Intelligence Community and its agencies, and the pronouncements of Duncan, supra., as applied to intelligence - related operations, it was quite proper for any person possessing intelligence classification power to consider USNVA receipts in whole or in part for intelligence-related purposes, as classified, and to destroy the same, or forward them to a higher intelligence agency authority for classified, i.e. secret, safe keeping or disposal, or not retain them at all, and no standard accounting procedure, or otherwise, of normal U.S. accounting procedures (e.g. of the AICPA) took precedence over those rules, policies or procedures. The IRS Litigation Expert would have testified to the same as to IRS rules, and also would have testified that the receipts USNVA did retain, and did present to the IRS during the USNVA tax audit the State put into evidence[2] would have sufficed to any reasonable forensic accountant to conclude lack of probable cause to believe any "deficiency of quantity of receipts" - related economic crime had been committed[3]; and have testified that given the evidence of USNVA's far-flung geographical operations and multi-functional purpose, the movement of funds from one account to others, the same basis Palaitis used to opine Money Laundering had occurred, was normal, reasonable, proper and consistent with the normal business practices of [redacted] situated organizations and their lawful financial operations.

The investigator would have testified that the USNVA officers State's witnesses Leo Palaitis and Al Bansky testified they could not find had explicit indicators all of them were CIA non-official cover operatives, and that the failure of BCI to locate them reinforced that conclusion. Using investigative sources and methods neither Patituce nor Thompson personally had access to, the investigator would have testified it was reasonable to believe Thompson was CIA and unreasonable to conclude otherwise.

1. Defendant did not have a requirement to move for the subject defense subpoenas and witnesses. He did so because the State had done so ex parte [Thompson received no copies of their motions, see record, JEs 12-565050-A, to challenge them] (JEs, 10.15.2012). All the State's witnesses were allowed as "necessary and material", including BCI witnesses who testifie at trial about techniques of government agency professionalism as applied to the use of cover names, identities and documents in undercover operations. The State was permitted to raise in its case-in-chief a presumptive refutation of the CIA defense; but Cody was appropriately denied arguing those defenses, the Opinion held, because they were "incredible."

2. The State put the tax audit into evidence via the testimony of McMurray, who testified as to it on direct, and via the testimony of the IRS agent Spencer Ross who testified to it on direct, and in the testimony of State's forensic accounting expert Leo Palaitis.

3. This conclusion would have been obvious to make from simply reading the IRS determination letters on the audit, or from studying GC Mac Murray's emails to USNVA and USNVA Special Counsel Samuel Wright that USNVA had passed the audit "with flying colors". [State's Disclosures CD-Rom # ____, not part of record].

The computer expert would have testified there was no reason to disbelieve that multiple individuals had inputted and extracted and used information and data on the USWA computers seized, but denied production to the Defense for inspection, and as to intelligence agency encryption present in the computer. (part of this Assignment below, and of this Proposition)

(7) The IRS Special Agent-In-Chief

There is one more witness not mentioned heretofore the Defendant contended below he was denied at trial: the IRS Special-Agent-In-Charge Spencer Ross of the Tampa investigation of USWA and the Defendant. He was called by the State at trial and testified extensively as to what the State wanted him to say (many of the questions were leading) about the Tampa investigation, USWA and the Defendant. [Tr. 1720-1730]. The IRS SAIC had personal knowledge concerning the existence of IRS treatment of returns filed by intelligence-related individuals and activities; and the files and information developed on USWA and Cody/Thompson as part of the Tampa investigation, and suppressed from the Defendant in CR-12-565050-A, because he had just concluded extensive-in-scope testimony on direct about the Tampa investigation. When Defense Counsel Patitucc immediately began cross-examination designed to elicit substantive testimony on the CIA Defense the suppression of evidence, and on the Tampa investigation itself, the IRS Special Agent-In-Charge ("SAIC") invoked a privilege against testifying further about "an ongoing investigation" after doing just that, extensively, on direct examination. [T.Tr., testimony of IRS SAIC, 1734: 18-19]. The witness was dismissed.

The evidence Patitucc sought to elicit on the CIA Defense and the suppression of evidence about the Defendant and USWA, which questions he never got to, was outcome determinative in both cases to the CIA Defense: it would have established that defense as applicable to Counts 2-12; it would have explained USWA's IRS audit issues raised by the Prosecutor via other State's witnesses (T. Tr., Mac Murray, Palaibis) under Evid. R. 404 (B); it would have established what was deleted from Brady disclosure in the joint sharing of information on the Ohio/IRS investigation, and thus made a different outcome, even if that were only on one or more Identity Fraud counts, reasonably probable.

The Defendant, however, does not need to show prejudice, or cause and prejudice, where he is denied such a material witness on these grounds, Jencks v. U.S., 353 U.S. 657 (1957).

1. Patitucc had no other reason or reasons to cross-examine this witness.

III. Automatic reversal and new trial were required because the Defendant was forced to stand trial while legally incompetent, violating the due process and equal protection standards of Pate v. Robinson, 383 U.S. 375 (1966) and State v. Berry, 94 Ohio St. 3d 173 (2002) et al.; Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. This Proposition and its bases spill over into the following Proposition, and are also incorporated therein.

IV. In violation of the Defendant's rights of due process of law under the 14th and 6th Amendments pursuant to Gibson v. Mishne, 290 F. 3d 1175, 1188 n. 9 (9th Cir., 2002) and Alberti v. Klevenhagen, 790 F. 2d 1220, 1224 (5th Cir., 1986), et al. (and of those rights pursuant to the Ohio Constitution); and/or in violation of his rights against cruel and unusual punishment under the 8th Amendment pursuant to Bell v. Wolfish, 441 U.S. 520 (1997) et al. (and of those rights pursuant to the Ohio Constitution), the trial court's "no contacts" order [JE, 3.19.2013] placing the Defendant, after he had been appointed counsel pro se, in solitary confinement in the Cuyahoga County Jail pre-trial through 12.16.2013, and other court and jail imposed conditions pertinent to that confinement, contributed to the causation of the Defendant's mental state of dysfunctional incompetence to stand trial, to plea bargain and to relinquish his right to self-representation on 8.26.2013; contributorily caused his attempted suicide; blocked his fundamental right to access counsel of choice pursuant to Sullivan v. Louisiana, et al. and to access his courts pursuant to Bounds v. Smith, 430 U.S. 817 (1977) et al.; and to obtain discovery on his own behalf pursuant to D'Ambrosio v. Bagley, 527 F. 3d 489 (6th Cir., 2008) et al.; the order bore no stated rational; it had no purpose and/or was overly punitive or was an exaggerated response to a fictional or perceived concern; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

V. The Defendant was denied his right under the 6th and 14th Amendments to the U.S. Constitution (and his parallel right under the Ohio Constitution) to testify on his own behalf at trial by the trial court and/or by the forced or enforced ineffectiveness of trial counsel related thereto, pursuant to the holdings of Sheen v. Heidle, 4 Fed. Appx. 236 (6th Cir., 2001) et al.; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

Defense counsel told the trial court Cody wanted to testify and would testify. The trial court examined Cody as to his right to testify; Cody said he would like to first rectify his dishelved state after attempting suicide. The court took a short recess accordingly. When court re-convened, Defense counsel refused to call Cody, or to present any defense case-in-chief.

VI. Automatic reversal is required because Defendant's due process and equal protection rights pursuant to the U.S. and Ohio Constitutions were violated because a satisfactory colloquy and examination to be pro se counsel pursuant to the requirements of Faretta v. California, 422 U.S. 806 (1975) and State v. Smith, 2012-Ohio-5420 (Cuyahoga cty., 2012) were not held prior to the appointment by the trial court of the Defendant as counsel pro se, or, in the alternative, if Defendant were effectively appointed counsel, he relinquished involuntarily and unintelligently that appointment on 8.26.2013 in violation of those same rights; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

The involuntary relinquishment stemmed from the denial by the trial court of the defendant's ability to obtain any physical documentary evidence whatsoever for his use at trial if he continued in pro se status at the same time subject to the 3.19.2013 JE.

VII. Automatic reversal was required because there was: a lack of subject matter (territorial) jurisdiction; insufficiency of the evidence, and a verdict contrary to the weight of the evidence, all in violation of the due process of law clauses of the 6th and 14th Amendments to the U.S., and of the parallel provisions of the Ohio Constitutions, on Count 12, Identity Fraud on Bobby Thompson of Washington State, because the Defendant never met any of the elements of the crime in Ohio other than the use of the generic name Bobby Thompson; and that was insufficient to tie that usage with the actual victim identified by the State; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. Strickland v. Palla, 391 U.S. 330 (1410); State v. Homan, 381 N.E. 2d 469 (S.Ct. 1998).

VIII. Reversal is automatically required because the Defendant was never given a constitutionally mandated (pursuant to the due process and equal protection clauses of the 6th and 14th Amendments to the U.S. and to parallel provisions of the Ohio Constitution) mental health and insanity examination, (also required by R.C. 2945.371 (G)). In Defendant's case No. CR-12-565050-A because he was never given such an examination, followed, on the insanity issue, by the two, three and specific charges of CR-12-565050-A, and no rational finding was ever made, and no competency to stand trial, all after trial defense counsel had evidence facie showing of incompetency and trial Appellate Counsel failed to raise or argue the above violation of his Strickland responsibilities.

IX. Violation of Defendant's rights of due process of law and of a fair trial under the 6th and 14th Amendments to, and the Roe v. Wade privacy right inherent in, the U.S., and parallel provisions in the Ohio Constitution, and of his rights pursuant to R.C. 2317.02 and 2317.02 (B)(5)(a), Defendant's dentist, Dr. Gary Steen, and Defendant's twin restorative surgeon, Dr. Francis Rieger, gave testimony as to defendant's protected medical and dental information, the only circumstantial evidence at trial as to how the Defendant, over a 12 year indictment period of stealing 'hundreds of millions' of dollars, spent ($ 5,000, Dr. Rieger; c. $25,000, Dr. Steen) any of the life-option gains on what might be perceived as personal luxuries, and the testimony was not stricken; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. State v. Metro Life, 171 Ohio St. 537 (S.Ct. 1961).

X. It was contrary to Ohio law on allied offenses for the trial court to run the sentences on Count 2 (Agg. Theft/Complicity) with Counts 3-9 (Money Laundering) consecutively; Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities. State v. Johnson, 2016-Ohio-6314 (S.Ct. 2016).

Cody received a substantial amount of additional prison time for this [redacted] failure). Cf. State v. Dabney, 2015-Ohio-1972 (Hamilton Cty., 2015).

XI. The appellate court erred preliminarily to the Opinion's decision, in denying Cody's motion to supplement the record [JE: 8.4.2015; denied in pertinent part, JE: 9.25.2015] to include the items of the State's Brady disclosures not in the record, and in the same proceeding, finding that Cody was merely speculating as to what was and was not in the disclosure (as the court's basis for denying Cody's constitutional claims for reversal found in his App. R. 26 (B) application assignments as to discovery of Cody's intelligence agency files (Proposition I herein); and in accepting a state's 'affirmation', without any record reference, to what the State included on disclosure on the highly exculpatory www.Newvets.org site (Proposition I; Opinion, ¶ 9) and finding in the same proceeding (without record reference to the actual disclosure) that Cody's claims as to what was in the disclosure (which Cody saw only [redacted] of his solitary confinement for reading on a computer monitor) were "incredible" (Opinion. ¶¶ 8,9), i.e. not worthy of any belief. These were violations of substantive (and perhaps also procedural) due process under the 6th and 14th Amendments, and, under the parallel provisions of the Ohio Constitution because, although occurring on a procedural motion, the onerous outcome against Cody on the application was substantively unfair; and Appellate Counsel failed to raise or argue the above in violation of his Strickland responsibilities.

The spillover between procedural and substantive due process instantly is explained by, as pertinent, Darling v. Lake County, 2012 U.S. Dist. LEXIS 72798 (N.D. Ohio 2012), citing Howard v. Grinage, 82 F. 3d 1343, 1349-53 (6th Cir., 1996), Landefill v. Cleveland Bd. of Rtc., 721 F. 2d 550, 563 (6th Cir., 1983), Daniels v. Williams, 474 U.S. 327, 331 (1986).

XII. The appellate court erred as a matter of procedural and substantive due process in violation of the 6th and 14th Amendments to the U.S. Constitution, preliminarily to the Opinion's decision, in striking Cody's first application's affidavit[1] (the Appellate Rules stated the affidavit was to contain the factual bases for the applicant's claims and could contain citations to authorities), three Cody made in a 503 pp. long affidavit. There was no authority in Ohio for striking such an affidavit, without which the appellate court lost jurisdiction, based on its length. New law was created uniquely, for Cody. Based upon Cody's hindsight, that, since his pre-trial (commencing around October, 2012) pro se representations of record of his 'CIA and Bush White House affiliation based-defense' was being denied by the state, and the trial court was pre-trial making rulings cited in this memorandum having the effect of substantially denying Cody these defenses at trial, Cody had the foresight to realize [redacted] himself (suppressing these affiliations) at trial posture of the prosecution and [redacted] court would continue throughout the [redacted] proceeding, as a strategy, Cody added to the [redacted] affidavit on the factual basis surrounding that affiliation substantially greater than [redacted] those factual bases was stricken, and all of Cody's other factual bases to establish these defenses were ignored by the appellate court in finding Cody's claims of CIA or Bush White House affiliations "incredible" as its basis for denying the application's assignment I (referenced in Proposition I).

[1] Cody's asserted past affiliations remain today either a secret, a figment of Cody's imagination, or a lie concocted by him. The prosecution has steadfastedly maintained it's one of the latter two. Cody's case stands for the legal proposition, however if it stands for anything at all, that the trial court from the outset, by means of a number of due process errors pre-trial and at trial, and in actual findings in the PCRP proceeding, and the appellate court, in this Opinion, have determined at law that the state's denial of facts alleged by Cody is correct, when due process rendered all along the trial of these facts and contentions to be determined by a jury. Like a "good clandestine intelligence operative" Cody kept his mouth shut about former government affiliations from the date of his arrest (4.20.2012 in Portland, Oregon) through October, awaiting [redacted] some CIA (always unlikely because USNA was a pro-Bush Administration operation, and it was now Obama's CIA) or former Bush White House person or persons for some form of intervention in the case, even if it were only to provide him counsel. In so doing, Cody employed good FORTUNE, and OMEC.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

John Cody a.k.a. Bobby Thompson
A651-040
P.O. Box 8107
Mansfield OH 44901-8107

Appellant pro se

APPENDIX

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ATTACHMENTS

The attached Journal Entry and Opinion of the Court of Appeals contains the full written response to the written request of Appellant to Nailah Byrd, Clerk of the Cuyahoga County Court of Appeals, for a "date stamped copy of the court of appeals' opinion and judgment entry" being appealed from in this App. R. 25 (B) application denial.

John Cody A651-040
a.k.a. Bobby Thompson

Appellant pro se

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 100797
LOWER COURT NO. CR-12-565050-A

COMMON PLEAS COURT

-vs-

JOHN DONALD CODY A.K.A. BOBBY THOMPSON

Appellant

MOTION NO. 491304

Date 04/21/17

Journal Entry

Appellant's pro se application to reopen direct appeal pursuant to App.R.26(B) is denied. See journal entry and opinion of same date.

RECEIVED FOR FILING
APR 21 2017
CUYAHOGA COUNTY CLERK OF THE COURT OF APPEALS
By _____ Deputy

Judge TIM McCORMACK, Concurs

Judge MARY J. BOYLE, Concurs

KATHLEEN ANN KEOUGH
Administrative Judge

CA13100797 9858127?

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100797

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

**JOHN DONALD CODY, A.K.A.
BOBBY THOMPSON**

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-565050-A
Application for Reopening
Motion No. 491304

RELEASE DATE: April 21, 2017

Appendix G

Decision of State Court of Appeals on Petitioner's "2015 Post-Conviction Relief Petition" Appeal

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102213

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN DONALD CODY
A.K.A. BOBBY THOMPSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-565050-A

BEFORE: Jones, P.J., Kilbane, J., and McCormack, J.

RELEASED AND JOURNALIZED: July 9, 2015

CA14102213 90043418

Appendix G

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

Mike DeWine
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LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant, John Donald Cody, a.k.a. Bobby Thompson,[1] appeals the trial court's decision to deny his postconviction petition. For the reasons that follow, we affirm.

Procedural History and Facts

{¶2} The following facts are taken from Cody's direct appeal, *State v. Thompson*, 8th Dist. Cuyahoga No. 100797, 2015-Ohio-2261.

{¶3} The case arose from an investigation regarding the United States Naval Veteran's Association ("USNVA"), a charity organized and created by a person holding himself out to be Bobby Thompson. Through the investigation, it was discovered that the USNVA was a sham, fabricated by a person named John Donald Cody, who manipulated unsuspecting individuals across the United States to donate to this charity, unlawfully procuring millions of dollars.

{¶4} In mid-2010, the state of Ohio began its investigation into the USNVA after a story was published in the St. Petersburg Times that the charity was fictitious. Through its investigation, the state revealed that Ohio residents had been solicited by various professional fundraisers contracted by USNVA to donate money to the USNVA. It was discovered that approximately $2 million

[1]After sentencing and the filing of his direct appeal but before the filing of the instant appeal, the caption in the lower case was changed to reflect that the defendant's real name is John Donald Cody a.k.a. Bobby Thompson. In this opinion, the defendant is referred to as John Donald Cody.

was solicited on behalf of the USNVA from resident-donors in the state of Ohio.

{¶5} As a result of the investigation, on October 13, 2010, "Bobby Thompson" was indicted in Cuyahoga C.P. No. CR-10-543025 on charges of engaging in a pattern of corrupt activity involving the USNVA, money laundering, and aggravated theft. In December 2010, another indictment was issued against "Bobby Thompson" in Cuyahoga C.P. No. CR-10-545577 on 22 additional charges, including engaging in a pattern of corrupt activity, aggravated theft, money laundering, tampering with records, and identity fraud.

{¶6} A warrant was subsequently issued for Cody's arrest. In April 2012, he was finally apprehended in the state of Oregon. After Cody was in custody in Ohio, a new indictment was issued against him in July 2012 in Cuyahoga C.P. No. CR-12-565050. Cody was charged with one count each of engaging in a pattern of corrupt activity pertaining to the criminal enterprise of the USNVA, complicity to commit theft, tampering with records, complicity to tamper with records, identity fraud (a felony of the second degree), and possessing criminal tools; seven counts of complicity to commit money laundering, and 11 counts of identity fraud (felonies of the fifth degree). The previous indictments issued in Case Nos. CR-10-543025 and CR-10-545577 were dismissed and the surviving indictment in Case No. CR-12-565050 ultimately was tried before a jury that heard testimony from 47 witnesses and viewed over 200 exhibits.

{¶7} At the close of evidence, the court granted Cody's renewed Crim.R.

29 motion for judgment of acquittal as it pertained to Count 24, possessing criminal tools. The court stated that the state of Ohio lacked jurisdiction to pursue this charge because the criminal tools were found in Cody's possession when he was arrested in Oregon.

{¶8} The jury returned a guilty verdict on the 23 remaining counts. After considering merger, the trial court imposed a total sentence of 28 years in prison and ordered that Cody spend every Veterans Day in solitary confinement.

{¶9} Cody filed a direct appeal, challenging the trial court's jurisdiction, the admission of certain evidence, and the court's decision to sentence him to solitary confinement. This court sua sponte ordered the parties to address an additional issue with regard to the jury instructions on Counts 13 through 23.

{¶10} While his direct appeal was pending, Cody filed a postconviction petition in the trial court. As evidentiary support, Cody attached his own two affidavits to the petition. In his petition, Cody raised five claims: (1) ineffective assistance of counsel; (2) lack of jurisdiction related to money laundering and identity theft charges; (3) the state's failure to provide full discovery; (4) issues with regard to his detention prior to and during trial; and (5) prosecutorial misconduct before and during trial.

{¶11} The state filed a memorandum contra and motion for summary judgment. The state also filed proposed findings of fact and conclusions of law. On October 15, 2014, the trial court granted the state's motion for summary

judgment and denied Cody's postconviction petition. The court subsequently adopted the state's findings of fact and conclusions of law.

{¶12} In *Thompson*, 8th Dist. Cuyahoga No. 100797, 2015-Ohio-2261, this court found, pursuant to R.C. 2901.11, that the state of Ohio did not have jurisdiction over the 11 counts of identity fraud contained in Counts 13 through 23 and vacated his convictions on those counts. This court then found that the sua sponte issue raised regarding the jury instructions given on Counts 13 through 23 was moot. This court determined that the trial court's decision to sentence him to solitary confinement each Veterans Day was contrary to law but overruled his assignment of error that challenged the admission of certain evidence. *Id.* at ¶ 29-30.

Assignments of Error

{¶13} Cody appealed the denial of his postconviction petition and raises the following nine assignments of error for our review, which will be combined when possible:

> I. The trial court abused its discretion when it ruled as to Claim No. 1, that petitioner presented insufficient cognizable evidence and insufficient applicability of the evidence to warrant post-conviction relief, and to state a constitutional claim.
>
> II. The trial court abused its discretion in denying petition Claim No. 2 for dismissal of counts 13-23 and 3-9 of the indictment on grounds of lack of jurisdiction.

III. The trial court abused its discretion in dismissing petition Claim No. 3, holding petitioner presented insufficient cognizable evidence and insufficient applicability of the evidence to warrant a hearing on postconviction relief, and failed to state a constitutional claim.

IV. The trial court abused its discretion in not holding a hearing on petitioner's claims of discrimination, disproportionality and excessivity [sic] of sentence.

V. The trial court abused its discretion in not holding a hearing on petitioner's claims of a vindictive and politically selective prosecution.

VI. The trial court abused its discretion in granting the state's motion for summary judgment.

VII. The trial court abused its discretion in applying the state's lack of credibility standards to the case.

VIII. The trial court abused its discretion in making numerous fundamental erroneous conclusions of law, which whether considered separately claim-by-claim and issue-by-issue, or as a whole as cumulative error, permeative [sic] the entire judgment of dismissal [and] require remand for correction and re-decision.

IX. The trial court abused its discretion in providing appellant no meaningful appeal given its adoption of the structuring of the [findings of fact and conclusions of law].

Postconviction Relief

{¶14} "'[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence.'" *State v. Sidibeh*, 10th Dist. Franklin No. 12AP-498, 2013-Ohio-2309, ¶ 7, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. An abuse of discretion connotes a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} Unlike a direct appeal, a petition for postconviction relief is a collateral civil attack on a criminal judgment. *State v. Easley*, 10th Dist. Franklin No. 09AP-10, 2009-Ohio-3879, ¶ 9, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). The petition is intended to reach constitutional issues that would otherwise be impossible to consider because the evidence supporting those issues was not contained in the trial court record. *Easley* at *id.* The petitioner bears the burden in a postconviction proceeding to submit evidentiary documents containing sufficient operative facts to demonstrate the substantive grounds of his or her petition. *State v. Jackson*, 64 Ohio St.2d 107, 111, 413 N.E.2d 819 (1980). Broad assertions without any demonstration of proof are insufficient. *Id.* at 110-111. A postconviction petition is not intended to provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. Franklin No. 01AP-1011, 2002-Ohio-3321, ¶ 23.

Res Judicata

{¶16} Under the doctrine of res judicata, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."

State v. Patrick, 8th Dist. Cuyahoga No. 99418, 2013-Ohio-5020, ¶ 7, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). When a petitioner seeks postconviction relief on an issue that was raised or could have been raised on direct appeal, the petition is properly denied by the application of the doctrine of res judicata. *State v. Tucker*, 8th Dist. Cuyahoga No. 84595, 2005-Ohio-109, ¶ 11, citing *State v. Edwards*, 8th Dist. Cuyahoga No. 73915, 1999 Ohio App. LEXIS 894 (Mar. 11, 1999). In order to overcome the res judicata bar, the petitioner must show, through the use of extrinsic evidence, that he or she could not have appealed the original constitutional claim based on the information in the original trial record. *State v. Combs*, 100 Ohio App.3d 90, 97-98, 652 N.E.2d 205 (1st Dist.1994). Said another way, issues properly raised in a petition for postconviction relief are only those that could not have been raised on direct appeal because the evidence supporting such issues is outside the record. *State v. Milanovich*, 42 Ohio St.2d 46, 50, 325 N.E.2d 540 (1975). Thus, a trial court may dismiss a petition on the basis of res judicata if an issue was or should have been raised on direct appeal. *State v. Dowell*, 8th Dist. Cuyahoga No. 86232, 2006-Ohio-110, ¶ 10, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶17} In his first assignment of error, Cody argues that his trial counsel was ineffective because counsel (1) refused to pursue certain witnesses that would have established that Cody was working for the CIA; and (2) did not

pursue a line of defense that Cody was medically incompetent to stand trial or assist in his defense due to beatings he received in jail.

{¶18} In its findings of fact and conclusions of law, the trial court found that the sole support for Cody's claims was contained in his own self-serving affidavits and he was unable to demonstrate that any facts existed from outside the record.

{¶19} Cody's claims that he received ineffective assistance of counsel because his trial attorney failed to pursue specific witnesses and present a certain line of defense are both claims that could have been brought on direct appeal. Although Cody argues that both of these claims would be proved by evidence outside the record, he does not show what the evidence would be. Because Cody did not raise these issues on direct appeal, he has waived those claims and they are barred by res judicata.

{¶20} In the second assignment of error, Cody claims that the trial court abused its discretion by denying his petition based on his argument that Counts 3-9 and 13-23 of the indictment should have been dismissed. Counts 13-23 were vacated on direct appeal; therefore, any argument as to them is moot.

{¶21} Counts 3-9 charged Cody with money laundering. In its findings of fact and conclusions of law, the trial court found, in part, that Cody identified no set of facts from outside the record that identified why jurisdiction and venue were not capable of being raised in his direct appeal. We agree.

{¶22} In his direct appeal, Cody raised a jurisdictional challenge as to the identity fraud counts, Counts 13 to 23. He certainly could have raised any argument with respect to jurisdiction on the money laundering convictions, Counts 3-9, in that appeal as well if he wanted to challenge the trial court's jurisdiction and venue. Because he did not, his claim is barred by res judicata.

{¶23} In the third assignment of error, Cody challenges the alleged withholding of exculpatory evidence. He claims that the state withheld military and intelligence community files on him and such actions "occurred de hors the record." He argues that because the state's actions occurred outside the record he was only able to bring the current claim in a petition for postconviction relief as opposed to direct appeal.

{¶24} The trial court disagreed and again found that the sole support for Cody's argument was contained in his own self-serving affidavit. The court determined that Cody failed to show that the state withheld any military files, files concerning Cody's relationship to any other federal agency, or other exculpatory material, and identified no set of facts from outside the record. We agree; Cody fails to support his claim that the state acted outside the record or that he was prevented from making this claim on direct appeal with more than unsupported assertions.

{¶25} During pretrial discovery, Cody made multiple discovery requests, which the state responded to. Although many of the state's responses were that

the discovery Cody requested did not exist, Cody is unable to provide any evidence that the state acted improperly.

{¶26} The issue Cody complains of could have been fairly determined without resorting to evidence outside the record; therefore, he is barred by res judicata from raising these issues in a postconviction petition.

{¶27} In light of the above, the first, second, and third assignments of error are barred by res judicata and are overruled.

Postconviction Petition Hearing

{¶28} It is well-established that a petitioner is not automatically entitled to an evidentiary hearing on a postconviction petition. *Jackson*, 64 Ohio St.2d 107, 110-113, 413 N.E.2d 819. To warrant an evidentiary hearing, the petitioner bears the initial burden of providing evidence demonstrating a cognizable claim of constitutional error. *Id.*, citing R.C. 2953.21(C). Pursuant to R.C. 2953.21(C), before granting a hearing, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings. *Id.*

{¶29} The trial court may deny the petitioner's postconviction petition without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *State v. Calhoun*, 86 Ohio St.3d

279, 714 N.E.2d 905 (1999), paragraph two of the syllabus.

{¶30} In the fourth assigned error, Cody argues that the trial court should have held a hearing on his claim that his sentence was discriminatory, disproportionate, and excessive. In his fifth assigned error, Cody argues that the trial court erred when it did not hold a hearing on his claims against the prosecutor.

{¶31} Cody provided nothing to the trial court to warrant an evidentiary hearing. All of his claims about his sentence or against the state were ones that were either presented or could have been presented on direct appeal. Because Cody failed to set forth sufficient operative facts to establish substantive grounds for relief, he was not entitled to a hearing on his petition. The fourth and fifth assignments of error are overruled.

Summary Judgment

{¶32} In the sixth assigned error, Cody claims the trial court erred in granting summary judgment in favor of the state. In the seventh assignment of error, Cody claims the trial court erred in granting summary judgment to the state without holding an evidentiary hearing to determine Cody's credibility.

{¶33} As discussed previously, the trial court did not err when it denied Cody's petition without holding a hearing. Nor did the court need to hold a hearing in order to assess the veracity of Cody's affidavits. When reviewing a postconviction petition, "a trial court should give due deference to affidavits

sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905, at paragraph one of the syllabus. When determining the credibility of supporting affidavits in postconviction relief proceedings, courts should consider all relevant factors including:

> (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial.

Id. at 285.

{¶34} The court further reasoned:

> Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Such a decision should be within the discretion of the trial court. A trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur.

Id.

{¶35} In this case, the same trial court presided over Cody's trial from the beginning through trial and sentencing. This included a large portion of time during which Cody represented himself, filed over 120 pro se motions, and had

numerous in-court appearances. Thus, the trial court had a high degree of direct contact with the petitioner and was in the best position to judge the veracity of his affidavits. We cannot find that the trial court erred in granting summary judgment without holding a hearing.

{¶36} The sixth and seventh assignments of error are overruled.

Findings of Fact and Conclusions of Law

{¶37} In the eighth and ninth assigned errors, Cody challenges the trial court's findings of fact and conclusions of law. Cody argues that the trial court erred in adopting the state's proposed findings of fact and conclusions of law verbatim. A trial court does not err when it adopts a party's proposed findings of fact and conclusions of law as its own if it has thoroughly read the document to ensure that it is completely accurate in fact and law. *State v. Williams*, 8th Dist. Cuyahoga No. 99357, 2013-Ohio-2706, ¶ 25, citing *State v. Thomas*, 8th Dist. Cuyahoga No. 87666, 2006-Ohio-6588; *see also Anderson v. Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (when a trial judge adopts proposed findings verbatim the findings are those of the court and may be reversed only if clearly erroneous).

{¶38} Civ.R. 52 provides that it is within the trial court's discretion to "require any or all of the parties to submit proposed findings of fact and conclusions of law." This court has previously held that a trial court's adoption of the findings of fact and conclusions of law submitted by the state does not, by

itself, deprive the petitioner of a meaningful review of his or her petition for postconviction relief and does not constitute error. *Williams* at *id.*, citing *Thomas* and *State v. Powell*, 90 Ohio App.3d 260, 629 N.E.2d 13 (1st Dist.1993).

{¶39} Cody has been unable to show that the trial court erred in adopting the state's proposed findings of fact and conclusions of law or that the format of the order was faulty; again Cody makes unsupported assertions in an attempt to bolster his claims.

{¶40} We find no error in the trial court's adoption of the state's proposed findings of fact and conclusions of law.[2] The eighth and ninth assigned errors are overruled.

{¶41} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

[2]We do not consider that portion of the findings of fact and conclusions of law that dealt exclusively with vacated Counts 13-23.

Appendix H

Decision of (State) Court of Appeals
on Petitioner's
"2019 Post-Conviction Relief Petition" Appeal

App. C 24(B): McCormack, Boyle & Keough
MNT 107595 : Jones, Sr., Gallagher & Boyle

Appendix H

JUL 11 2019

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

v. : Nos. 107595, 107607, and 107664

JOHN CODY, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 11, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-12-565050-A

Appearances:

Dave Yost, Ohio Attorney General, and Brad L. Tammaro, Assistant Attorney General, *for appellee.*

John Cody, *pro se.*

LARRY A. JONES, SR., J.:

{¶ 1} Pro se defendant-appellant, John Donald Cody ("Cody"), a.k.a. Bobby Thompson, appeals the trial court's decision to deny his postconviction petition. Finding no merit to the appeal, we affirm.

CR12565050-A 109489994

EXHIBIT 96

{¶ 2} In 2013, Cody was convicted of one count each of engaging in a pattern of corrupt activity, complicity to commit theft, tampering with records, complicity to tamper with records, and identity fraud; seven counts of complicity to commit money laundering, and 11 counts of identity fraud after bilking Ohio donors of approximately $2 million in a sham charity scam. The trial court imposed a total sentence of 28 years in prison and ordered that Cody spend every Veterans Day in solitary confinement.

{¶ 3} Cody filed a direct appeal. In *State v. Thompson*, 8th Dist. Cuyahoga No. 100797, 2015-Ohio-2261, this court found that the state of Ohio did not have jurisdiction over the 11 counts of identity fraud contained in Counts 13 through 23 and vacated his convictions on those counts. This court also held that the trial court's decision to sentence Cody to solitary confinement each Veterans Day was contrary to law but overruled his assignment of error that challenged the admission of certain evidence. *Id.* at ¶ 29-30.

{¶ 4} While his appeal was pending, Cody filed a postconviction petition. In his petition, Cody raised five claims: (1) ineffective assistance of counsel; (2) lack of jurisdiction related to money laundering and identity theft charges; (3) the state's failure to provide full discovery; (4) issues with regard to his detention prior to and during trial; and (5) prosecutorial misconduct before and during trial.

{¶ 5} The state filed a memorandum contra, motion for summary judgment, and proposed findings of fact and conclusions of law. The trial court

granted the state's motion for summary judgment, denying Cody's postconviction petition. The court also adopted the state's findings of fact and conclusions of law.

{¶ 6} Cody appealed the denial of his postconviction petition. *State v. Cody*, 8th Dist. Cuyahoga No. 102213, 2015-Ohio-2764. Cody raised nine assignments of error, claiming: (1) trial counsel was ineffective because counsel refused to pursue certain witnesses that would have established that Cody was working for the CIA; and did not pursue a line of defense that Cody was medically incompetent to stand trial or assist in his defense due to beatings he received in jail; (2) the trial court abused its discretion by denying his petition based on his argument that Counts 3-9 and 13-23 of the indictment should have been dismissed; (3) exculpatory evidence was withheld from him; (4) the trial court should have held a hearing on his claim that his sentence was discriminatory, disproportionate, and excessive; (5) the trial court erred when it did not hold a hearing on his claims against the prosecutor; (6) the trial court erred in granting summary judgment in favor of the state; (7) the trial court erred in granting summary judgment to the state without holding an evidentiary hearing to determine Cody's credibility; and (8) and (9) the trial court erred in adopting the state's findings of fact and conclusions of law.

{¶ 7} This court upheld the denial of his postconviction petition, finding that (1) his petition was barred by res judicata (assignments of error 1, 2, and 3); (2) Cody did not show he was entitled to a hearing on his postconviction petition (assignments of error 4 and 5); (3) the trial court did not err in granting summary

judgment without holding a hearing (assignments of error 6 and 7); and (4) the trial court did not err in adopting the state's proposed findings of fact and conclusions of law (assignments of error 8 and 9).

{¶ 8} Cody subsequently appealed this court's decision to the Ohio Supreme Court, which declined his discretionary appeal. *State v. Cody*, 143 Ohio St.3d 1501, 2015-Ohio-4468, 39 N.E.3d 1271. He also filed a petition for a writ of certiorari in the Supreme Court of the United States that was denied. *Thompson v. Ohio*, 136 S.Ct. 2023, 195 L.Ed.2d 228 (2016).

{¶ 9} In 2017, Cody filed an App.R. 26 application to reopen his appeal with this court, claiming ineffective assistance of appellate counsel. This court denied his application. *State v. Cody*, 8th Dist. Cuyahoga No. 100797, 2017-Ohio-1543. The Ohio Supreme Court and United States Supreme Court declined jurisdiction. *State v. Cody*, 150 Ohio St.3d 1411, 2017-Ohio-6964, 78 N.E.3d 910 and *Cody v. Ohio*, 138 S.Ct. 668, 199 L.Ed.2d 556 (2018).

{¶ 10} Cody also filed a complaint in federal court against 15 defendants alleging multiple causes of action, including denial of access to courts, retaliation, denial of due process, denial of equal protection, unlawful search and seizure of property, subjection to cruel and unusual punishment, violations of the Americans with Disabilities Act, and numerous state law claims. *See Cody v. Slusher*, N.D.Ohio No. 1:17-CV-00132, 2017 U.S. Dist. LEXIS 90716 (June 13, 2017). His federal case was recently dismissed without prejudice. *See Cody v. Slusher*, N.D.Ohio No. 1:17-CV-00132, (June 24, 2019).

{¶ 11} As it pertains to the instant appeal, on May 11, 2018, Cody filed a "Motion to Correct Record." The trial court denied his motion on May 15, 2018. Cody did not timely appeal the court's denial; instead he later filed a motion for leave to file a delayed appeal. We denied his motion and dismissed his appeal as untimely. *State v. Cody*, 8th Dist. Cuyahoga No. 107471. The Ohio Supreme Court declined jurisdiction. *State v. Cody*, 153 Ohio St.3d 1506, 2018-Ohio-4285, 109 N.E.3d 1261.

{¶ 12} Cody subsequently filed a "Petition to Vacate Judgment of Conviction and Sentence made 12.16.2013," which was virtually identical to his May 11, 2018 "Motion to Correct Record." The trial court denied his petition, which became the basis for Cody's notice of appeal in 8th Dist. Cuyahoga No. 107664.

{¶ 13} On June 13, 2018, Cody filed a "Motion for Leave to File (Delayed) Motion for New Trial." On July 5, 2018, Cody filed a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence," which is identical in substance to his June 13, 2018 motion for leave.

{¶ 14} Thompson filed two other notices of appeal with this court, 8th Dist. Cuyahoga Nos. 107595 and 107607. In appeal No. 107595, Cody appeals the trial court's denial of his "Motion for Leave to File (Delayed) Motion for New Trial." In appeal No. 107607, Cody appeals the trial court's denial of his "Petition to Vacate or Set Aside Judgment of Conviction or Sentence." This court consolidated the three appeals for briefing and disposition.

{¶ 15} On appeal, Thompson raises numerous assignments of error, which are difficult to decipher. For clarity, we have broken his arguments down to two

assigned errors. In the first assignment of error, Cody argues that he was not properly informed of his sentence on Count 1, engaging in a pattern of corrupt activity. In the second assignment of error, Cody argues that there is "new evidence" that is both "material" and "outcome determinative" and he should be granted a new trial and postconviction relief.

Law of the Case

{¶ 16} In his first assignment of error, Cody claims that the trial court was without jurisdiction to sentence him on Count 1, engaging in a pattern of unlawful activity; therefore his sentence is void and should be vacated. As mentioned, Cody filed a "Motion to Correct Record," on May 11, 2018, that the trial court denied. He did not timely appeal the court's decision. Instead, Cody filed a motion for leave to file a delayed appeal with this court. We denied his motion and dismissed his appeal. *Cody*, 8th Dist. Cuyahoga No. 107471, motion No. 519649 (July 25, 2018).

{¶ 17} On August 6, 2018, Cody filed a motion titled "Petition to Vacate Judgment of Conviction and Sentence made 12.16.2013," which is virtually identical to his May 11, 2018 "Motion to Correct Record." The only difference between the two motions was the cover page and a conclusory paragraph that Cody added to his August 2018 petition. On August 14, 2018, the trial court denied his petition and Cody is appealing that denial (appeal No. 107664).

{¶ 18} The law-of-the-case doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v.*

Nolan, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). The rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. *Id.* "Adverse rulings by the trial court in response to the repeated filings of substantively identical motions in no way constitutes a legitimate legal basis for a continuation of [a] properly concluded case." *State v. Hill*, 6th Dist. Lucas No. L-16-1086, 2016-Ohio-8529, ¶ 8 – 9.

{¶ 19} In addition, as discussed above, this court upheld Cody's convictions in his direct appeal (except for Counts 13 – 23). "When an appellate court affirms the convictions in an appellant's first appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them are barred." *State v. Ellis*, 8th Dist. Cuyahoga No. 105705, 2017-Ohio-8581, ¶ 11, citing *State v. Poole*, 8th Dist. Cuyahoga No. 94759, 2011-Ohio-716, ¶ 11.

{¶ 20} Because the trial court denied Cody's motion to correct the record and this court dismissed his appeal of that decision as untimely, an identical successive motion to correct the record is prohibited. Thus, the trial court did not err in denying Cody's August 6, 2018 motion to vacate his conviction and sentence.

{¶ 21} Moreover, under the doctrine of res judicata, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *State v. Patrick*, 8th Dist. Cuyahoga No. 99418, 2013-Ohio-5020, ¶ 7, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). A trial

court may dismiss a petition on the basis of res judicata if an issue was or should have been raised on direct appeal. *State v. Dowell*, 8th Dist. Cuyahoga No. 86232, 2006-Ohio-110, ¶ 10, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Even if the denial of Cody's motion was before us in a properly pled postconviction petition, Cody's claim would be barred by res judicata.

{¶ 22} In *Cody*, 8th Dist. Cuyahoga No. 102213, 2015-Ohio-2764, where this court denied his postconviction petition, Cody argued that the trial court was without jurisdiction to sentence him on Counts 3 – 9 and Counts 13 – 23. *Id.* at ¶ 20. This court noted that in his direct appeal, Cody raised a jurisdictional challenge as to the identity fraud counts, Counts 13 to 23, and stated that Cody "certainly could have raised any argument with respect to jurisdiction on the money laundering convictions, Counts 3-9, in that appeal as well if he wanted to challenge the trial court's jurisdiction and venue. Because he did not, his claim is barred by res judicata." *Id.* at ¶ 22.

{¶ 23} Likewise, Cody could have raised an argument on direct appeal with respect to Count 1, engaging in a pattern of unlawful activity. He did not; therefore, his claim is barred by res judicata.

{¶ 24} Therefore, pursuant to the law-of-the-case doctrine and res judicata, Cody's argument that his sentence on Count 1 should be vacated is barred and appeal No. 107664 is not well taken.

{¶ 25} The first assignment of error is overruled.

Motion for a New Trial and Postconviction Petition

{¶ 26} In the second assignment of error, Cody contends that the trial court erred in denying his motion for a new trial and motion for postconviction relief. As previously stated, Cody filed nearly identical motions on June 13 and July 5, 2018, both of which the trial court denied.

Motion for New Trial

{¶ 27} As it pertains to this case, Crim.R. 33(A)(2) and (A)(6) provide that a new trial may be granted on motion of the defendant based on misconduct of the prosecuting attorney or "[w]hen new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(B) provides that a motion for new trial upon the ground of newly discovered evidence must be filed within 120 days after the verdict was rendered unless "it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he [or she] must rely" within the 120-day period.

{¶ 28} A trial court's decision on a Crim.R. 33 motion for a new trial will not be reversed absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus. "A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 29} A defendant will be granted leave to file a delayed motion for new trial based on newly discovered evidence only if he or she has "demonstrate[d] by clear and convincing evidence that he [or she] was unavoidably prevented from discovering the new evidence within the time period provided by Crim.R. 33(B)." *State v. Sawyer*, 8th Dist. Cuyahoga No. 25911, 2005-Ohio-6486, ¶ 11.

> The standard of 'clear and convincing evidence' is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

State v. Gray, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, ¶ 18. Thus, the trial court could have only properly granted Cody's request for leave to file his motion for new trial if it found Cody clearly and convincingly demonstrated that he was unavoidably prevented from discovering the facts upon which he based his motion for new trial within 120 days of the verdict.

{¶ 30} In addition, a motion for a new trial based on newly discovered evidence will only be granted if the defendant shows:

> [T]hat the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Smith, 8th Dist. Cuyahoga No. 100588, 2014-Ohio-4799, ¶ 10; *State v. Barnes*, 8th Dist. Cuyahoga No. 95557, 2011-Ohio-2917, ¶ 23.

Postconviction Relief

{¶ 31} The postconviction petition filed in this case is not Cody's first postconviction petition. *See Cody*, 8th Dist. Cuyahoga No. 102213, 2015-Ohio-2764. The instant petition was filed more than four years after Cody's convictions. His petition is untimely under both the current and prior version of R.C. 2953.21.[1] R.C. 2953.23(A)(1) authorizes a trial court to address the merits of an untimely filed petition for postconviction relief only if 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.

{¶ 32} "'[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of

[1]The prior version of R.C. 2953.21, which was effective at the time of Cody's convictions in 2013, stated a postconviction petition had to be filed within 180 days "after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction." The current version states a postconviction petition has to be filed within 365 days "after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction."

discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence.'" *State v. Sidibeh*, 10th Dist. Franklin No. 12AP-498, 2013-Ohio-2309, ¶ 7, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

The trial court did not abuse its discretion in denying Cody's motions

{¶ 33} Cody submitted the following in support of his motions: (1) various statements purportedly made by the prosecutor that Cody claims show the state knew he was involved with the CIA; (2) Cody's 19-page affidavit; (3) Cody's curriculum vitae; (4) the CIA's response to Cody's Freedom of Information Act request dated January 29, 2018; (5) a 1973 redacted letter from a law firm based in Hawaii that purports to list the name "John Cody" as one of the firm's associates; (6) various transcripts and court filings; and (7) a letter from the Office of Government Information Services dated April 19, 2018, explaining the CIA's response to Cody's Freedom of Information Act request.

{¶ 34} We have reviewed Cody's motions and evidence in support of his motions. None of the documents attached to Cody's request for leave clearly and convincingly demonstrate that he was unavoidably prevented from discovering the evidence on which he relies; therefore, he was required to file his request for leave either within 120 days of the verdict (for a motion based on newly discovered evidence) or within 14 days of the verdict (for any of the other permissible reasons

enumerated in Crim.R. 33(A)). Cody's request for leave to file his motion for new trial is untimely under Crim.R. 33.

{¶35} Cody's postconviction petition is likewise untimely. Cody has not shown that he was unavoidably prevented from discovering any purported new evidence.

{¶36} Therefore, the trial court's decision to deny the untimely Crim.R. 33 motion and postconviction petition are affirmed and the second assignment of error is overruled.

{¶37} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of t[illegible]

LAT[illegible] JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)
JUL 11 2018
CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [illegible] Deputy

0816 - FOR FILING & DOCKETING (Double-sided)

In the Cuyahoga County Common Pleas Court

State of Ohio,
Plaintiff - Respondent

v.

John Cody, etc.,
Defendant - Petitioner

No. CR-12-[redacted]-A
Judge [redacted] E. Gall

FILED
APR 10 2018
Clerk of Courts
Cuyahoga County, Ohio

Petition to Vacate or Set Aside Judgment of Sentence (Timbs v. Indiana)

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EXHIBIT
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Appendix I

Petitioner's District Court Traverse (serving as his presentation of facts and law on his habeas claims by order of the magistrate judge [No. 1:18 CV 1787, Doc. 18]) showing Cody's debatability factual presentation on what his testimony would have been had he testified on the issue of outcome-determinativeness for his denial of right to testify claim claim, and for his procedural actual innocence claim, and his argument on the law of outcome-determinativeness as applied to those facts, pp. 31-54.

ORIGINAL - For Filing & Docketing

Doc. 57

In the United States District Court
Northern District of Ohio

John Cody, etc.,
Petitioner

No. 1:18 CV 1787
(Habeas Corpus)

v.

Ed Sheldon, Warden,
Respondent

Judge Pamela A. Barker
Mag. Judge Kathleen B. Burke

Petitioner's Traverse Brief

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[1] Although not part of the substantive text, a table of contents is an important part of a legal brief, because it shows the good faith effort of the author to organize his thoughts and presentation in the manner in which he did, confronted with the issues as he/she saw them, and provides an opportunity for legitimate insights into that organized thought for critics who would have organized the same material differently, or who find the author's organization or contents disjointed, incomprehensible, or even vexatious.

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I. History of the Case Pertinent to this Brief

Due to this Court's limitations upon petitioner (Doc. 18: 1381,1383; Order [non-document] 9/12/2019), Cody limits himself herein to argument/factual presentation on three constitutional claims:

(1) Ground 4 (Doc 42:1666);
(2) Ground 6 (Doc 42:1666-67), limited as follows:

> "In violation of the Defendant's rights of due process of law under the 14th and 6th Amendments pursuant to [clearly established federal law as explained by] *Gibson v. Washoe,* 290 F. 3d 1175,1188, n.9 (9th Cir. 2002) and *Alberti v. Klevenhagen*, 790 F. 2d 1220, 1224 (5th Cir. 1986), et al., and/or in violation of his rights against cruel and unusual punishment under the 8th Amendment pursuant to *Bell v. Wolfish*, 441 US 520 (1979) et al., the trial court's no contact order [JE 3.19.2013]...and other court and jail imposed conditions [of]pretrial confinement [while he was in pro se status...blocked his fundamental right to access counsel of choice pursuant to *Sullivan v. Louisiana*, et al....; and Appellate Counsel failed to raise or argue the above in violation of his *Strickland* responsibilities"; and

(3) Grounds 16/17 (Doc 42:1669) as limited to the ineffectiveness of trial defense counsel in his failure to investigate and pursue, pretrial, and his abandonment at trial of, Cody's "CIA-affiliation"-based defenses, raised especially, but not solely, in the context of Cody's state court motion for new trial/post-conviction relief ("MNT/PCRP") proceeding on a claim of newly discovered evidence of the affiliation.

Cody's convictions by the Cuyahoga county, Ohio petit jury, relevant to his wrongful detention in this action, were for engaging in one count of a pattern of corrupt activity (ORC §2923.32)("corrupt activity"); one count of complicity, theft, aggravated, by deception (ORC § 2913.02); seven counts of complicity, money laundering (ORC§ 1315.55)("money laundering"); two counts of tampering with records (ORC§ 2913.42)("tampering with records"); and one count of identity fraud (ORC § 2913.49)("identity fraud"-the acquisition, possession or use of identifiers of the "real" Bobby Thompson (Doc 43-22:8246-54); and, non-relevantly, also for eleven counts of identity fraud, those convictions having been vacated by the Ohio 8th district court of appeals, on direct appeal, *State v. Cody*, No. CA 2013-100797 (8th Dist.).

II. Standards for Habeas Review Applying Generally, to the Constitutional Claims Arising Out of the State Court App. R. 26(B) Proceeding, and Out of the State Court Motion for New Trial/Postconviction Relief Petition ("MNT/PCRP") on Evidence of Cody's CIA Affiliation; and on Procedural Defaults and Exhaustion

The only Ohio court to make rulings which arguably pertain to the Ground 4,6 and 16/17 claims was the Ohio 8th district appellate court, in Cody's App. R. 26(B) decision, *State v. Cody,* 2017-Ohio-1543 (with respect to all those claims), and in Cody's motion for new trial/post-conviction relief petition ("MNT/PCRP") – newly discovered evidence decision, *State v Cody*, 2019-Ohio-2824 (with respect to claims 16/17):

On claims arising out of Cody's App. R. 26(B) proceedings

The gist of the claims as clearly stated in Ground 4, as presented here, in what serves as Cody's original petition, is (an underlying claim of) denial of right to testify at the time of the trial court colloquy on the subject; (an underlying claim of) ineffective assistance of trial counsel at the time of the same colloquy by trial counsel invoking his own decision to not have Cody testify, in lieu of Cody's personal decision, citing to Cody's temporary physical and mental inabilities as the reason for his decision; and (two overlying claims of) appellate counsel ineffectiveness for failure to raise, in the direct appeal, both of those underlying claims, claims fairly presented for habeas exhaustion "notice " purposes to the state courts[1].

On Cody's underlying Ground 4 claim of denial of right to testify (merits argument made infra, pp.6-10), because the state court [2] "actually determined – in the context of adjudicating [an appellate counsel] ineffective assistance claim – that the underlying claim lacked merit," the habeas corpus court ignores any res judicata bar which may apply to the underlying claim,[3] and makes an independent, and irrespective-of-the- overlying-appellate-counsel claim, review of the underlying claim. *Davie v. Mitchell*, 547 F. 3d 297, at **43, and at 312 et seq. (6th Cir. 2009). Because P13 provided "little analysis on the substantive constitutional issue [of denial of right to testify]", that review is without full deference to the state court ruling; and is "a careful and independent review of the record and applicable law...to see if the decision on the underlying claim is an unreasonable application of federal law." *Davie,* id. Although *Moore v Mitchell,* 780 F. 3d 760, at 776 (6th Cir 2013), addressing habeas law, points out that Harrington V Richter, 131 S. Ct 770 (2011) rejects an expansive de novo review of a conclusory type of state court ruling (like P13), it does not upset, or overturn, *Davie, supra's* habeas law ruling for only modified deference to be provided to the state court decision in this situation. *Davie, supra's* emphasis is on the "modified" aspect of the deference, not on the "deference" side of the issue, and *Moore, supra,* provides only a dance of avoidance on *Davie's* emphasis. A logical construct that a habeas court determining hypothetical reasons for a scanty, or summary, state court decision, and then arguing those reasons with itself (see, *Moore, supra,* at 777) is not a form of what might be called "de novo" review, is a difficult one.

No state court raised any state procedural default on any of Cody's claims arising out of the App. R. 26(B) application. There is no federal procedural default present unless the state court "clearly and expressly stated that the judgment rested on a procedural bar." *Abela v. Martin,* 380 F. 3d 915,924 (6th Cir. 2004). Res judicata as a state procedural default rising to a habeas procedural bar on underlying App. R. 26(B) constitutional claims was first announced in Davie, supra, at 315. The *Davie*-based res judicata bar does not by definition apply to App. R. 26(B) overlying claims of appellate counsel ineffectiveness, however, decision on those claims often turns on whether appellate counsel did fail to raise a (posed by petitioner in an underlying) substantial, meritorious constitutional claim. *Davie,* supra, at HN 12.

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[1] See, Return Ex. 75: Doc 42-3:2807-08, "V", Doc 42-3: 2829-32; Return Ex. 79: Doc 42-3: 2968 (Prop. V), Doc 42-3: 2829-32 ("V").

[2] Doc 42:1687, *P13. ("P13").

[3] See, also, *Jones v. Houk,* 2013 US Dist. LEXIS 135662, at *30 (N.D. Ohio) (no habeas procedural default if state court made any analysis of the underlying claim's merits).

On Cody's underlying Ground 4 claim of ineffective assistance of trial counsel (merits argument made infra, pp. 10-12), fairly presented to the state courts for habeas exhaustion "notice" purposes[4], by waiving a defendant's right to testify for him, citing to his client's mental and physical inabilities, because the App. R. 26(B) state court[5] ignored the claim entirely, review de novo of the merits of that claim is to be made, and is to be made independent and irrespective of the overlying appellate counsel ineffectiveness claim, and without any res judicata bar. *Carter v. Mitchell*, 693 F. 3d 555, at HN 4 (6th Cir. 2012); *Davie*, supra; see, also, *Vance v. Scott*, 2014 US App LEXIS 13799 (6th Cir.) (where there is denial of relief, but no substantive ruling, or state court invocation of state law procedural default, legal presumption of state court adjudication of the claim on the merits occurs). See, Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 785 (2010).

Since the Ohio App. R. 26(B) court did not invoke a state procedural default, and made no actual substantive determination of Cody's underlying Ground 6 claim of the trial court's solitary confinement order/Cuyahoga county jail conditions causing denial of his right to access counsel of his choice[6], and the overlying claim of appellate counsel ineffectiveness for failure to raise the underlying claim (merits argument made infra, pp. 17), fairly presented for habeas exhaustion "notice " purposes[7], review of the underlying claim is to be made de novo, independent and irrespective of the overlying appellate counsel ineffectiveness claim, and without any res judicata bar. *Carter v. Mitchell*, 693 F. 3d 555, at HN 4 (6th Cir. 2012; *Davie*, supra.

On Cody's underlying Grounds 16/17 claim, in the App. R. 26(B) proceeding, of trial counsel ineffectiveness for failure to investigate Cody's "CIA-affiliation"-based defenses, and for the abandonment of those defenses at trial (merits argument made infra, pp. 17-18; 21-24), fairly presented for habeas exhaustion "notice" purposes, to the state courts[8], the App. R. 26(B) state court likewise ignored the claims entirely.

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[4] See, Ex 75: Doc 42-3: 2807("V"), Doc 42-3: 2829-30 (Prop. V); Ex. 79: Doc 42-3: 2989 (Prop V).

[5] Doc 42:1687, *P13.

[6] See, Doc 42:1687, *P12.

[7] See, Return Ex. 76: Doc 42-3: 2806-07, :"IV", Doc 42-3: 2827-29, "IV"; Return Ex. 79: Doc 42-3: 2967 (Prop. IV), Doc 42-3: 2989 (IV).

[8] Return Ex. 75: Doc 42-3: 2806, "II", Doc 42-3: 2819-2025, through "6" (citations inasmuch as trial counsel refused to adopt Cody's motions for Cody's listed "CIA-affiliation " defense witnesses, or to attempt to interview any CIA officials), (both inasmuch as trial counsel failed to call Cody to testify, knowing the defendant's testimony was the only way to pursue his CIA affiliation as a defense to the jury and to establish that all of Cody's purchases for his own use were made from his life-savings of working for the CIA) (merits argument made infra, pp. 17-29); Return Ex. 79: Doc 42-3: 2966 (Prop. II), Doc 42-3: 2984 ("II") (citations inasmuch as trial counsel refused to adopt Cody's motions for "CIA- affiliation" defense witnesses, or to attempt to interview any CIA officials); Doc 42-3: 2968 (Prop. V), Doc 42-3: 2989-32. See, also, Return, Doc 42:1669 arguing the Grounds 16/17 ineffectiveness claims are a reprise of claims raised prior to Cody's MNT/PCRP proceedings).

On claims 16/17 arising out of Cody's MNT/PCRP proceedings

The gist of these claims is that trial counsel was ineffective for failure to investigate and pursue Cody's "CIA-affiliation" defenses pretrial, and for his abandonment of those defenses at trial, with an emphasis absent in the presentation of the claim, supra, pp. 2-3, presented in the App. R. 26(B) proceeding, on counsel's failure to discover or present at trial, the "newly discovered "evidence of Cody's "CIA-affiliation" Cody propounded in the MNT/PCRP proceedings. That new context of these two claims changes their gravamen from the claims as raised in the App. R. 26(B) application because, the claims, here, stem from the denial of Cody's motion for new trial. See, *Franklin v. Jenkins*, 839 F. 3d 465, at HN 7 (6th Cir. 2016); *Bolan v. LaRose*, 2014 US Dist. LEXIS 140565 (N.D. Ohio 2014). In the context of that gravamen, these two intertwined claims were fairly presented for habeas exhaustion "notice" purposes, to the state courts.[9] Fair presentment, and therefore habeas exhaustion, is consummated upon the petitioner's presentment of his constitutional claim to the state highest court. Justices *of Boston Mun. Court v. Lydon*, 466 US 294, 302-03 (1984).

Although the MNT/PCRP appellate court found Cody's MNT/PCRP "untimely",[10] this was only because it found Cody was not, in a substantive sense, "unavoidably prevented" (before the expiry of a state-law based 120 days from jury verdict) from discovering the propounded evidence. Since the state court invoked "unavoidable prevention" as its sole, and only dispositive of the claim and case, ground for its untimeliness finding, but failed to "explicitly" "explain[ ] its reasons for its conclusions" relating to the 120-day time period failure, the "actual enforcement" requirement of *Maupin v. Smith*, 785 F. 2d 135,138 (6th Cir. 1986) for a habeas bar based upon a state procedural default fails. *Veliev v Warden,* 2014 US Dist. LEXIS 136517, at *27 (S.D. Ohio). Moreover, since Cody did actually comply with the "unavoidable prevention" within the time limits (see, merits analysis, infra) federal procedural bar does not attach. *Maupin*, supra. If procedural bar does attach instantly, it is excused by trial counsel ineffectiveness[11], and by miscarriage of justice ("actual innocence").[12] Actual innocence means a "more likely than not probability" (Doc 42:1676) that [including the newly propounded evidence] the state could not prove every element of the offenses charged, or that an affirmative defense, once raised, did not apply, so that no reasonable juror would have found "[the] petitioner guilty beyond a reasonable doubt, a simple outcome-determinative standard". *House v. Bell*, 547 us 518, 536-37 (2006), quoting *Schlup v. Delo*, 513 US 298, 327 (1995).

Because no state court invoked any state law procedural default; and res judicata of the underlying Grounds 4, 6 and 16/17 claims is dealt with either by a *Davie* less than full deference merits review, or by a de novo review because the state court ignored the claim, there is no federal procedural bar of any of Cody's underlying App. R. 26(B)-arising constitutional

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[9] See, Return Ex. 83,84,87, 93 (pp. 25-39; see, also, Doc 42:1663-64, nos. 5,10; Cody's MISJ to the Ohio Supreme Court in *State v. Cody,* No. 2019-1145, at its originally numbered pages 5-12,14-15 ("(B)(5)", "(B)(10)", "(B)(11)". See, also, Ex. 93, pp. 25-27 and Doc 42: 1662-63 ("2," "5," "10"), (MISJ unfiled in this action; see, Cody's request for filing, Doc 56 (extension of time to file traverse granted, but no order to include MISJ in record [non-document order, 11.30.2019: the Ohio Supreme Court, 10.15.2019, id, declined discretionary jurisdiction, without comment, on this appeal from Cody's 16/17 claims decision of the 8th district appellate court].

[10] *State v. Cody,* 2019-Ohio-2824, ¶¶34,35.

[11] *Haliym v. Mitchell,* 492 F. 3d 680, 691 (6th Cir. 2007).

[12] Coleman v. Thompson, 501 US 722, 750 (1991).

claims; and a habeas procedural bar does not apply to any of the claims of appellate counsel ineffectiveness for failure to raise the underlying constitutional claims.

Any state court ruling on a mixed question of law and fact (present in all of the App. R. 26(B)'s court rulings on Cody's claims, and in the MNT/PCRP appellate court's (dispositive to Cody's claim 16/17 therein) ruling on "unavoidable prevention" (including all ineffectiveness of counsel issues) is reviewed by a habeas court de novo, without any "clear and convincing" burden, without deference, and without any "objective unreasonableness" standard being applied. *Higgins v. Renico*, 470 F. 3d 624,629, 630 (6th Cir. 2006); *Carter v. Bell* 218 F. 3d 581 (6th Cir. 2000, followed *Floyd v. Phillips*, 90 Fed Appx 108 at *115-16 (6th Cir. 2004). The Constitution's standard for de novo review of an ineffectiveness claim is whether counsel was ineffective based upon "the totality of the circumstances." *Strickland v. Washington*, 466 US 668, 690 (1984).

"Credibility" issues involve mixed questions of law and fact because, whether (arguably relevant to Cody's claims herein) the defendant and his propounded testimony are credible is a question of fact, but is determined within the context of a conclusion of law about the credibility. Plausibility and detailed extensiveness of propounded, new projected testimony are factors intertwined with the character of the witness in determining credibility. *US v. Woodfolk*, 197 F. 3d 900, 905 (7th Cir. 1994).

Relevant to issues raised in this brief, only the App. R. 26(B) court addressed credibility with respect to Cody's "CIA-affiliation"-based defenses evidence (not to include, by definition, any of the affiliation evidence Cody raised subsequently in the MNT/PCRP proceedings)*, in its App. R. 26(B) decision, supra, ¶¶ 8,9; the court's language lacks precision as to what it is saying about lack of credibility, although its comments are explicitly limited to Cody's projections of what CIA officers who knew him would say if they testified, and what the Navy group's website would show, misunderstanding Cody's projections even on those subjects, and probably follow from the State's continuing and deliberate misrepresentation that Cody's CIA-affiliation theory was that his affiliation justified the alleged theft, instead of the actual theory that no theft occurred because (a) unaccounted for funds raised went, in cash, both as payments to foreign leaders to secure the (failed) substitution of military personnel from their countries for front-line US combat personnel in the global war on terror, the classified CIA/White House purposes (made totally in synchronization with the Navy group's publicly stated purposes and solicitations made without revealing that state secret), the secret that is the reason the State of Ohio continues to stonewall the pertinent question any reasonable juror would ask in determining the credibility of any of Cody's projected testimony or evidence, of "why this Navy veterans case has not been prosecuted in the federal court system?"; and (b) unaccounted for funds also went to benefit payments to (mostly homeless) US veterans, including both rehabilitative and simply comfort purposes; and that (c) payments for any personal use of, or personal benefit to, Cody, were made from his personal retained earnings from working for the CIA, primarily as a non-official cover operations officer for, as of 2008, 41 years; and that (d) CIA assigned use of pseudonymic identities in any capacity was well within the CIA's lawful mandate found in the National Security Act of 1947, to "protect intelligence sources and methods."

* Or any of the evidence of such found in Cody's actual innocence affidavit found in this habeas traverse, because none of any of this was part of the trial record.

Pertinent to a number of issues in this brief, Cody raises the subject of what his projected testimony, and evidence at a second trial would be. Although neither the App. R. 26(B) nor the MNT/PCRP state courts made any "overwhelming evidence" at the first trial conclusion, any habeas consideration of "overwhelming evidence" at a first trial contra such petitioner projections is made de novo, independent of, and without deference to, any state court ruling, without any "clear and convincing" burden, and without any objectively unreasonable standard applied, to see whether the changes the defendant proposes would offset the outcome. *Hines v. Kelly,* 2009 US Dist. LEXIS 76348, at *11-12 (N.D. Ohio). "Outcome-determinativeness" of new evidence is considered looking forward, not backwards. *In re Air Crash*, 701 F. 2d 1189, at n. 8 (7th Cir. 1993).



Habeas review cases involving newly proffered evidence issues involve a standard of determining whether the non-inclusion of the proffered evidence "had substantial and egregious...influence in determining the jury's verdict." Brecht v Abrahamson, 507 US 619, 637-38 (1993). See, also, US v Moran, 493 F 3d 1002,1014 (9th Cir 2007) (non-inclusion of testimony not harmless because it went to the heart of defendant's good faith defense).

Procedural default issues of any sort are likewise determined de novo. *Abela v. Martin,* supra, at 422, followed Alexander v. Smith, 311 Fed Appx 875 (6th Cir 2009). Since a habeas procedural default issue, such as excuse involving the proffer of new evidence, or new testimony, for a second trial, is not a §2254(d)(1) merits issue, the petitioner is not limited by *Cullen v. Pinholster*, 563 US 170 (2011) to the record already before the state courts, or state court. Id., at 181.

Moreover, all "claims that were not adjudicated on the merits in state court" are not affected by the ruling in *Pinholster* on limitations to the record before the state courts. See, *Pinholster*, 563 US at 186, citing *Williams v Taylor*, 529 US 420 (2000).

Miscarriage of justice, proffered in a habeas proceeding as a gateway into a separate constitutional claim, constitutes a habeas exclusive proffer. See, *Herrera v Collins*, infra. Miscarriage was not, also, in *Cody*'s case, a claim adjudicated on the merits before the state courts. It is only where the "claim has been adjudicated on the merits by the state court" that "evidence introduced [outside what was introduced in the state court proceeding] has no bearing on the §2254(d)(1) review." *Pinholster*, supra, at 180, 185.

Finally, Respondent's discourse (Doc 42: 1670-77) on procedural default strongly implies an erroneous promotion of the concept contra, or a lack of cognizance that, a habeas procedural bar does not occur simply because a state court has ruled that a state procedural default has occurred. See, *Dietke v. Haley,* 541 US 386,388 (2004). The petitioner may

always establish compliance with the state law rule; certain standards established by federal law for the state law rule have to be met to preliminarily reach federal default; and excuses for federal default abound. *Coleman v. Thompson*, 501 US 722,750 (1991); *Maupin v. Smith.*

III. Merits Discussion

(A) Ground 4 Denial of Cody's Right to Testify

(1) History of the Issue

Paragraph 13 ("P13") of the App. R. 26(B) appellate court's decision contains the only, and full, analysis of and conclusions on the state courts on the subject, the denial of Cody's right to testify, analysis and conclusions adopted by reference as Respondent's argument. See. Doc 42:1687.

The trial court initiated a colloquy with the defendant on the subject of his right to testify. Since a colloquy did occur, precedent on whether such a colloquy should have occurred is inapposite, as is precedent where no alert of the defendant's desire to testify is present, and the defendant does not make the claim of such desire until sometime during the appellate process, collateral challenge or in the habeas itself (Doc 43-2:8037,10).

For the colloquy, Cody had just come off a suicide attempt in a Cuyahoga county justice center holding cell (Doc 43-21:7995, 12-15), proximately motivated by Cody's inability to bear the conditions of the 10th floor jail restrictive housing unit, in approximately seven months of solitary, no contact confinement (Doc 42-3: 2826-28). There were no contradictions either in the record, or in P13, of these conditions, or their applicability to Cody at the time. The existence of the jail conditions Cody cites as applying to him, as well as others applicable to Cody, were supported in the US Marshal's Quality Assurance Report issued on jail conditions, November 1, 2018, pp. 2-3, 23; violations of Marshal's recommendations at E.7.10C, E.7.11, E.7.13, E.7.14, E.7.16, E.7.16, E.7.17, E.7.20, E.7.23, E.7.24, E.7.29, E.7.30, E.7.31, E.7.33, E.7. 34, E.7.36, E.7.37, E.7.38, and E.7.40; the Report also noting the conditions were inmate suicide related, id., p.2. Cody was in the 10th floor RHU [redacted] in the Report, p.38. This report qualifies for judicial notice in this case under FRE 201(b)(2), in support of Cody's allegations that these jail conditions were external [redacted] government imposed conditions relevant to his behavior during the colloquy, and petitioner requests this Court take that notice pursuant to FRE 201(d).

During the attempt, after Cody had previously self-inflicted a serious head injury (Doc 43-21:7995, 12-15), a jail guard had slammed Cody's head into the cell's concrete wall, causing a visible wound to the forehead[13]. Jail guards thrust Cody into the courtroom for the colloquy, having dressed him in disarray, and having refused him a reasonable

[13] See, Doc 42-3: 2845; Doc 42-3: 3267; the App. R. 26(B) court's decision P10, P11, P13, P14, P16 and P 23 correctly indicate the appellate court had the full trial court transcript before it.

opportunity to comb his hair, or have it cut, and had taken his reading glasses, placing an impossibility on him reading.[14]

The trial court was alerted four times, prior to or during its "colloquy" on the subject, that Cody desired to testify: (1) Defense counsel opening statement, Tr., Doc 43-21:892, 9-13; (2) the court indicating defense counsel has also related off record Cody wished to testify (Tr., 43-21: 8037, 16-17: (3) during the colloquy, defense counsel stating to the court, "[M]y client indicates he wishes to answer to his complaint, " Tr., Doc 43-21: 8038, 12-14; (4) Defense counsel: "[H]e is reiterating the same. He wishes to answer to all the charges," Tr., Doc 43-21: 8039, 5-7.

P13 ignores these accurate, truthful and lawful and properly made statements of counsel that Cody desired to testify, and that, it was Cody himself saying these things, that he desired to testify, not counsel.

The trial court then erroneously concluded[15] that "I can perhaps infer from your silence that you do not wish to testify," following that error with the egregious suggestion that that is what Cody should do, "...as is your Constitutional Right to remain silent, and proceed accordingly, if that is what you'd like to do,"[16] both statements also ignored by P13.

The trial court continued with a last question to Cody, premising it with the words, "[I]f you would like to testify," Cody could make himself more presentable. Answering with somewhat incoherent grammar ("I would like to put myself in physical appearance state (sic)"), Cody nevertheless responded affirmatively to the predicate of the questioning, stating he also wanted his glasses returned {so that he could read the numerous exhibits which would be required during his testimony], noticing the trial court, now, five times, that he desired to testify, stating at the same time he also wanted to consult with counsel first.[17]After Cody consults with counsel, but still without his reading glasses, and having been refused the ability to repair himself by justice center staff, and after the trial court admits Cody did not personally, affirmatively waive his right to testify[18], the trial court ignores Cody further, and turns to defense counsel[19], who then waives Cody's right to testify, citing Cody's mental and physical impediments. The trial court complies with, and accepts, counsel's waiver, and announced decision to rest, and, rough step, immediately moves on with the proceedings.[20]

(2) Argument on the Issue

Cody's failure to answer the trial court during colloquy questions posed to him directly was justified by his reliance on constitutional law clearly established by the US Supreme Court that his attorney speaks for him in the courtroom,

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[14] See, Doc 42-3: 2845.
[15] See, *Carnley v. Cochran*, 269 US 506, 516 (1962)
[16] Tr., Doc 43-21: 8039,19-24.
[17] Tr., Doc 43-21: 8040, 18-8041, 12.
[18] Tr., Doc 43-21: 8044, 14-18.
[19] Tr., Doc 43-21: 8046, 1-2.
[20] Tr., Doc 43-21: 8046, 1-2.

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but that his attorney may not waive the right; nor may waiver be presumed, and therefore achieved, by the trial court, from the defendant's inaction to affirmatively issue the waiver himself[21] ; and by the following additional, relevant events of record in the case, personally creating a mental sandbagging effect on Cody, if juxtaposed with any erroneous holding that Cody had an obligation to personally affirmatively speak to assert his right to testify, each event ignored by P13:

(1) The trial court telling Cody "[Y]ou don't have to answer any of the questions I may impose upon you." Tr., Doc 43-1: 3681, 8-10:

(2) The trial court lecturing Cody that he was speaking improperly since he had counsel; and in striking anything Cody desired to say to move the court, pro se: "...[W]e assigned counsel to represent you...which I believe is sufficient to support your Constitutional Rights under the Sixth Amendment. And we're going to remain in that mode throughout this trial...." Tr., Doc 43-1: 3671, 6-16;

(3) The trial court lecturing Cody that he was not going to be permitted to discharge defense counsel Patituce. Tr., Doc 43-1: 3684, 21-24; 43-1: 3692, 3-9;

(4) The trial court explicitly warning Cody not to interrupt the speech of the court. Tr., Doc 43-1: 3686, 3-3687, 9;

(5) After the trial court ignores Cody after Cody is returned to the courtroom after his "repair" session, and begins to address defense counsel on waiver[22], and defense counsel, changing his sentence mode and person, from '**Cody says**...he does not waive' to "**I do believe**" [or] **"I certainly believe"** he will not testify because **"I believe"** he physically and mentally cannot[23] [Emphasis added], and announces the defense is resting[24], the trial court complies with counsel's invalid waiver, and moves on, immediately in its speech, to proceed with the trial without Cody's testimony, and without [25]further opportunity for Cody to object.

The application of these facts, along with Cody's five prior statements to the court that he desired to testify, to the circumstances of the colloquy, and the waiver issues, show factual justification for Cody "not [further] objecting to these proceedings."

Cody did not waive. The trial court made no finding Cody did waive, at any point. Counsel cannot waive for him. The trial court's compliance with counsel's unlawful waiver constitutes unlawful waiver by the trial court. *US v. Teague*, 953 F 2d 1525, 1532 (11th Cir. 1992), citing *Harris v. N.Y.*, 401 US 222, 225 (1971).

Cody had no legal obligation, in order not to constitute waiver, to personally object to defense counsel waiving his right to testify, and resting. *Wood v. Sternes*, 2003 US App LEXIS 13688(7th Cir. 2003), citing *Rock v. Arkansas*, 483 US 44, 52-53 (1987). P13's conclusion, "Cody did not [further] object to these proceedings [as to (5) above]," constitutes a dispositive decision that Cody had a duty to personally object, at that point, which is either contrary to, or

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[21] See, *Carnley v Cochran*, id; *Barker v. Wingo*, 407 US 514, 525 (1972).
[22] Tr., Doc 43-12: 8041, 11-13.
[23] Tr., Doc 43-12: 8045, 4-6.
[24] Tr., Doc 43-12: 8045, 12-25.
[25] Tr., Doc 43-21: 8046, 1-2.

involves an unreasonable application of clearly established federal law, as determined by the US Supreme Court in *Carnley*, supra (as explained by *Teague*, supra, citing *Harris*, supra; *Barker*, supra; *Rock*, supra; and *Williams v. Taylor*, 529 US 362, 405 (2000), that the defendant's right to testify cannot be waived by defense counsel, or by the trial court; see, also, in support, *Marquez v US*, 684 Fed Appx 843, 866(11th Cir. 2017); *US v. Ortiz*, 317 US App D.C. 262, at *11 (DC Cir. 1996); *Underwood v. Clark*, 939 F. 2d 473, 476 (7th Cir. 1991).

The decision in P13 that Cody may have had a duty to object at the point of defense counsel waiving his right and answering that the defense is resting is also a decision based on an unreasonable determination of the facts concerning the waiver because it overlooked the actual relevant circumstances of record Cody has mentioned relating to waiver. Overlooking relevant evidence in making mixed findings of law and fact, even if the state appellate court made an adequate factual presentation and employed an adequate procedure for making the determination, makes the resulting determination substantively unreasonable. *Brumfield v. Cain*, 135 S. Ct. 2269, 2273, 2277-79 (2005); *Miller-El v. Dretke*, 545 US 231, 240 (2005); *Wiggins v Smith*, 539 US 510, 528 (2003); *Miller-El v. Cockrell*, 537 US 322, 340, 346 (2003); *Heil v. Anderson*, 881 F. 3d 483, 501 (6th Cir. 2018); *Rice v. White*, 660 F. 3d 242, 257 (6th Cir. 2011), cert. den. 567 US 914 (2012); see, also Williams v Taylor, supra, 529 US at 405 ("unreasonable application" if decision extends legal principle to a new context).

P13 also constitutes a decision either contrary to, or involving an unreasonable application of the clearly established federal law (28 USC §2254(d)(1)) that a waiver of this type of fundamental right[26] cannot be presumed from the defendant's silence or inaction (even if ambiguous) in not affirmatively and personally asserting the waiver.[27] P13 constituted an unreasonable determination of facts in light of the App. R. 26(B) state court ignoring: the five statements Cody proffered that he desired to testify (pp. 7-8); the trial court's promotion of the idea to Cody that he not testify, (p. 9); the trial court's warnings to Cody not to speak pro se, id.; the trial court telling Cody he could not discharge Patituce , id.; and its telling Cody he did not have to answer any of the court's questions, id.; Cody's head injuries (p. 7); and the trial court's moving the proceedings immediately after Patituce's wrongful waiver, without giving Cody an opportunity to object (p. 9), all dispositive evidence before the state court. See, 28 USC § 2254(d)(2).[28]

Finally, those same seven unique circumstances, establishing an unreasonable determination of the facts in evidence before the state court, also establish a rebuttal to any evidentiary presumption[29] made at law, which may exist in federal law (with respect to federal criminal trials), respecting a waiver, by Cody personally, by his not objecting affirmatively at the time of defense counsel's waiver, or counsel's announcement of resting.

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[26] See, *Faretta v. Calif.*, 422 US 806, 819-20, n. 15 (1975).

[27] See, *Carnley, Barker*, supra.

[28] See, also, *Brumsfield, Dretke, Wiggins, Cockrell, Heil, Rice , Hill*, supra.

[29] Such a presumption would be rebuttable pursuant to FRE 301.

(B) Ground 4 Ineffectiveness of Trial Counsel

Cody's constitutional claim in Ground 4, that "The Defendant was denied his right under the 6th and 14th Amendment to the Constitution to testify on his own behalf at trial...by the forced or unforced ineffectiveness of trial counsel....", was ignored entirely by P13. A merits review, de novo, is mandated.

Patituce was ineffective because he waived Cody's right to testify (without any evidence of Cody's direction, or even consent, which was, in fact, never given), stating, upon the promotion of the idea by the trial court, that counsel's personal reason for making counsel's decision to waive was that he believed Cody, in the state he was in at the time of the colloquy, did not have the mental or physical ability to assist his counsel during that testimony, a temporary incapacity justifying, at most, a request for a continuance, but, under no circumstances, a waiver of Cody's right.

The unique circumstances of Patituce's waiver, in a unique case in which the defendant, from pre-trial to trial to postconviction collateral challenge after challenge, asserted he had a lot to say in full defense to the charges made, but was never given an opportunity, no less a fair opportunity to do so, to even get one bite at the apple, are not that Patituce said Cody told him to waive, but that he, Patituce, was making the waiver because **he** believed Cody could not mentally or physically assist Patituce during direct or cross-examination (Doc 43-21: 8045, 12-18; see, also Doc 43-21:7995, 12-15).

A physically or mentally incompetent defendant cannot be tried or convicted. Drope v. Missouri, 420 US 162, 178-83 (1975). [redacted] That holding [redacted] rules out a legitimate tactical decision, or a reasonable decision, by counsel for, even if Cody had told Patituce he was not physically able to currently assist Patituce on direct or cross-examination), the only remedy permissible under Ohio law for such a disability is a continuance until the disability is cleared. O.R.C. §2945.37(G), §2945.371(G)(3)(a). It is hard put, additionally, for a reviewing court to conclude that, if Cody was too physically and mentally incompetent to proceed with testimony [redacted] at that point, that he was nevertheless physically and mentally competent to affirmatively object to what defense counsel was saying in waiving his right to testify. The trial court promoted, and then accepted, the theory that Cody had mental deficiencies preventing his testimony, Doc. 43-21: 8045, 1-18.

The denial of Cody's right to testify by Patituce's waiver, an ineffectiveness coupled with his cumulated errors, incongruous by any norm, of promising the jury Cody was going to testify on his intelligence agency/ White House affiliation-based defenses (Doc 43-5:4502,9-13), and then not calling Cody[30]; his failure to investigate or proceed upon any of the CIA, intelligence community and White House officer and official witnesses Cody, while pro se, had identified and moved for subpoenas *sub duces tecum* on (Docket sheet, State v. Cody, CR-12-565050A, 2.14.2013, 3.6.2013, 3.15.2013, 7.18.2013, 7.26.2013, 8.1.2013; see, Cody's motion for inclusion in the record in this habeas case

[30] By itself, found to be ineffective assistance of counsel requiring reversal without any further showing of prejudice. See, *Ouber v. Guarino,* 293 F. 3d 19, 35-36 (1st Cir. 2002).

of these trial court motions, denied by order, Doc 52[non-document]); of Patituce telling the trial court three times during the colloquy, Cody desired to testify (Doc 43-21:8037, 16-17; Doc 43-21: 8038, 12-14; Doc 43-21: 8039, 5-7), and then telling the trial court he was waiving Cody's right; of his failure to request Cody's files from the CIA (see, Doc 42-3: 3191(Cody MNT/PCRP affidavit, ¶44)); of his failure to interview Secret Service personnel present at Cody's photographed meetings with President George W. Bush at the White House, a failure Patituce himself raised at trial[31]; of his failure to subpoena White House logs[32]; of his failure to even attempt to interview CIA officials in Washington[33]; and of his abandonment of Cody's CIA/White House-affiliation-based defenses by producing no witnesses, no defense case-in-chief[34], and by waiving any closing argument[35], was incongruous by any reasonable norm.

Moreover, the incongruity of Patituce promoting Cody's CIA-White House affiliation as the defenses in the case, specifically promising Cody would testify on the defenses, and then failing to call any witnesses, or make any closing argument, an "abandonment" of a promised, relevant and material defense, constitutes the exact reasoning of the *Ouber* court, supra, for finding ineffectiveness without requiring further prejudice (Claim 17). Moreover, the fact counsel promoted the CIA/White House affiliation as the material defense in his opening statement (as opposed to a counsel who ignored his client's strategically chosen defense entirely because he believed it was founded on falsehoods)[36], established his obligation to have investigated those defenses (Claim 16), and "his recognized duty to investigate and subpoena" the CIA/White House witnesses Cody named of record[37], and his failure as to the latter investigations establish a separate incongruity which predicated the greater, and even crazier, *Ouber* failure to meet an objective standard of reasonableness in his trial performance.[38]

Moreover, Counsel's ignorance of the law regarding his waiving Cody's right to testify, and regarding his not seeking a continuance as the only remedy constitutionally permissible for a defendant counsel adjudges mentally and/or physically unable to assist counsel at trial, coupled with a failure to pursue defense pre-trial discovery of facts supporting a defense, fit squarely within the holding of *Kimmelman v. Morrison*, 477 US 365, 385 (1986) for ineffectiveness, and prejudice.

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[31] Tr., Doc 43-5: 4500,25-4501, 3 (" [S]eemed like everyone in the room knew who he was, that he got into a joking, kind of punching match with President Bush, and the secret service, they didn't do a thing").

[32] Id.

[33] Doc 42-3: 3191 (Cody MNT/PCRP affidavit, ¶44).

[34] Doc 43-21: 8045, 20-25; Doc 43-21: 8090, 20-21.

[35] Respondent admits that abandonment. Doc 42:1681 ("Trial counsel[ ] [made an] apparent refusal to pursue an irrelevant CIA Agent defense at trial...."). See; also, Doc 42-2:2623, for the first appearance of record of the State's consistent admission Patituce abandoned all CIA-affiliation based defenses at trial; and Doc 43-22: 8234, 23-25 to 8235, 1.

[36] See Anderson v. Calderon, 232 . . 3d 1053, 1095 (9th Cir. 2000).

[37] See, Caldwell v. Lewis, 2011 US App LEXIS 5380 (6th Cir). Witnesses who, or evidence which, would support the credibility of a defendant's testimony, or support his claim of lack of specific intent to commit the crime, are crucial witnesses, or is crucial evidence, requiring investigation. *Ramirez v. Berghuis,* 490 F. 3d 482, 483-91 (6th Cir. 2007) (Failure to investigate witnesses who might have undermined a key element of proof was ineffective (see, infra, pp. 47-53, on relevance and materiality of Cody's CIA/White House affiliation).

[38] See, *Strickland v. Washington*, 466 US at 687-88(1984).

The claims of trial counsel's ineffectiveness instantly having merit, and also meeting the *Cronic* and *Brecht* tests for error justifying new trial without a showing of further prejudice, appellate counsel's ineffectiveness in failing to raise the claims on direct appeal is established, under *Davie*'s holding, supra, at 312 et seq., of a permissible finding of appellate counsel's ineffectiveness for failure to raise a meritorious claim, and for Maupin cause and prejudice, if any habeas procedural bar is asserted on this claim, excusing such a bar. In the bricfest of encounters (see, Doc 43-21: 8041, 18-19) allowed by Patituce, Cody, in fact, told Patituce affirmatively, he wanted to testify, and gave Patituce no authority to waive his right to testify, for any reason, or to make any argument based upon Cody's head wound, for Cody not testifying (Cody's testimony here made permissible, even considering *Pinholster*, since it is on a procedural bar excuse issue; see, §1746 declaration attached).

(C) Ground 6 Denial of Right to Access Counsel of Choice

Cody was denied the right to access and choose counsel of his choice during the period he represented himself, and thereafter, March, 2013 through, for the sake of Cody voluntarily limiting his argument, beginning of trial, when he desired to, and attempted to, exercise that right, by reason of the trial court's no contact order placing him in solitary confinement.

Cody was placed in solitary confinement in the Cuyahoga county jail by the trial court, at the near outset of his self-representation, with an order prohibiting him from any contact with the outside world.

The effect of such an order is noted by the Quality Assurance review of the Cuyahoga county corrections center performed by the US Marshal, N.D. Ohio, published November 1, 2018, at its pp. 2, 50-51, and Cody requests this Court take judicial notice of that review pursuant to FRE 201.

When he attempted to contact an outside counsel for retained representation in CR-12-565050A, he was apprehended by jail authorities, his writing request which he had smuggled to another inmate in the RHU housing area (by smuggling the note under the door of the inmate's different cell), was seized, and he was placed in, and given, even more punitive conditions than he has described above, still in the No Contact area of the jail's Restrictive Housing Unit. These facts were before the App. R. 26(B) court. Doc 42-3: 2827, "Assignment IV," ¶¶1, 2, 3).

The right to the defendant's act of choosing counsel of choice, his right to engage in the personal process of selection of a retained, non-appointed attorney, is structural and its denial requires no showing of further prejudice for reversal. *US v. Gonzalez-Lopez*, 548 US 140, 150 (2006). *Tolliver v. Dallman*, 1995 US App LEXIS 15398, at HN 3 (6th Cir.)[39] acted as a precursor to *Gonzalez-Lopez'* holding, in this circuit, as did *Lemaster v. Ohio*:

[39] *Wheat v US*, 486 US 153 (1988), on the other hand, holds simply that the right does not extend to a demanded appointment of a lawyer (by name) the defendant cannot afford.

"[A] Defendant's Sixth Amendment right includes the right...to have a reasonable opportunity to select and be represented by chosen counsel, and the right to a preparation period sufficient to assure minimum quality counsel." Lemaster v. *Ohio*, 110 F. Supp. 754 (S.D. Ohio 2000)



"[I]f a defendant in a criminal case desires to hire his own counsel [in Cody's case, see Docket Entry, Defendant's motion, CR-12-565050A, 7.26.2013, et al., request made by petitioner Cody for inclusion in the habeas record, Doc 52, denied. Court order [non-document, 9.12.2019], in order that the object of the Sixth Amendment be met, such defendant must have a fair opportunity and reasonable time to employ counsel of his own choosing." *US v. Johnston,* 318 F. 2d 288 (6th Cir. 1963); see, also, *Chandler v. Fretag*, 348 US 3 (1984).

"An element of the right to counsel is the right of a defendant who does not require appointed counsel to choose who will represent him." *Cobb v. Warden,* 2012 US App LEXIS 4426, at HN 8 (6th Cir).

The standards for determination of the constitutional violation instantly derives from federal law clearly established by US Supreme Court precedent. That precedent is *Gonzalez-Lopez*, supra, which makes no mention of a defendant's impecuniousness as an excuse pursuant to the Constitution for denying the defendant the right to engage in the process of selection of a retained counsel. The right in *Gonzalez-Lopez* is underpinned by *Powell v. Alabama,* 287 US 45, 53 (1932) (" [A] defendant should be afforded a fair opportunity to secure counsel of his own choice") and, indeed, *Gideon v. Wainwright,* 372 US 335, 339 (1963), the other major underpinning for *Gonzalez-Lopez'* expansion from right to counsel into the area of the right to the opportunity of choosing counsel, specifically rejected the proposition that denial of counsel "is to be tested by...the totality of facts;" where a denial of the 6th Amendment right occurs, the Constitution mandates automatic reversal. Nevertheless, impecuniousness may be raised, as a novel matter, as somehow constitutionally barring the free activity of such a process of choosing, for those who are indigent. The following occurrences make any reading into *Gonzalez-Lopez* of an exception to the right to access counsel of choice based upon impecuniousness inapplicable instantly, and also evidence Cody made no voluntary waiver of, or statement indicating he did not desire, outside counsel:

1. No motion for determination of Cody's indigency was ever filed by the State or by the defendant. Docket Entries, CA-12-565050A, throughout. The defendant never asked the trial court to find him indigent; and never affirmatively claimed to be indigent before the trial court.
2. No State v. Gipson, 1998-Ohio-659 (Oh. S. Ct) sentencing affidavit of indigency was ever filed on the defendant's behalf. Id.
3. No examination of the defendant ever took place in CR-12-565050A as to indigency. Id. Indeed, *US v. Krzyske*, 836 F. 2d 1013, 1018 (6th Cir 1988) holds that a defendant must affirmatively demonstrate indigence

by personally supplying requested financial information before the legal requirement for appointed counsel is effectuated.

4. No order of forfeiture pre-trial took place as to any property or money seized in evidence from the Defendant's possession; or as to any other property or money Defendant may have had, or had access to.
5. Defendant was promoted in this nationally publicized case pre-trial, and by Plaintiff at the sentencing phase of trial, as sitting on millions of dollars as of the time of his arrest, and during pre-trial (Doc 42-3:3265, 15-16, 22-23). Even if the Defendant had been found to be without funds, many Cuyahoga county attorneys would have welcomed the opportunity to take on the trial case, based on the defendant's I.O.U.'s, or for the public exposure.
6. Defendant was initially appointed Mark Stanton, Esq. to represent him on two superseded indictments. Defendant had confidence in Mr. Stanton. Mr. Stanton withdrew, and Joseph Patituce, Esq. was appointed to represent him (See, Doc 43-2: 3916, 23-3917, 2; 3917, 17, 20-22) (all the cases were being "handled at the same point in time"). Cody's lack of confidence in Patituce's ability to represent a strategy based upon Cody's CIA/White House affiliation defenses grew exponentially with every meeting with Patituce (See, Doc 43-1: 3684, 21-24; Doc 43-2: 3953, 2-3). Cody's initial approach was to attempt to discharge Patituce (Doc 43-2: 3953, 2-3) and represent himself, but only with the appointment of subordinate co-counsel, or proactive advisory counsel (other than Patituce), and one or more investigators to develop evidence on the CIA/White House affiliation defenses, something the trial court would not allow (See, Doc 43-1: 3692, 3-5, 10-11; 3695, 13-15; 3705: 23-3706,4; Doc 43-2: 3953, 2-3 (4. 22. 2013, one month after the no contact order took effect)). Because of that denial, and the denial of any discharge of Patituce, Cody made the decision to contact outside counsel, but that desire was thereupon thwarted by the 3.19.2013 trial court's no contact/solitary confinement order (effective through date of sentencing, 12.17.2013). Only the denial of any opportunity to choose outside counsel; the denial of any discharge of Patituce, supra; having to conduct trial proceedings pro se in handcuffs and shackles (Doc 43-1: 3748, 22-3752, 2); the threat of having to conduct further trial proceedings pro se in handcuffs and shackles (Doc 43-1: 3748, 22- 3752, 2); the denial of the appointment of proactive advisory counsel (other than Patituce), supra, and of investigators, supra; and of subpoenas for defense witnesses (Doc 43-2: 3884, 16-19); the denial of any documentary State's discovery (600,000 pages of it) which the defendant, pro se, could have used at trial (Doc 43-2: 3884, 5 – 3885, 10), [the ordered by the trial court sandbagging of the pro se defendant was egregious; Cody was told if he continued pro se, he could not use any of the State's 600,000 discovery provided documents at trial (Doc 43-2: 3884, 20 – 3885, 10); if he surrendered to use of Patituce, Cody knew Patituce would not seek any documents of a CIA/White House affiliation (Doc 42-3: 3051 (Cody MNT affidavit, ¶ 44)); the no contact order prohibited Cody from contacting anybody, no less the CIA, to obtain documentary evidence; and prohibited him from seeking outside counsel of his choice who would do what Patituce refused to do], caused Cody to "turn the case" back over to Patituce on 8.26. 2013. That was not a freely made volitional act, and neither it, nor any other act Cody took with

respect to his wishes on counsel, ever implied, no less affirmatively stated, a desire not to pursue retaining, or not to retain, outside counsel of choice.

7. Defendant was barred from contacting existing family members to request funds for an attorney to represent him at trial, which they could have provided, or from raising a defense fund online, by the 3.19.2013 JE.
8. Defendant moved the trial court, complaining the no contact order was barring him from contacting outside counsel to represent him. See. JEs, CR-12-565050A, Doc 42-4: 3555, JE 5/31/2013: "Motion to Vacate [No Contact] Order" [so that defendant could access prospective counsel of choice; Doc 42-4: 3555, JE 6/12/2013: "Defense…Other Motions;" Doc 42-4: 3554, JE 7/26/2013: "Defendant's Continuing Objections of Record to Retain Outside Counsel." See, also, Petitioner's motion (Doc 52) to include the content of the above motions in the habeas record, denied, Order [non-document], 9.12.2019. Regardless whether these motions are included in the habeas record or not, the title of the defendant's 7/26/2013 motion, by itself, shows the petitioner was filing "continuing objections" to the no contact order barring him from access to counsel he wished to retain.
9. There was plenty of time before trial began for the Defendant to have acquired chosen counsel. This is not a case of a defendant making such a request a day or week before trial.
10. On becoming counsel pro se, Cody specifically refused to sign the waiver document presented to him by the trial court, [redacted] which said "I hereby waive my constitutionally guaranteed right to counsel…." (Doc 43-2: 3879, 24-3881, 9).

Apr. 22, 2013

Finally, on this putative point of impecuniousness, the correct federal constitutional guarantee under the equal protection clauses, with regard to indigency of a defendant seeking outside counsel of choice, is to be found in *State v. Miller*, 2015-Ohio-279 (Summit cnty):

"The 6th Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom the defendant can afford to hire; **or who is willing to represent the defendant even though he is without funds**. A court commits structural error when it wrongfully denies a defendant his counsel of choice, so a defendant need not demonstrate further prejudice." Id, at HN 1. [Emphasis added].

The claim (Habeas Ground 6) arose before the App. R. 26(B) appellate court. The court where the claim arose was fairly put on notice of, substantively, what the claim was; likewise, the state supreme court was put on such notice. See, supra, p.3, n. 7.

The claim was ignored both at law, and factually, entirely, by the appellate court, in its opinion, choosing to focus entirely on a separate "solitary confinement" issue, stated by the state court, as to whether Cody "was going insane" by reason of the solitary confinement, and by the state supreme court, in denying its discretionary jurisdiction.

Where the merits of an underlying App. R. 26(B) claim are ignored by the state courts, habeas procedural default does not apply (*Davie*, supra, at **43), the habeas court makes a de novo determination of the claim as standalone, i.e. whether the

asserted constitutional right was violated, and, if so, what relief, if any, is appropriate, regardless of the merits of the overlying App. R. 26(B) claim of appellate counsel ineffectiveness for failure to raise the claim on direct appeal. *Davie*, supra; *Carter v. Mitchell,* supra.

However, because the merits of Cody's underlying denial of right to counsel are meritorious, and the claim involves structural error, appellate counsel's failure to raise the claim also constituted ineffectiveness. See. *Davie,* supra, at 312 et seq.

(D) Constitutional Claims 16/17 – Denial of Right to Effective Assistance of Counsel for His Failure to Investigate, Discover and Prepare Petitioner's CIA/White House Affiliation-Based Defenses, and for Counsel's Abandonment of those Defenses, and Any Defense, at Trial

(1) Introduction: *Strickland* Prejudice on the Ineffectiveness Claim; and Miscarriage of Justice as an Excuse for any Habeas Procedural Bar, as Expanded, Pursuant to *Herrera* and *McQuiggan,* Requiring Habeas Relief of New Trial on the Remaining 12 Counts of the Convicted-Upon Indictment

If either the trial court and/or defense counsel is held to have denied Cody the right to testify, or if defense counsel is held to have been ineffective in his actions related to Cody testifying, or ineffective in his failure to investigate Cody's CIA/White House affiliation or in abandoning Cody's CIA/White House affiliation based defenses at trial, Cody may have to show prejudice by his failure to testify. This can only be accomplished by the denied defendant stating what he would have testified to at a second trial. This is an application of a harmless error standard for general trial improprieties presumed from *Brecht, supra,* at 619, 623, 629-30, to habeas proceedings.(One circuit court has clearly held, however, that making harmlessness turn on the projected testimony of the defendant fails as a matter of law because one never knows exactly what the defendant would testify to until the defendant actually testifies at the second trial, and, therefore, omission of the defendant's testimony in the first trial was never harmless. *Hayes v. Brown*, 399 F. 3d 972 (9th Cir 2005); *US v. Williams*, 435 F. 3d 1148, 1163 (9th Cir 2006). However, since we are dealing in this projected testimony to follow constituting an establishment of miscarriage of justice, with a gateway (a prejudice prong) into independently asserted constitutional violations (denial of right to testify; ineffectiveness of counsel), the miscarriage of justice presented serves, separately, as cause for habeas relief of a directed new trial. *Herrera v. Collins*, 506 US at 404-05, in support *McQuiggan v. Perkins*, 569 US 383 (2013).

If Cody is procedurally barred as a matter of federal law on any of his constitutional claims asserted in this brief, moreover, miscarriage of justice serves as an excuse for such a bar. To show miscarriage of justice, Cody would likewise have to show what he would have testified to at a second trial. Such a showing of miscarriage of justice, since

it is tied to an independently asserted constitutional violation in each case, qualifies for a separately made determination (of miscarriage) justifying habeas relief of a new trial ordered, made independently of any finding of default excuse. *Herrera v. Collins*, 506 US 390, 400, 404-05, 409-11 (1993). See, also, *McQuiggan*, supra.

Even though the state court record citations throughout Cody's statements made here of his projected testimony show ample record reference, the use of projected testimony for the Herrera gateway purposes cited nulls any *Pinholster* requirement of state court record reference to such testimony. *Pinholster*, 563 US 170, 181-82 (2011).

Where there is a question of prejudice about omitted evidence or testimony, the habeas petitioner must show what the testimony would have been, or what the omitted evidence would have shown. See, *Reid v Sowers* , 1990 US App LEXIS 9565 at *7 (6th Cir); *Gray v Wolfenbarger*, supra, 501 Fed Appx, at 430. *Moore v Mitchell, supra,* also presents a dance of avoidance of the complex comparative construct between the habeas law rule of *Herrera v Collins,* [redacted] supra (permitting, as a gateway matter activated by, but not requiring [redacted] a review of a separate constitutional claim *per se,* [redacted] an independent habeas court consideration of miscarriage (not constituting a separate, standalone constitutional claim but which miscarriage then morphs, [redacted] if found, through evidence presented in the petition, into a habeas relief of new trial), and the habeas law of *Reid* and *Gray, supra* (on the necessity of the habeas applicant asserting, regardless of issue, "outcome determinativeness" of omitted evidence, making a showing of what that evidence would have been) [redacted] *Pinholster*, *supra* (on the subject of no evidentiary hearings permitted to add evidence not already in the record, when deciding, strictly, the merits of a constitutional claim) on the one hand; and on the other hand. But Moore limits [redacted] itself as to the meaning of *Pinholster*, within the constraints of the facts of Moore's habeas case, to finding what, unlike Cody instantly, petitioner Moore was attempting to do was to have an evidentiary hearing to develop evidence, not within the existing record, petitioner Moore could, on the issue of outcome determinativeness, only speculate about in his petition. *Moore* thus does nothing more, on this issue, than validate *Pinholster*'s bar of an evidentiary hearing to develop new evidence strictly related to the merits of a §2254(d)(1)/(e)(1) constitutional claim already raised. The issues avoided in the triple interplay above are, first, how a miscarriage determination based upon what new evidence would show, presented non-speculatively, in the petition itself, on an excuse gateway for a procedural default, if found to be reliably "outcome – determinative," can be made to apply to the excuse, but not, at the same time, justify a new trial. *Herrera*, *Reid* and *Gray* hold such evidence can be thusly presented; *Herrera* holds, if miscarriage is thusly found, new trial is warranted, per se; and neither *Pinholster*, nor *Moore* explaining *Pinholster*, overturn any of those holdings. The second issue avoided is how, if trial counsel were ineffective for not presenting evidence (clearly a *Strickland* constitutional claim) in *Cody*, Cody's testimony (obviously not part of the trial record), or, if the defendant were not permitted to testify by external factors (also clearly a constitutional claim; and also a clearly a case where his omitted testimony did not become part of the trial record), the habeas petitioner is to communicate what the omitted evidence would have been, or shown. Neither *Pinholster*, on its facts, nor *Moore*, on its, bars. nor purports to bar, the habeas applicant from making such a showing in the petition itself.

starting, supra, p. 17

Serving all the purposes above stated in this introduction section, the section here on Cody's projected testimony, while applicable to Cody's claims 4 and 16/17, will not simply be repeated in the sections dealing more specifically with the merits of Cody's constitutional claims of denial of right to testify (Claim 4) and ineffectiveness of counsel in failing to investigate pre-trial, and abandonment of at trial, Cody's CIA/White House affiliation-based defenses (Claims 16/17).

(a) What Cody Would Have Testified to at a Second Trial (the Nature of the MNT/PCRP Evidence)

The "evidence" in support of these constitutional claims 16/17 record Cody presented to the MNT/PCRP trial court, the MNT/PCRP appellate court, and the Ohio Supreme Court, was contained, exclusively, in Cody's 19 page trial court affidavit with incorporated exhibits[40], which Cody also presents here[41], relates to a merits determination of prejudice on Cody's claims of denial of right to testify and all his claims of ineffective assistance of trial counsel; to miscarriage of justice as an excuse for any habeas procedural bar on any of his constitutional claims determined as existing by this Court; and to the prejudice prong of ineffective assistance of counsel as Maupin cause and prejudice excuse for any habeas bar on any of his constitutional claims determined as existing by this Court.

The 19-page affidavit certainly, in its totality, was a statement of evidence Cody would have testified to at a second trial. However, within it, only (1) the State of Ohio's court record statement that "to the State's personal knowledge," Cody was never CIA;[42] (2) Cody's FOIA request[43] citing his detailed and specific covert curriculum vitae, and the CIA's refusal to confirm or deny the existence of classified records pertaining to that curriculum vitae, including Cody's cover employment with the United States Navy Veterans Association, because those records covered classified subject matter[44]; (3) the US Government's ("USG") Office of Government Information Services letter to Cody, made as part of Cody's official administrative appeal of the CIA's refusal decision, explaining that that subject matter, in Cody's case, related to the foreign and military policies of the USG, information acquired through technical intelligence, and the protection of classified intelligence sources and methods[45]; and (4) a letter on the stationery of the Conroy, Hamilton, Gibson, Nickelsen & Rush Honolulu law firm, formerly classified by the CIA, declassified in 2001, but still containing the CIA stamp "Statutory Intelligence" next to Cody's name, a marker indicating, for a declassified

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[40] Doc 42-3: 3178-3196.
[41] In addition to what he presents, infra, pp. 31-47, as to what he would testify to at a second trial.
[42] Doc 42-2:2633, n. 12.
[43] Doc 42-3: 3047-3048 (Cody MNT/PCRP affidavit ¶¶ 32-34).
[44] Doc 42-3: 3048 Cody MNT/PCRP affidavit ¶33).
[45] Doc 42-3:3054-3056 (Cody MNT/PCRP affidavit¶¶51-58).

document, an item which remains classified,[46] might be considered the "new" evidence for Hertzen purposes.

In that affidavit Cody also presented other evidence: the salient, relevant details of his training and experiences (1967-2012), covertly, as an official cover and non-official cover CIA operations officer,[47] including his stints at the CIA's Office of General Counsel;[48] his training and experiences as a US Army Reserve intelligence officer[49] and his stints as an Army JAG advisor[50]; his security clearances[51]; the details of his conversation with Mike DeWine in Washington in early 2006 (including DeWine's statements of his personal knowledge of, and participation in, the Bush 43 White House and CIA's sponsorship of the activities of the Navy association; and DeWine's unrequited request for a campaign contribution)[52]; and Cody's statement, based on his experiences as a CIA Office of General Counsel lawyer, and as a Langley headquarters officer handling directorate of operations input to FOIA responses, that a "refusal to confirm or deny" the existence of covert employment records has never been issued to an active or former covert intelligence operative in the past 45 years, other than where such an affiliation existed, or exists.[53] (let Cody be clear as to what he is saying: if every Tom, Dick and Harry in the world made an FOIA request for their covert employment records to the CIA, they would be met with a denial such records could be found; otherwise every crazy in the world would be walking around with a "refusal to confirm or deny" letter from the Agency touting it to their publishers as proof they were CIA; if respondent doubts that, he is welcome to give it a try). When allegedly omitted evidence, as propounded by the defendant, contains both newly discovered, and non-newly discovered evidence, there must be a "cumulative evaluation" of all the propounded evidence to determine any issue of outcome-determinativeness. *Wearry v. Cain*, 136 S. Ct. 1002, at HN 5 (2016), citing *Porter v. Mc Collum*, 558 US 30, 43 (2009).

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[46] See, Doc 42-3: 3048-50 (Cody MNT/PCRP affidavit ¶¶36, 38, 40), 3040-43, 3049-50 (Cody MNT/PCRP affidavit ¶¶12, 13, 37, 41). As a CIA operations officer with Top Secret ("TS"), TK/KH (satellite acquired intelligence) and SI (sensitive intelligence – access to source identity), Cody had classification authority for documents up to and including Top Secret. In his assignments as a CIA Office of General Counsel officer (1974-75), and as a Langley HQs declassification and FOIA input officer (1974-76) (the latter for FOIA requests made by former CIA officers), Cody had significant personal experience with CIA classification/declassification stamps, markers and markings; and CIA policies with respect to enforcement of Acts of Congress and executive orders relating to classification and declassification. Inasmuch as his MNT/PCRP affidavit contains numerous statements of fact based upon Cody's 45 years of CIA experiences (see, Doc 42-3: 3040-43, 3047-50 (Cody's MNT/PCRP affidavit ¶¶9-10, 12, 13, 37, 41)), there is no way an adjudicator of law can determine the "credibility" of Cody's statements, from a witness (Cody) who has never given testimony to a jury, without firmly concluding that either the State's firm statement of fact that Cody was never CIA (see, e.g. Doc 42-3: 3042-3043 (Cody MNT/PCRP affidavit ¶¶ 14-16)), or Cody's statements of his CIA affiliation, are a fraud upon numerous courts, including this one. See, *US v. Rouse*, 410 F 3d 1005, 1009 (8th Cir. 2005), followed *US v. Two Crow*, 178 Fed Appx 610 (8th Cir. 2006). (the proper standard for any court reviewing testimony or evidence propounded for use at a second trial, for credibility, is not what the court, based upon its experience, knowledge or insights, would find credible, but, instead, how likely a jury of the defendant's peers would be to believe it).

[47] Doc 42-3: 3180, 3182, 3183, 3188, 3189-90, 3194-96 (Cody affidavit ¶¶9, 12, 13, 17, 33, 38-40, 40, 42, 50-56).

[48] Doc 42-3: 3182, 3183-84, 3190 (Cody MNT/PCRP affidavit ¶¶13,19, 41).

[49] Doc 42-3: 3178-79 (Cody MNT/PCRP affidavit ¶¶4 -7).

[50] Doc 42-3: 3181 (Cody MNT/PCRP affidavit ¶11).

[51] Doc 42-3: 3179-80, 3180-81).

[52] Doc 42-3: 3192-94 (Cody MNT/PCRP affidavit ¶¶ 48,49).

[53] Doc 42-3: 3190 (Cody MNT/PCRP affidavit ¶¶41,42).

Certainly, the return challenges, as determinative dispositively of all of Cody's claims in this brief related to prejudice on counsel ineffectiveness, justification of counsel's abandonment of the CIA-affiliation defenses at trial,[54] miscarriage of justice, and probably more, in the strongest possible terms, the truthfulness of the hundreds of details Cody has related in the state court record, and in this proceeding, on his CIA/White House affiliation, and the credibility of all his pleadings in both on that affiliation. Here, however, in these MNT/PCRP proceedings, probably stemming from a concern for factual error related to subsequent evidence, given Cody's detail, there was a backing off from any such rulings, and there were no such determinations made by any state court, as to any of that evidence presented in the MNT/PCRP proceedings, and, as to that evidence, also, any such determination, as it relates to any of those issues, if it is to be made, needs to be made de novo in these proceedings. Moreover, the MNT/PCRP appellate court made no finding that res judicata of any of its prior decisions on Cody's cases, which may have arguably involved lack of credibility of evidence of Cody's Affiliation with the CIA or White House applied to the evidence he relied upon in his MNT/PCRP affidavit.

The detailed evidence of and related to Cody's CIA affiliation, and its implications from which a reasonable juror could infer no theft, lack of specific intent, and national security operational intelligence related lawful purpose in Cody receiving and using assigned cover identities by the CIA, in Cody's MNT/PCRP, are overwhelming, and meet any standard for showing prejudice related to ineffectiveness by their omission from any second trial, which can be applied, absent a finding from a federal court that they are falsehoods, or that they are not capable of belief. See, *US v. Rouse,* supra, on standards for determining credibility.

The overwhelming nature of that detail also establishes that a miscarriage of justice involving Cody's actual innocence occurred, as an excuse for the MNT/PCRP appellate court's invocation of untimely filing (related to unavoidably prevented discovery of the "newly discovered" evidence (*Cody*, infra (MNT/PCRP appellate court decision, ¶¶34,35) within the state-law prescribed 120-day period). See, Murray v. Carrier, 477 US 478, 496 (1986). While a miscarriage of justice claim as an excuse for procedural default permits the petitioner to present in his habeas proceedings any de novo evidence he propounds for use at a second trial (see, *Pinholster*, 563 US at 181), it is conceptually impossible to conclude that a miscarriage of justice applies as such an excuse, but does not also justify habeas relief of an ordered new trial, in and of itself, where it is tied to an independently presented constitutional violation, such as, e.g., ineffective assistance of counsel, or the denial of right to testify. See, Herrera v. Collins, 506

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[54] Defense counsel was justified in abandoning Cody's "non-existent" CIA affiliation at trial because the affiliation is a "fantasy." Doc 42: 1681. The position of the State has been consistent throughout the state court record before this Court, that defense counsel did indeed "Abandon" any CIA-affiliation defense during the trial, after promising the jury the defense would be proffered (Doc 43-5: 4497, 16- 4498,6), and that Cody would testify at trial to his affiliation defense (Doc 43-5: 4512, 9-13), and after carrying out a cross-examination of State's witness BCI detective Al Bansky, eliciting information from Army and the CIA cover source Department of Army Geographical Evaluation and Analysis Group eliciting written evidence from which a reasonable juror might infer a CIA affiliation (Doc 43-16: 6917, et seq. Testimony sessions highly disjointed; citations are to trial transcript originally numbered pages and lines: 3966, 13-22; 3467, 5-6, 21-25; 3968: 13-14, 19, 22-23; 3964: 3-8, 12-18, 21-25; 3970: 25-3971: 21; 3972: 5-11; 3972: 15- 3973: 6; 3972: 15-18; 3975: 9-12; 3976: 14; 3976: 18; 3977: 2, 5; 3976: 14-3979:6; 3979: 16-17; 3980: 4-11; 4021: 3-15 [reading from document dated 3.20.1986]; 4021: 19-21). "[C]ounsel's apparent refusal to pursue a bizarre 'CIA agent' defense at trial was objectively reasonable...." *State v Cody*, No. CA -102213, at p. 9 (8th Dist. 2015), State's Reply Brief (Doc 42-2: 2623).

US 390, 400, 404-05, 409-11 (1993). Moreover, delay in bringing the attention of the habeas court in the petitioner's petition to new evidence upon which the miscarriage claim relies, is reviewed de novo, as part of the substantive determination of miscarriage, simply as "explained" or "unexplained," not as an "absolute barrier to relief," but, if unexplained[55], as one "factor in determining whether actual innocence has been reliably shown." *McQuiggan v. Perkins*, 569 US 383, at ***1026 (2013). A six-year delay in *McQuiggan* between Perkins' obtaining the new evidence and the filing of Perkins' habeas claim did not qualify for a rejection of Perkins' actual innocence claim. (Id., at ****5), and the pleading of miscarriage itself (as an excuse for a procedural bar excuses any applicability of AEDPA's one-year timeliness limitation (Id., at ****3)). In supporting *McQuiggan*, the standard of actual innocence has been most recently restated in this circuit, moreover, as "convict[ion for] a crime that the law does not deem criminal." *Penney v. US*, 870 F. 3d 459, at **9 (6th Cir 2017).

(2) Legal argument on Claims 16/17 Arising Out of the MNT/PCRP Proceedings

(a) Defense Counsel Ineffectiveness

Claims 16/17 are ineffectiveness of counsel claims. They are not a claim that Cody was denied a constitutional right by a denial of the MNT/PCRP. They are not a claim that, as a matter of state law, a new trial should have been granted. They also serve, however, in addition to their independent, standalone merit, as a "gateway" (pursuant to the prejudice prong of the ineffectiveness of counsel, and pursuant to the necessity of showing excuse for any procedural default of them) for the miscarriage of justice claim Cody makes, tied to them. See, *Herrera*, supra. The claims are also implicated in the "new evidence" MNT/PCRP proceedings, and in the rulings of the Ohio appellate court on those proceedings, because they stem from the MNT/PCRP denial (made on a state law procedural default ground only) of that ineffectiveness (duly noticed as a claim to all the state courts) for counsel's failure to present all the evidence, and not just the "newly discovered" evidence, Cody propounded in his affidavit in those proceedings.

Without that evidence, and Cody's testimony, defense counsel did, in a brief manner and moment at trial, pursue a CIA/White House affiliation defense theory of sorts (including the erroneous and ridiculous idea that the CIA directed Cody to make political contributions, out of donors' funds designed to benefit veterans (Doc 43-5: 4498, 13-17))[56], but then abandoned any such strategy; the Return admits that is exactly what trial counsel did. See, Doc 42: 1681.

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[55] Cody's delay in both obtaining the newly discovered evidence, and the chronology of bringing his claims 16/17 to the habeas court, are, and have been, "explained" thoroughly in the record. See, Doc 42:1660-1664, 1668. (counting from mid-2013 through Cody filing herein his amended claims 16/17, exactly six years elapsed, from the date he obtained the CIA refusal to confirm or deny his covert affiliation to that habeas filing, approximately two years expired; and from the time he initiated state court exhaustion on claims 16/17 to that habeas filing, approximately one year expired (see, also, p. 4, supra, on exhaustion of claims 16/17)).

[56] Doc 43-20: 7680, 7682, 7684, 7686-87, 7688, 7691, 7692, 7693, 7695, 7696, 7737.

Contrary to the Return's statement that the "state courts noted" that Cody's MNT/PCRP affidavit reveals "no... evidence, new, or otherwise,"[57] the MNT/PCRP appellate court made no such finding or conclusion. Indeed, its opinion, supra, only says the court has read the statements in Cody's affidavit, but makes no ruling whatsoever on the statements not being "evidence," and, further, makes no rulings on that evidence not being outcome-determinative, not being truthful or plausible, or lacking credibility. Those determinations about the MNT/PCRP proceedings' "evidence", if they are to be made, must be made for the first time in these proceedings.

The gist of claim 16 is that defense counsel was ineffective in failing to properly investigate and prepare Cody's CIA/White House affiliation defense, and to develop evidence showing, or tending to show Cody had a covert, classified intelligence affiliation with the CIA and/or the Bush-43 office of the president. "[In] *Wiliams v Taylor,* 529 US 362, 396 (2000),...[w]e rejected any suggestion that a decision to focus on one potentially reasonable trial strategy [instantly, whatever trial strategy Patituce can be said to have had]...was justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation....Moreover, the reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced had counsel completed a constitutionally adequate investigation...." *Sears v Upton,* 561 US 945, 954, 954 at n. 10 (2010), followed, explained *Cauthern v. Colson,* 736 F 3d 465, 486 (6th Cir 2013) ("[T]he relevant question is not whether counsel's choices were strategic [or tactical], but whether they were reasonable.")

The MNT/PCRP state appellate court clearly found the evidence in the Cody MNT/PCRP affidavit "would have been available." See, Doc 42-4: 3517, *State v. Cody*, No. CA- 107595 (8th Dist., 2019), ¶¶34, 35. It is clear the appellate court found that, as to Patituce's representation of the defendant, through trial proceedings, from 8.26.2013 through date of sentencing, 12.16.2013, defense counsel was not unavoidably prevented from discovering, at a minimum, the CIA/OGIS documentary evidence the MNT/PCRP propounded. Id.

The failure of the "development of evidence" inherently included the failure of the development of defense witnesses. Cody's right to be a witness on his own behalf is included in Cody's right to present witnesses on his own behalf. See, Washington v. Texas, 388 US 14, at *18-19 (1967), quoting In re Oliver, 333 US 257, 273, at ****8 (1948). Patituce was advised of the basic facts of Cody's CIA/White House affiliation, of record in the courtroom (Doc 43-2: 3894, 3-11, 4.22.2013) with Patituce present (Doc 43-2: 3869, 9); and of the existence and identity of Cody's CIA officer witnesses when Cody first filed his motions sub duces tecum for them (CR-12-565050A, JEs 2.14.2013, 3.6.2013, 3.15.2013, 7.18.2013, 7.26.2013, 8.1.2013; see, also, Cody's motion to include these motions in the habeas record (Doc 52), denied [non-document order], 9.12.2019). Patituce was personally advised of Cody's desire for CIA/White House affiliation-based defenses when Patituce was present in court, 4.13.2013 as advisory counsel upon oral argument on the State's motion *in limine* to suppress any defense evidence of a CIA or White House affiliation. See, Doc 43-2: 3869, 9; 43-2: 3953-63. (The trial court also found Patituce "understands" the "issues", 5.21.2013, Doc

[57] Doc 42: 1673-74. The statement is then "walked back" in the very next sentence, indicating Respondent's counsel's wavering opinion as to whether Cody really was CIA.

43-2: 3991, 15-16). Patituce was advised thoroughly by Cody, of the details of the CIA/White House based defenses, its evidence, and its witnesses, again, on 8.26.2013. See, Doc 42-3:3051 (Cody MNT/PCRP affidavit, ¶45).

The failure to investigate a defense constitutes ineffective assistance of counsel, without the need for a further showing of prejudice. *Dugas v. Coplan,* 428 F. 3d 317,332 (1st Cir 2005).

The gist of claim 17 is that Patituce abandoned the CIA/White House affiliation based defenses clearly desired by Cody, during trial.

Patituce's ineffectiveness, on both claims 16 and 17, included his errors of refusing to investigate, interview, or even attempt to contact CIA officials who knew Cody the defendant, while he was counsel pro se, identified of record, and to Patituce on and off record, at trial. Cr-12-565050A, JEs 2.14.2013, 3.6.2013, 3.15.2013, 7.18.2013, 7.26.2013 and 8.1.2013[58], and abandoning Cody's motions for subpoenas *sub duces tecum* for them after Patituce took over as defense counsel on 8.26.2013; refusing to attempt to contact US Secret Service personnel who would have been present at Cody's well-known (and disclosed to Patituce) photographs with President Bush[59] ; his failure to even request Cody's CIA employment record from the Agency (the subject of the CIA's "refusal to confirm or deny the existence of, in their 2018 FOIA response), or, for that matter, any documentary evidence of any affiliation with the CIA (Doc 42-3: 3191 (Cody MNT/PCRP affidavit, ¶44: Patituce believed he " had [no} responsibility...to attempt to acquire any CIA documentary evidence of such an affiliation"); of telling the jury Cody had an intelligence agency affiliation defense (Doc 43-5: 4497, 8-4498,6; see, n. 58), and then presenting no evidence on it (Doc 43-21: 8045, 19-25; see, n. 58); of promising the jury Cody was going to testify for the defense, and then failing to call Cody to testify (Doc 43-21: 4502, 9 et seq.; see, n. 58)[60]; his failure to call any defense witnesses (Doc 43-21: 8045, 19-25); see, n. 58), including Cody, and his waiving any closing argument (Doc 43-22: 8234, 23-8235,1; see, also, n.61).

These cumulated errors, all of which were before the state courts (ORC §2945.83 (E)), denuded the trial of "meaningful adversarial testing," making the adversarial process, required for a fair trial, presumptively unreliable, requiring no further evidence of prejudice to justify the relief of a new trial ordered. See, *US v. Cronic*, 466 US 648, 659 (1984).[61]

16 and 17

Both claims are pegged to all the evidence, and not just the "newly discovered" evidence, presented in Cody's MNT/PCRP affidavit, and relied upon by Cody in the MNT/PCRP proceedings; the claims therefore stem from the

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[58] Both the MNT/PCRP trial, and appellate, courts are charged with reviewing the trial record, in the case of this type of constitutional claim. ORC §2945.83(e).

[59] It is the failure to even investigate witnesses which constitutes the ineffectiveness. *Stewart v. Wolfenbarger*, 468 F. 3d 338, 361 (6th Cir 2006).

[60] See, *Ouber v. Guarino*, 293 F. 3d 19, 35-6 (1st Cir 2002)(ineffective assistance of counsel exists where counsel failed to present promised testimony).

[61] Explaining *Cronic*'s failure of adversarial testing standard as covering ineffectiveness without a showing of prejudice, pursuant to both the Ohio, and the US, constitutions' requirement of fair trial, *State v. Smiley*, 1999 Ohio App LEXIS 5053, at HN 7 (8th Dist) held "[t}he process is...fundamentally unfair or unreliable when counsel in closing argument, fail[s] to...present the defendant's theory of the case."

denial of Cody's MNT/PCRP, a proceeding in which Cody fairly pleaded and presented the substantive ineffectiveness claims, which do dispute the underlying conviction in this habeas case. See; *Bolan v. Rose*; 2014 US Dist. LEXIS 140565 at *49-50 (N.D. Ohio); *West v. Bradshaw*, 2016 US Dist. LEXIS 187506, at *45 (N.D. Ohio), citing *Bolan*; *Pettaway v. Hooks*, 2015 US Dist. LEXIS 140565, adopted 2016 US Dist. LEXIS 7211 (N.D. Ohio).

Any habeas procedural bar is also excused for the cause and prejudice of trial counsel's ineffectiveness. However, where ineffectiveness is at issue, as an excuse for a habeas procedural bar, *Strickland*'s prejudice prong for ineffectiveness should be assumed where the existence of counsel's deficient performance is established. *Maupin*, supra, at 139.

Defense counsel's ineffectiveness in not discovering the MNT/PCRP newly discovered evidence during his representation of Cody pre-trial, during the trial, or even during the period (11.14.2013- 12.16.2013) after the jury verdict, but before sentencing (to be able to make a presentation for mitigation at sentencing based upon the "CIA/White House affiliation" evidence, or to be able to make a motion for new trial at that time, in a timely manner, based upon that evidence[62], an ineffectiveness implied without doubt in the appellate court's finding the defendant could have discovered the "newly discovered" evidence during that period (Ex. 96, State appellate court's opinion, ¶¶ 34,35); the unchallenged evidence Patituce determined himself as having no responsibility for discovering any evidence of Cody's CIA/White House affiliation at any time (Doc 42-3: 3051 (Cody MNT/PCRP affidavit ¶ 44)); Patituce withdrawing his motion for an investigator to investigate Cody's claims of his CIA/White House affiliation defenses Patituce, readily inferred from his evidentiary abandonment of those defenses at trial, did not have time to investigate himself (see, Docket sheet exhibit to habeas record, CR-12-565050A, "Ex Parte Motion for Investigator" (1/11/2013); "Motion to Withdraw Specific Ex-Parte Motions" (2/5/2013); "Defendant's [Patituce's] Motion to Withdraw...Motions for Computer Expert...Forensic Accountant and Investigator...Granted " (4/15/2013), over Defendant Cody's pro se opposition (JE, 2/14/2013)(see, also, petitioner's request for habeas record inclusion of content of motions (Doc 52), denied [non-document order], 9.12.2019); Respondent's admission of defense counsel's abandonment of any "CIA/White House affiliation" defense; and the cumulations petitioner is permitted for any ineffectiveness argument, also establish the basis for cause and prejudice excuse of any habeas procedural bar to be applied to these claims.

(b) No Federal habeas procedural Bar Applies Based on the State Court's procedural Default of "Untimeliness"

(i) No habeas procedural bar applies because the appellate court's conclusory statement of untimeliness is based upon its conclusory finding of "no unavoidable prevention" of discovering the "newly discovered" evidence within the 120 day period, without any explanation as to either[63]. That omission nulls the *Maupin* requirement of an

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[62] See, *Williams v. Taylor*, 529 US 362, 396-99 (2000); *Sommer v. Quarterman*, 476 F. 3d 349, 357-58 (5th Cir 2007).

[63] See, Return, Ex. 96 (appellate court opinion): Doc. 42-4: 3517, ¶¶ 34,35. See, also, Respondent's admission of the same, Doc 42:1666.

"enforced" state law default[64] (not an excuse for a habeas procedural bar, but, rather, a nullification of the state procedural default upon which the federal bar is pegged, which, when it occurs; as instantly, without any merits analysis of the substantive constitutional claim by the state court, results in a n advance to the merits determination (omitted by the state court). *Wainwright v. Sykes*, 433 US 72, 72 (1977); *Davie; Carter, supra.*

(ii) No habeas procedural bar applies because the appellate court's procedural rule was not a "clearly applicable state procedural rule."

Ohio's controlling statute, ORC §2945.79(F), actually only requires the defendant not to be able "with reasonable diligence" [to] "have discovered and produced at the trial" the propounded evidence. Ohio's R. Crim. P. 33(B) expands that concept, requiring the motion for new trial to be filed within 120 days from the date the jury returned the verdict unless "it is made to appear by clear and convincing proof that the defendant was 'unavoidably prevented' from the discovery of the evidence...." Neither the statute nor the rule defines either "with reasonable diligence" or "unavoidably prevented"[65], i.e. the state "rule" is a matter of discretion, or is discretionarily applied. Where the state "rule" is a matter of discretion, regardless how that discretion was exercised, it does not meet the test of the first of *Maupin*'s[66] *sine qua non* requirements for validity of a state procedural rule upon which habeas default is sought to be based, that of "a clearly applicable state procedural rule[67], nulling further consideration of a habeas bar, and moving the habeas court to a merits determination of the claim.

(iii) No habeas procedural bar applies because Cody complied with the state-law-based (ORC §2945.79 (F)/ Ohio Crim. R. P. 33(B)) "unavoidable prevention" excuse[68] for discovering the four items of the "newly discovered" MNT/PCRP evidence within the statutory period terminating 120 days from the date the petit jury returned its verdicts in the criminal trial (11.14.2013) (see, record docket sheets, CR-12-565050A, JE, 11.15.2013. 120 days later would have been 3.15.2014).

Such compliance is not so much an excuse for a habeas procedural bar applying, as it is a nulling of the state procedural default upon which the federal bar relies. *Maupin v. Smith*, 785 F. 2d 135,138 (6th Cir 1986). See, also, *Lundgren v. Mitchell*, 440 F. 3d 754, 763 (6th Cir 2006), citing *Wainwright, supra*, 433 US at 87. Upon such a nulling, where, as instantly, there has been no state court substantive analysis of the merits of the petitioner's constitutional claim, the habeas court proceeds to merits determination of that claim, by definition, in the first instance. *Wainwright,*

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[64] *Maupin*, 785 F 2d at 138, explained *Veliev v. Warden*, 2014 US Dist LEXIS 136517 at *27 (S.D. Ohio).

[65] The trial court made no ruling on untimeliness, failure of reasonable diligence, or unavoidable prevention, merely denying Cody's motion/petition without explanation or opinion. The appellate court merely concluded, without explanation, that the defendant was not "unavoidably Prevented."

[66] *Maupin v. Smith, supra*, 785 F. 2d at 138.

[67] See, *Sullivan v. Little Hunting Park*, 396 US 229, 233-34; *Williams v. Georgia*, 349 US 375, 389 (1955); *Ortega-Rodriguez v. US,* 507 US 234, 250 & n. 23.

[68] Failure of a conclusorily labelled "unavoidable prevention" of discovering the MNT/PCRP propounded four items (supra, pp. 19-20) [redacted] of the "newly discovered" evidence was the only reason the MNT/PCRP appellate court gave for conclusorily determining "untimeliness." Ex. 96 (Opinion), ¶¶ 34,35.

Davie, Carter, supra. Cody stated (Doc 42-3: 3382 (Cody MNT/PCRP affidavit, ¶ 44)) Patituce (and appellate counsel; it is clear appellate counsel was "unavoidably prevented" from discovering new evidence because he had no legal responsibility for making direct appeal argument for outside the trial court record)) took "no responsibility" for obtaining, and therefore did not seek to obtain, any documents evidencing Cody's CIA or White House affiliation from any US government source (including the CIA FOIA response, the U.S. OGIS letter explaining the citations in Cody's CIA FOIA response as being pertinent to military and foreign affairs secrets, and secrets pertaining to the protection of cover for covert officers, and the CIA declassified letter identifying Cody's name as an associate in the Honolulu law firm (Doc 42-3: 3380-3382 (Cody MNT/PCRP affidavit, ¶¶ 36-41) which Cody stated (record docket sheets, CR-12-565050A, JEs, 2.20.2013, "Brief in Support of Jurisdiction and Defendant's Discovery Motions..."; see, also, Cody's motion (Doc 52) to include the content of this motion in the habeas record, denied, Order [non-document], 9.12.2019; and Cody's letter/operational resume sent as a predicate for his CIA FOIA request for his files, Doc 42-3:3379(Cody MNT/PCRP affidavit ¶¶ 31-33)), had provided him CIA-arranged commercial cover from time-to-time during 1971-74). Indeed, the State's consistent position has been, and is, Cody's counsel had, and took, no such responsibility. (Doc 42-2:2635, n. 12: Doc 42: 1681). The appellate court (Ex. 96: ¶¶ 34,35), in its sole dispositive ruling on this, and every, issue, concluded the defendant was not "unavoidably prevented" from discovering the four items of propounded evidence within the Rule 33 period. Either Patituce was ineffective by not obtaining these documents; or Cody was unavoidably prevented from obtaining them for trial, i.e. compliance with the state court rule occurred; both issues are to be determined de novo in these proceedings[69]. Patituce's ineffectiveness in not securing these documents for trial has already been argued.

The alternate (to Patituce's ineffectiveness in not discovering these documents) argument is that Cody complied with the procedural rule because he was unavoidably prevented from discovering these documents for use at trial (or within the 120day period) because:

Since Patituce took no responsibility as Cody's attorney, ever, for obtaining CIA or White House sourced documents on Cody's CIA/White House affiliation (Doc 42-3: 3051 (Cody MNT/PCRP affidavit, ¶ 44))[70], physically that left only Cody who could have physically obtained, arguably, such documents. No covert CIA officer carries CIA documentation with him; it defeats the purpose of his clandestinity. After the issuance of the trial court's no contact order (3.19.2013), Cody had by definition no physical way, at all, to contact anybody, for documents of any sort,[71]

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[69] These alternate, or hypothetical, statements for argument are permitted by F.R. Civ. P. 8(e)(2).

[70] For Patituce's failure to even interview Cody as to CIA/White House involvement in indicted-upon activities, see Doc 42-1: 1860-61 (Cody pro se motion filed 2.11.2013 (id. 1856), covering Patituce's period of representation appointment (Doc 42-4: 3533, Record docket sheets, CR-12-565050A, JE, 7.13.2012) through date of filing; see, also, Cody's habeas motion (Doc 52) to include the content of this motion in the record of these proceedings, denied, Order [non-document], 9.12.2019.

[71] "Detainee/inmates assigned to 'No Contact Housing' (Special confinement restrictions ordered by the court which include no access to mail, telephones or general population) are denied general housing privileges to which they are entitled, as they are not confined for disciplinary reasons" [in violation of the "Federal Performance-based Detention Standards for non-federal detention facilities"]. US Marshal's Quality Assurance Review, Cuyahoga County Correctional Center, November 1, 2018, pp. 2,1.

until, arguably, he arrived at his first "parent" ODRC prison, the Richland Correctional Institute, on 1.7.2014. When he arrived there, he mailed to the CIA.[72] three times during the remainder of the 120 day period expiring on 3.13.2014, FOIA requests for his "integral block file"; he received no response to those requests, ever (Doc 42-3: 3046-47 (Cody MNT/PCRP affidavit, ¶¶ 24, 29, 30). There is no reason to believe that that non-response would have been different in, or for, any earlier period after Cody's arrest.

Even prior to the no contact order, the conditions Cody confronted, incarcerated in the Cuyahoga county jail, and in and by other actions of the trial court, all the while presumed to be innocent, effectively prohibited him from conducting discovery on any matter. Cody complained of record he was not given the tools necessary to conduct effective discovery at any time (Doc 42-4:3563, record docket sheets, Cr-12-565050A, JE, trial court motion for legal tools for self-representation, 2.22.2013; motion denied by trial court failure to rule (see, decision in Cody, supra, App. R. 26(B) appellate court decision); see, also, Cody's habeas motion (Doc 52) to include the content of this motion in the habeas record, denied, Order [non-document], 9.12.2019).

Cody could not have read, with the kind of precise visual study necessary for the two items of the detailed FOIA correspondence the US Government did, in 2017, provide him with, because his reading glasses had been taken from him by authorities upon his arrest, and substitute glasses were not provided to him by the prosecutor, not by the jail, until well into the period of the no contact order. See, Doc 43-1: 3749, 16-24 (complaint of prescription glasses taken by the State upon arrest made 4.11.2013 (referencing earlier motions); Doc. 43-1: 3757, 8-13 (trial court "request" to State to provide "your reading glasses," 4.11.2013); Doc 43-2: 3946 (substitute glasses provided by the State, 4.22.2013). See, also, US Marshal's Quality Assurance Review, supra, citing an "inadequate medical program" at the jail (p. 2); noting a deficient finding in non-compliance with the federal standards for a "proactive program…that provides care for special needs patients…." (p. 12, B.5.5).

Cody had no reasonable or objective motivation as a criminal defendant to (on the record) be seeking classified information of his CIA/White House affiliation, without confronting the strictures of the National Security Act of 1947, the espionage laws of the United States, and his secrecy agreement with the CIA, signed by him in 1974 upon entry into the CIA's Career Trainee Program, and valid forever, not to participate in the disclosing of classified information, until the moral imperative of self-defense in a criminal case was effectuated, and that did not occur until 4.22.2013, a date after the no contact order's effectuation, at hearing, upon the State's pronouncement, of public record, of the

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[72] The CIA does not provide FOIA response other than by correspondence requiring strict adherence to their form for content of the request, including specifically identified and obtainable documents. See, Doc 42-3: 3047-48 (Cody MNT/PCRP affidavit, ¶¶ 31,35).

falsehood stated as fact, that Cody was not CIA.[73]

Had Cody by himself been able to obtain the documents he did in 2017, after his arrest, but before the no contact order took effect, 3.19.2013 (*supra*), to use them at trial, *pro se*, would have required subpoenas *sub duces tecum* to issue for the document record keepers, at a minimum, with motions for service. All Cody" trial court motions for service of subpoenas upon CIA witnesses made, for the record, without addresses, were denied by trial court failure to rule. See, Doc 42-4:3557, record docket sheets, CR-12-565050A, JE, 4.15.2013 (defense "Reply"); JE, 7.18.2013; Doc 42-4:3554. The failure to rule on a trial court motion under Ohio law constitutes its denial. See, *State v. Cody*, No. CA-13-100797 (Cuyahoga county court of appeals, 8th district, App. R. 26(B) decision, decided 4.21.2017, ¶ 15 (Ex. 76)).

Cody would have had to have had the address, at a minimum, of the CIA FOIA coordinator in Washington to even initiate correspondence. No such reference guide was available to him in the Cuyahoga county jail, and, even after his appointment as counsel *pro se* (see, record docket sheets, CR-12-565050A, JE, 2.14.2013), when he requested addresses for CIA officers, and for access to such tools (for the record), the motions were denied (see, Doc 42-4, record docket sheets, CR-12-565050A, JEs, 3.15.2013, 4.19.2013, 3.28,2013) by failure to rule.

Upon Cody's arrest (4.29.2012) in Portland, Oregon, Cody, at no time, was permitted by any jail or prison authority, access to the internet where, only on the CIA's "Electronic Reading Room" page, the "Conroy, Hamilton" declassified-in-part letter was to be found; and Cody had no reason to believe, or know, that document was on that webpage until former BCI agent Jodi Andes mailed him a copy (Doc 42-3: 3046, 3048-49 (Cody MNT/PCRP affidavit, ¶¶ 26,28,36-38)).

The above facts and argument clearly and convincingly establish that, due to factors external to him, Cody, by himself, met the discretionary standard of unavoidable prevention of obtaining the two U.S. Government issued FOIA related documents, and the Conroy, Hamilton letter presented in the MNT/PCRP as "newly discovered" evidence before the expiry of the statutory 120-day period; and that Patituce refused to even attempt to obtain that evidence.

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[73] Doc. 43-2: 3954-56; 3959 ("...this alleged association with a government intelligence agency...;" "The State's not aware of any employment records. We have no employment records that show that he worked for anybody;" "[And he} go[es] through some kind of rigamarole, claiming and presenting these claims [that he was CIA] to the jury...some kind of establishment that...he was...conducting one of these operations.... Those...things don't exist." The State's denial of Cody's affiliation was actually made, first, in its motion *in limine* to suppress, well after the no contact order took effect, (Doc 42-4:3559, record docket sheets, CR-12-565050A, JE, 3.21.2013), but the content of that motion, requested to be made part of the Habeas record (Petitioner filed Doc 52), has been denied entry into the habeas record by the Court, Order [non-document], 9.12.2019.

IV. Further Showings of (1) Prejudice on Right to Testify and All Ineffectiveness Claims, and (2) Miscarriage of Justice as Excuse for Any Procedural Defaults Determined to Exist; and as Separately Determinative of New Trial Habeas Relief Pursuant to *Herrera* and *McQuiggan*

(A) Introduction: Prejudice on the Right to Testify and Ineffectiveness Claims; and Miscarriage of Justice as Excuse for Any Habeas Procedural Bar, as Expanded Pursuant to *Herrera* and *McQuiggan*, Mandating Habeas Relief of New Trial on the 12 Remaining Counts of Petitioner's Indictment

If either the trial court and/or defense counsel is held to have denied Cody the right to testify, or if defense counsel is held to have been ineffective in his actions related to Cody testifying, or ineffective in his failure to investigate Cody's CIA/White House affiliation or in abandoning Cody's CIA/White House affiliation based defenses at trial, Cody may have to show prejudice by his failure to testify. This can only be accomplished by the denied defendant stating what he would have testified to at a second trial. This is an application of a harmless error standard for general trial improprieties presumed from *Brecht, supra,* at 619, 623, 629-30, to habeas proceedings.(One circuit court has clearly held, however, that making harmlessness turn on the projected testimony of the defendant fails as a matter of law because one never knows exactly what the defendant would testify to until the defendant actually testifies at the second trial, and, therefore, omission of the defendant's testimony in the first trial was never harmless. *Hayes v. Brown*, 399 F. 3d 972 (9th Cir 2005); *US v. Williams*, 435 F. 3d 1148, 1163 (9th Cir 2006). However, since we are dealing in this projected testimony to follow constituting an establishment of miscarriage of justice, with a gateway (a prejudice prong) into independently asserted constitutional violations (denial of right to testify; ineffectiveness of counsel), the miscarriage of justice presented serves, separately, as cause for habeas relief of a directed new trial. *Herrera v. Collins*, 506 US at 404-05, in support *McQuiggan v. Perkins*, 569 US 383 (2013).

If Cody is procedurally barred as a matter of federal law on any of his constitutional claims asserted in this brief, moreover, miscarriage of justice serves as an excuse for such a bar. To show miscarriage of justice, Cody would likewise have to show what he would have testified to at a second trial. Such a showing of miscarriage of justice, since it is tied to an independently asserted constitutional violation in each case, qualifies for a separately made determination (of miscarriage) justifying habeas relief of a new trial ordered, made independently of any finding of default excuse. *Herrera v. Collins*, 506 US 390, 400, 404-05, 409-11 (1993). See, also, *McQuiggan*, supra.

Even though the state court record citations throughout Cody's statements made here of his projected testimony show ample record reference, the use of projected testimony for the Herrera gateway purposes cited nulls any *Pinholster* requirement of state court record reference to such testimony. *Pinholster,* 563 US 170, 181-82 (2011).

Where there is a question of prejudice about omitted evidence or testimony, the habeas petitioner must show what the testimony would have been, or what the omitted evidence would have shown. See, *Reid v Sowers* , 1990 US App LEXIS 9565 at *7 (6th Cir); *Gray v Wolfenbarger*, supra, 501 Fed Appx, at 430. *Moore v Mitchell, supra,* also presents

a dance of avoidance of the complex comparative construct between the habeas law rule of *Herrera v Collins, infra* (permitting, as a gateway matter arising out of, but not requiring, a review of a separate constitutional claim *per se,* an independent habeas court consideration of miscarriage (not constituting a separate, standalone constitutional claim) but which miscarriage then morphs, if found, through evidence presented in the petition, into a habeas relief of new trial), and the habeas law of *Reid* and *Gray, supra* (on the necessity of the habeas applicant asserting, regardless of issue, "outcome determinativeness" of omitted evidence, making a showing of what that evidence would have been) on the one hand; and *Pinholster, supra* (on the subject of no evidentiary hearings permitted to add evidence not already in the record, when deciding, strictly, the merits of a constitutional claim) on the other hand. But *Moore* limits itself as to the meaning of *Pinholster,* within the constraints of the facts of Moore's habeas case, to finding what, unlike Cody instantly, petitioner Moore was attempting to do was to have an evidentiary hearing to develop evidence, not within the existing record, petitioner Moore could, on the issue of outcome determinativeness, only speculate about in his petition. *Moore* thus does nothing more, on this issue, than validate *Pinholster*'s bar of an evidentiary hearing to develop new evidence strictly related to the merits of a §2254(d)(1)/(e)(1) constitutional claim already raised. The issues avoided in the triple interplay above are, first, how a miscarriage determination based upon what new evidence would show, presented non-speculatively, in the petition itself, on an excuse gateway for a procedural default, if found to be reliably "outcome – determinative," can be made to apply to the excuse, but not, at the same time, justify a new trial. *Herrera, Reid* and *Gray* hold such evidence can be thusly presented; *Herrera* holds, if miscarriage is thusly found, new trial is warranted, per se; and neither *Pinholster*, nor *Moore* explaining *Pinholster*, overturn any of those holdings. The second issue avoided is how, if trial counsel were ineffective for not presenting evidence (clearly a *Strickland* constitutional claim) in *Cody*, Cody's testimony (obviously not part of the trial record), or, if the defendant were not permitted to testify by external factors (also clearly a constitutional claim; and also a clearly a case where his omitted testimony did not become part of the trial record), the habeas petitioner is to communicate what the omitted evidence would have been, or shown. Neither *Pinholster,* on its facts, nor *Moore*, on its, bars, nor purports to bar, the habeas applicant from making such a showing in the petition itself.

Serving all the purposes above stated in this introduction section, starting supra, p. 30, the section here on Cody's projected testimony, while applicable to Cody's claims 4 and 16/17, will not simply be repeated in the sections dealing more specifically with the merits of Cody's constitutional claims of denial of right to testify (Claim 4) and ineffectiveness of counsel in failing to investigate pre-trial, and abandonment of, at trial, Cody's CIA/White House affiliation-based defenses (Claims 16/17).

(1) What Cody Would Have Testified to at a Second Trial

Cody would preface his testimony with the statement , based upon his opinion formulated as a CIA operational officer lawyer attached to the Office of General Counsel, CIA ("OGC"), working on the 7th floor of the old CIA headquarters building, Langley, which he would describe in detail, in 1974, and, as a CIA official cover (Department of Defense) officer about to be reclassified as a non-official cover officer, during 1974-76, while working as such in CIA

headquarters, Langley (see, Doc 42-3: 2821), and from his experiences as an operations officer between 1976 and 2012, that many matters in his testimony remain classified. The information Cody possesses in detail on the covert administrative finance mechanisms within the US Government for US intelligence non-official cover officers is undoubtedly highly classified, at the TS level. The making of a public record of this information provides a roadmap of operational insights to every foreign intelligence service as to how to recruit CIA NOC officers as spies against the interests of the United States. Unlike Edward Snowden, Cody would testify, Cody is not releasing this information to the public, or to a trier of fact, in violation of his secrecy agreement (see, supra, pp. 27-28) voluntarily, or with the intent to release secrets, but does so, without volition or desire, because, in all of America, only one agent of one prosecutor, Mike DeWine, has chosen, in the context of the first criminal trial case accusations [redacted] against Cody, to misrepresent intentionally Cody was never CIA.

Cody would testify that, although he spent most of 1976 working at Langley headquarters, his non-official employment cover ("NOC") beginning that year was backdated, with false tax and employment documents, coordinated with the IRS, from Cody's cover consultancy firm, Barnett & Collins, in New Orleans, a CIA proprietary company serving as a "holding organization" for NOC officers about to be placed in more sensitive operations, and operational covers. See, Doc 42-3: 2813. Cody's next cover assignment was with Weyerhauser Company, an international wood products giant, headquartered in Federal Way, Washington. See, Doc 42-3: 3063 (Copy of predicate CIA employment resume Cody lettered CIA, producing CIA FOIA response refusing to confirm or deny the existence of such records. See, Doc 42-3:3066-67). He would testify that the now-named National Clandestine Service (formerly the CIA's directorate of operations) uses two forms of employment cover for its operations NOCs: private enterprise entity (including non-profit organizations) cover, and official government agency documented cover counterfeited by the CIA without "official" license or approval from the Non-CIA agency used, [redacted]* and for its official cover officers, licensed, official employment by the facial, apparent agency. He would testify that he has conferred with, and had communications concerning, CIA related legal matters, the nature of classified intelligence, national security and other intelligence matters, with Directors of Central Intelligence ("DCI") William Colby in 1974-75 in his 7th floor old Headquarters office; George H.W. Bush in 1976 in the same office, and in his home at Palisades Drive in the District of Columbia; William Casey in 1972,1980, 1981 (the subject of one 1981 meeting being the movement of certain NOC officer remuneration "off the books" of the CIA and, as possible, of any federal agency), 1984 and 1985, at his office in the Old Executive Office Building, part of the White House complex, when, in early 1985, Casey was accompanied briefly by President Reagan; and that all of these men knew petitioner in both his true name of John Cody, and his pertinent assigned cover name; Secretary of Defense Richard "Dick" Cheney, and CIA officers mutually introduced to each other as "Bobby Thompson" (Cody), "Jack Nimitz," "Brian Reagan" and "Richard Barberry" (and that, in New York City in 2001, a follow-through meeting was had to the 1992 meeting, infra, in which other Navy association-to-be national officers, "John Richardson," "Samuel Minami," "Susan Chamberlain," "Karen Adair," " Katherine Hughes," "Linda West,", and others, and prospective Navy association state chapter leaders, including "Brad Zielinski" (whom Cody had known as a NOC officer in 1972) were also introduced (see, DOC 42-3:2805). In early

*Called "simulated military rank" where the non-CIA agency is a branch of the U.S. Armed Forces.

1992, in the Old Executive Office Building, the subject of that meeting being the conceptualization of the United States Navy Veterans Association being formulated officially as a non-governmental organization reliant on private donors, but existing in support and furtherance of the achievement of allied contributions of their armed forces' combat personnel to military operations in order to minimize US Armed forces' casualties (See, Doc 42-3: 2804 & n. 2; 2831); to provide assistance, largely in cash, to the neediest, and oftentimes homeless, veterans who were vehemently reluctant to participate in official government programs because of their negative perception of unwarranted personal intrusion of bureaucratic requirements attached to those programs, and to promote a national defense posture, with emphasis on the capabilities and force projections of the United States Navy (President George H.W. Bush's service branch), second to none; and with President George W. Bush, and Special Assistant to the President Karl Rove, during their tenures in Washington, 2001-2008.

Cody would have traced his honorable military intelligence career as both an enlisted cadet, and as an officer, with the United States Army Reserve, including joint CIA-Army intelligence operations, dating back to 1967, when he was recruited as a covert intelligence operative to serve initially in contract NOC status, for the CIA (the "Agency") by a CIA officer serving under cover as a naval officer with the department of naval science at the University of Virginia. He would testify to his enlistment as a US Army Reserve military cadet that same year, and to Agency officials having objections that an officer serving covertly for the Agency should also be having an overt career, in his true name, with any US military service branch (see, Doc 42-3: 2812-13 (A)(1)); and that those objections were overcome at the time, but continued to be voiced through 1985. He would have testified to his beginning CIA assignment to Angola during the late summer (US time) of 1967, after his completion of the Army reserve officer trainee basic course at Ft. Benning, under cover of a CIA documents branch counterfeited State Department officer's passport, to interview Jonas Savimbi, rebel leader of the UNITA movement, for possible US assistance. Cody would testify to the CIA's enthusiastic support and assistance for his (accepted) application to Harvard Law School in 1969, and their provision to him of a cash stipend scholarship of $20,000 per year during his attendance. He would testify to the witting ("witting" is intelligence-speak; it means one knows of the CIA affiliation (in Cody's case) of another, usually by being informed of such by an authorized Agency officer) knowledge of certain of his Harvard professors, including professor Leonard Hall, who introduced Cody, in 1970, to (also witting) Nixon administration official (later DCI, 1981-87) William Casey.

Cody would testify he was known, as were a certain number of others, dating back to 1974, and continuing through 2012, as a non-ideologue whose intelligence analysis and experience were trending him to supportive positions on foreign and military policies favored by high-level conservative Republican policymakers and consumers of the intelligence product within the intelligence community, and within all the offices of all the presidents which provided direction for that community and its activities; and that he was likewise known for a deep-seated fervor as a nationalist (he first used the term "American nationalist" to describe himself during his interview for the Agency's career trainee program in 1974, in a CIA cover facility in Roslyn, Virginia) who believed the United States was founded with the special purpose and dominant concern of its governance to promote the universality of freedom, and

the rights of the individual person, against those in government, anywhere, who followed foreign-origin statist doctrines; that he was likewise well known within those populations as quoting constantly from his two heroes, President John F. Kennedy, in his inaugural address, that the United States would go any distance to preserve the cause of individual liberty in the world; and from President Reagan, later, in his 1981 inaugural address, that, in the context of our times, government was not the solution, but the problem.

Cody would testify that a number of Navy association PFRs were selected by the Agency for Navy association use, not because of the total dollars expected to be generated by such fundraisers at, what the CIA knew, from years of studying public fundraising, would be a per-contribution average of $17-20, but because of the proprietary information, the "tap base" of the established fundraisers constituting millions of US citizens, so that, in the case of cash payments, made from Navy association assets, averaging $1 million per payment to foreign leaders, called, in intelligence parlance, "influence agents" or "assets," from Afghanistan, Iraq, Israel, Turkey, the Republic of Georgia, [redacted] Ukraine, Kazakhstan, Turkmenistan, Tunisia, the Philippines, Belgium, France, Germany, Italy, Spain, the United Kingdom, the Netherlands, Denmark, Norway, the Czech Republic, Slovakia, Hungary, Poland, Romania, Bulgaria, Croatia and other countries, and within the non-American political hierarchy of the North Atlantic Treaty Organization, those payments having been made to those persons to exert influence within their countries to secure the substitution of combat-effective troops from those countries for U.S. armed forces front-line veterans engaged in the most dangerous missions in the global war against jihadist terror abroad, or in other covert activities of an intelligence or security function purposed to inflict damage upon enemy forces operating as part of an Islamist state and non-governmental organizational axis against the cause of freedom for which US armed forces personnel were laying down their lives; those payments could be, and were, supported by Navy association and NOC officers presenting the case, simultaneously, of tens of millions of Americans (and a number of foreigners as well) with the resolve to support the cause of the American soldier and sailor in serving what should also be their country's cause in fighting against the violent projection of harm of Islamist and caliphate ambitions, into their countries, and against their peoples, as well as Americans. See, Doc 42-3:2821.

Cody would testify that these more specifically described payments, supra, to these agents of influence, were well within the more generalized purposes and purposive activities the Navy association had registered in written form with the State of Ohio, with the IRS, with every other American local and state authority (numbering, at a minimum, 30) where such registrations were made, and as they were described on the "Mission Statement: Who We Are" page of the Navy association's website, www.NavyVets. org. Cody would testify that he participated in two of such payment events personally; and that he had the other events personally confirmed to him orally as having been made, by the President of the United States, by the Special Assistant to the President of the United States, by his NOC handler, and by others reasonably known to him as officers of the Central Intelligence Agency, on multiple occasions.

Cody would testify that neither he, nor any other Navy association officer, personally supervised each word spoken in every telephone solicitation made by each PFR, nor would it have been physically possible to have done so. The

Navy association's contracts with its PFRs specified that, in addition to raising funds, they were charged with communicating the purposive missions of the Navy association. State's witness Judith Roberts testified (see, Doc 43-16: 6889, 12-13; 43-16: 6892, 9-12) she was solicited [by ACS, the PFR which raised the overwhelming amount of PFR – raised funds], that her donation was going to "help veterans." State's witness Dr. Patrick Garnett Bray testified[74] that he was solicited to help Navy veterans transition back into civilian life.

Although the Navy association did make donations to US veterans affairs, and state and local veterans and employments agencies, to assist with facilities and programs to assist veterans in transitioning back into civilian life after active service, no instruction was ever given, by Cody or the Navy association, to any PFR, to solicit funds for such a discretely defined purpose exclusively, or ever to solicit funds discretely in support of US armed forces members, or veterans from any service branch, or locality, to the exclusion of others. The homepage of www.NavyVets.org prominently proclaimed that the Navy association considered 'all American patriots to be part of the Navy family.' The website, along with the name of the association, was cleared by the Bush-43 administration, with its Department of the Navy, and its Department of Veterans Affairs ("VA"). "Bobby Thompson" had one face-to-face meeting in Washington with the then acting director, VA, who was made witting. No demurral to the Navy association's website, name, or its substantive activities or expenditures was ever received by the association from the Bush-43 administration, or any of its agencies; instead, the association and its activities, were prominently featured in VA and Department of Defense publications as recognized, in glowing terms, by both.

Cody would testify that total dollars produced by all PFRs for all the years the Navy association operated was no more than $25 million, or an average of approximately $2.85 million annually, for the years 2001-10. All of this money was received from each donor in the form of a monetary instrument, usually a check, sent by mail. All these donor checks were physically picked up and acquired by the PFR (or a dependent collection/accounting company appointed by the PFR), with the Navy association having no physical access to those donor checks. The PFR, or its dummy collecting agency, then deposited those instruments to a Navy association bank account, or accounts, which, in all cases, the PFR had opened, by reason of the PFR's, not the association's, personal appearance, in a bank the PFR had unilaterally selected, using Navy association documents the PFR required as a condition of its fundraising contract with the association. At the same time of these deposits, the PFRs withdrew from that account 85-90% of the deposited amount, as its fees (and the fees of its dummy collecting agency), and the banks charged their transactional fees, leaving the Navy association (and Cody, as the signatory for the account) with a grand total of, maximum, $2.85 million from those donations from those PFR-origin donors, for those years, of about $285,000 annually, which could be expended for Navy association purposes.

[74] See, Doc 43-13: 6325, 18-23; Doc 43-13: 6326, 11-14; Doc 43-13: 6332, 14-6333, 4. Mrs Roberts and Dr Bray were the only public donor witnesses who testified to what they were solicited for. They were both telephonically solicited by the PFR, Associated Community Services, Inc. ("ACS").

* Sees, infras, pp. 36, 39.

Cody would testify that funds received from every donor were expended for 'all the purposes' of the Navy association, explicitly as stated in a writing Cody, the Navy association, and the Agency, insisted (in Cody's and the association's case, to each PFR) each PFR-solicited donor received, as well as being explicitly stated on the Mission Statement page of www.NavyVets.org. See, Doc 42-3:2831. No PFR was ever authorized to tell a PFR-solicited donor that his or her contribution, or any percentage of his or her contribution, was going to go, or was earmarked to go, exclusively to a tightly or discretely defined activity of the Navy association; and each donor likewise received in writing, before any check was written, a statement that a substantial portion of the contribution went to defray the cost of fundraising (CSI's statement said 90%). Likewise, no registration with any state promised that received funds, or a percentage of received funds, would be spent exclusively "in" a given geographical locus, as opposed to a promise that received funds from donors within a state would be spent to benefit, but not exclusively, veterans from that state, or be spent in accordance with the purposes of a Navy association state chapter, which were the same as those of the national Navy association. It was the national Navy association, not its Ohio chapter, which was registered to solicit funds in Ohio.

The association's "care kits" program, for example, featured kit items deployed troops and sailors told the association they wanted (including canned beer, one per kit (when and if provided), encapsulated in bubble wrap; and traps requested by ground troops in Iraq and Afghanistan for vermin-infested structures they were housed in temporarily), by design, provided, with the personal approval of the Commander-in-Chief and SecDef Rumsfeld expressed to Cody, our service members with items not readily (or, many times, at all) provided by the Department of Defense ("DoD"), with recipients chosen (by state home-of-record, in bulk) comparatively proportionate to dollar contributions from each home-of-record state.

Cody would testify that all monies received, from whatever source, by the Navy association, were treated, as a general accounting concept, as "fungibly received" into one "fund", comparative[illegible] with the concept that incoming receipts of the US Government are received into one fund, the US Treasury; and, thus, funds received in cash, in an average per donation amount of approximately $4,900, from donations of US armed forces and veteran members of the Navy association, friends of the CIA, friends of American patriotism directed against the jihadi terror threat to US national security, and friends of the George W. Bush administration's military, veterans and foreign policies in the global war on terror against Islamism's war on America, solicited, not by any PFR, but by CIA or former CIA officers or friends of the CIA, or friends of the Bush-43 administration, regardless of where those monies were kept prior to expending, were treated as being received into the same internal "pot" as donations received by check, or solicited by the PFRs to other members of the public not falling into one or more of the categories above.

[Cody's Income and Savings]

Cody would testify that, for the most part, and especially, but not limited to, when he worked abroad in a covert intelligence role, he was paid in cash. The exceptions were when he had overt income from his cover job: for example, when he had official cover of a Department of the Army ("DA") Geographical Evaluation and Analysis Group, while

actually working at CIA headquarters in 1974-76, as a GS-9, the DA would normally have paid salaries by check, so that is how he received that portion of his total CIA compensation, to be deposited (however, with no overt record retained) with the covert branch of the Navy Federal Credit Union located inside Langley HQs. The remainder of his CIA compensation, as well as operational allowance funds (large sums in comparison to what his overt cover pay was) were made in cash. For the years 1967-2009, his total average annual remuneration, from covert intelligence work sources, was approximately $50,000, with another (approximately) $50,000 received annually in non-receiptable (by Cody signature) general and miscellaneous operational funding allowances. Cody received a full quarters allowance when not residing in the D.C. area, his official permanent duty station. Monies were advanced to Cody, and, likewise, because of the nature of his covert employment, he was asked, frequently, because of federal government red tape in securing budgetary allotments to be distributed in the field, to advance from his own funds, operational expenses, to be reimbursed to him later. While serving under pseudonymic identity cover over long periods, Cody could not, and did not, in order to protect both his personal and operational security, maintain bank accounts or asset-of-record accounts in his true name or identity, and maintained such accounts in the cover names/identities as assigned, or inasmuch as the existence and maintenance of such an account was a necessary building block for effective cover. Agency policy prohibited any transactions with or related to the operation of such an account to the economic or financial loss, detriment or prejudice to any US citizen, or permanent resident alien with established title to the original identifier or identity (cf., see, wording of the federal identity theft statute). Cody would testify that no such detriment or prejudice did occur to any person the State might, or did (at the first trial in Cr-12-565050A) identity was a "victim" of identity fraud. See., Doc 42-3: 2801, ¶ I(A).

Cody would testify that his cash savings as of 2000, amounted to approximately $1,400,000; that he brought that money with him when the Agency assigned him, and the Navy association, to a low-rent, nondescript home office on 21st Avenue in Tampa (Doc 42-3:2831); that from time-to-time over the next ten years, he was requested by persons reasonably believed by him to be his superior CIA superiors, such as his NOC handler "Hal Burke," or persons he knew to be officially connected with the Office of the President (George W. Bush), to make contributions to certain political candidates, without any *quid pro quos* of any kind being stated or mentioned, and that he did so, in both cases, from time-to-time; and did so further, *sua sponte*, at other times; and that, at other times, because a prospective foreign influence asset was visiting Washington, or Orlando, on short notice, and a cash payment and oral presentation (see, supra, pp. 34 [redacted]) needed to be made, and there was insufficient cash available from Navy association accounts, or secured storage (while Cody was willing to risk keeping his personal funds in the 21st street home-office, he did not keep Navy association cash on hand in the home office, other than in very small petty cash amounts, for fear of his professional liability if such monies were stolen or went missing), he was requested, in each case, by one or more of those same persons, to advance his personal funds for such CIA and Navy association purposes, with the direction and advice (which, he found, from a business and accounting perspective, and legally, and morally appropriate) that he could, and should, reimburse himself for such advances, from Navy association checking accounts. Cody also knew these procedures had been used before in covert operations he had been personally involved in with non-profits providing funds

for Chilean truck drivers and miners on strike against the Allende regime in Chile in 1973; providing funds for the Contras in Nicaragua in 1981-84; and providing funds for eastern European movements striking against the Soviet-puppet socialist regimes in their countries in 1987-91; and from other American non-profit provision of funds Agency operations he had been involved in. Cody, likewise, from time-to-time, made expenditures from his personal funds for cash purchases for gifts to needy veterans in the states he visited on Navy association business, sometimes as an outright gift or gifts, and, on other occasions, as a reimbursable, and reimbursed, advance or advances. Cody did not steal, or take, monies from donors to the Navy association and spend those monies for his own personal benefit or inurement. Nor did he authorize the expenditure of such monies at any time other than for the legitimate administrative and purposive operational expenses of the Navy association.

Cody left the Navy association in 2010 with substantially less in savings than when he entered the Ybor City, Tampa, 21st avenue Navy association home-office in 2000. See, Doc 42-3: 2819; Doc 43-19: 7583, 21-23; Doc 43-19: 7624, 15-7625,7. Tampa had been selected because the Navy association CIA mission was expected to be informed and furthered by activities of, and require interfacing with, the U.S. Armed Forces CENTCOM and CINC-SNAKE (Special Operations Command, a.k.a. SOCOM), the headquarters for both located at MacDill AFB. In his activities relating to the Navy association, Cody did, in fact, coordinate with representatives of both those DoD agencies.

Cody would have related, from the history of the case, each one of the repeated of record denials by elements and officers of the Ohio Attorney General's office, and the office of the Cuyahoga county prosecutor, that Cody was never CIA (see, e.g., Doc 42-2: 2635, n. 12: "To the State [of Ohio's] personal knowledge, no ...materials [showing Cody was ever CIA] exist...in federal files"; see, also, Doc 42-3: 3069, *et seq.*). Cody would relate that he spoke with then Senator Mike DeWine in Washington in 2006, then a ranking Republican member of the US Senate Select Committee on Intelligence, in a conversation in which Senator DeWine related the large income flows into the Navy association (a matter of public record on the association's IRS-filed 990 form informational income returns) from what he believed, and called, were political fundraising and "party" (meaning Republican party) sources; acknowledged "Bobby Thompson" (petitioner's CIA assigned personal cover identity at the time), Cody, as an intelligence operative with apparent access to President George W. Bush (see, Doc 42-3: 2801, ¶I(A)), and as a man most prominently responsible for managing the day-to-day affairs of the Navy group, the United States Navy Veterans Association, and, therefore, a person with, DeWine said he believed, control over the substantial amount of money DeWine believed the Navy association was receiving; DeWine related the work he had done to help avoid public scrutiny by Democratic party elements in the congressional intelligence committees, of the patriotic activities of the Navy association, since those activities were White House military and intelligence-function related, and the work he and then Senator George Voinovich (R.-Ohio) had done to assist the Navy association with its fundraising activities in Columbus, and Franklin county, Ohio; and he requested monetary assistance with his 2006 senatorial re-election campaign. Cody spoke to Karl Rove about DeWine's request, and was informed that Senator DeWine and Senator Voinovich, had not done "a lot" to help President Bush's re-election campaign in 2004 (against Democratic presidential candidate US Senator John Kerry), in a "closely run" affair in Ohio, and that President Bush was not authorizing any such contribution or

contributions. Senator DeWine did not receive the monetary contribution[s] he requested, but did receive an "in-kind," FECA reported, contribution to his campaign, in a much smaller value, from donors to a Navy association related (but independently operated) Federal Elections Commission-registered political action committee, NavyVets, also conceptualized, first, in Cody's 1992 meeting with SecDef (under President George H.W. Bush), and, later (under the former's son, President George W. Bush) Vice-President Dick Cheney. See, Doc 42-3:2804, n. 1.

To Cody's personal knowledge, dating back to his CIA OGC tenure in 1974, there have been [redacted] CIA interventions, of every kind and degree, and declined interventions, in governmental administrative proceedings involving, and criminal proceedings brought against, CIA and other intelligence community officers, involving their intelligence-related activities. He would testify that no federal charges, and no state charges other than Ohio's, have been brought against him related to any activity for which he stands convicted in CR-12-565050A. He would testify the Navy association fundraised in, and conducted operational and administrative activities identical to its activities in Ohio in (many times over his cover signatures on government and business documents) 39 other states, the District of Columbia, and other territories and dependencies of the United States, and in at least 10 foreign countries, raising 10's of millions of dollars more in many of those jurisdictions than the $2-3 million which was raised by the Navy association PFRs in Ohio over the indictment's 6-7 year period. See, Doc 43-22:8205, 8-12. The excess, reported by the Navy association in its IRS form 990 informational returns, of $4 million (for Ohio) over the $2 million-PFR-raised figure was before the App. R. 26(B) appellate court. Id.

The Agency used personal assets, in and outside the United States (not to include Cody) to solicit its friends (most of whom were qualified, first, as "US veterans"[75], and who, also, were patriotic supporters [redacted] (as was Cody) of the foreign and military policies of the George W. Bush administration (2001-09) and, prior to that, patriotic partisans of the cause of the American veteran. Approximately $72-75 million in contributions, during the years 1998-2009, were received from such contributors. See, Doc 43-22: 8205, 8-12, comparing the amount raised by the PFRs, with the total amount raised reported by the Navy association, the excess being the non-PFR –made contributions by friends of the CIA and the Bush administration.

Funds received by the Navy association were expended, in single digits as a percentage of total receipts of the association, on recreational activities for Navy association members, and other veterans. These included functions during which food, and both alcoholic and non-alcoholic beverages were served. These were IRC §501(c)(19) sanctioned purposive expenditures, each of which (in addition to being explained in the Navy association's IRC Form 1024 application) were listed, in dollar amounts, in each of the association's annual IRS form 990 informational returns. Funds were expended (and likewise IRS authorized, and IRS reported), also, for Navy association members, including Cody, entertaining CIA and USG officers interfacing with those members on Agency/Navy association

[75] This IRC §501(c)(19)-based definition included any person who served in any branch of the US Armed Forces during a time of war, including service members actively serving, This period of time was further defined, for pertinent purposes during the time of the Navy association's activity, 1992-2010, as including almost every date from September 3, 1939 onward.

business. Where a donor was not told, orally or in writing, in a solicitation, that a portion of their donation might be spent on such activities, no portion of such a donation made was spent on such activities, one of the reasons for the Navy association maintaining multiple bank accounts.

Cash purchases were also made to buy in-kind gifts for individual veterans from retailers offering discounts for such. From time-to-time, individual Navy association purchasers were provided with personal cash funds of members, including but not limited to Cody, to make personal purchases for that member, and were provided Navy association cash funds simultaneously to make purchases for such gifts for veterans or active duty armed forces members. These purchasers were expected to keep each set of purchases separate; from time-to-time those purchasers (who were neither accountants nor professional buyers) did neither, commingling the cash from the two sets of origin funds, and provided a single receipt (some of which were referenced at the first trial) for both sets of purchases. Some of these receipts were submitted to the IRS examiners who audited one of the Navy association's chapters, with Cody's explanations orally provided at the audit hearing in Washington, of those expenditures and receipts, as above. Cody also related to the IRS auditors that the Navy association audited did not have receipts for approximately 70% of its claimed, and actually made, expenditures. He also related to the auditors that no Navy association funds were used for the personal expenses or personal inurement of individual members, including, but not limited to, "Bobby Thompson". See, Doc 42-3: 2831. There was no indication from either of the two IRS examiners that the substance of Cody's statements was less than credible, and the outcome of the hearing, and investigation the examiners determined was a "pass" of the audit with a caution that the association should be more careful with its record keeping in the future. It is these facts related to the excusable neglect Cody described, which were the factual presentation Cody was not permitted to make at the first trial, Cody would testify. Cody would testify that it was the absence of those facts which were one of the bases of the Ohio RICO, theft and money laundering charges at the first trial and the resultant convictions.

Cody would testify that the Navy association passed its IRS audit, held in the association's Farragut Square, D.C. rented offices facilities, even though 70-75% of its stated expenditures did not have receipted for backing (and where Cody gave testimony appearing as "Lieutenant Commander Bobby Thompson, USNR (ret)"), because IRS officials , appointees of the Bush administration carried into 2009, were made witting "Bobby Thompson" was an intelligence officer, and the activities of the Navy association bore the sanction of a USG intelligence activity (See, Doc 42-3: 3804, n. 2)), while at the same time being carried out for the heroically patriotic purpose of saving the lives of active duty US armed forces members, and for providing material assistance to Navy and other service branch veterans who had fallen through the cracks of the U.S., and state government's red tape in administering their veterans affairs programs (See, Doc 42-3:2816).

[Sierra Vista as *Res Gestae*; and as Evidence of Cody's CIA/White House Affiliation]

The prosecution raised, at the first trial, in the testimony of a retired, former Cochise county, Arizona prosecutor (1980-84)(and retired chief judge, subsequently, of the Arizona traffic offense appellate court (Doc 43-8:5334-38)), and Ohio Bureau of Criminal Investigation ("OBCI") detective Al Bansky (Doc 43-20: 7698, 5-7701, 18), evidence

concerning Cody's activities in Cochise county in 1980-84 (creating inferentially from that evidence that Cody had fled Cochise county in April, 1984 because he was engaged in criminal activity regarding his [CIA cover] law practice, and/or because he was disgraced by his failure in not passing an Army General Staff & War College course on nuclear weapons operations). Cody would have testified, as to these subjects that the events in Cochise county were indeed watershed events respecting Cody's covert career with the Agency. He would have testified, and would testify, that he was assigned by the Agency initially, in a cover employment of a solo law practice, for which he retained his own legal practice income, plus he received, as his Agency NOC compensation, approximately $50,000 annually cash money, plus approximately $50,000 per year discretionary-expenditure-unreceipted (by Cody's signature)-for operational funds cash money. He would testify that at the time of this assignment, in 1979, he heard a CIA official refer to him as a "Deep NOC" officer. Cody would have described, in detail, CIA NOC branch payments to NOC officers, and how they were administered, including the filing of Cody's 1040 and business-related income IRS returns, with both NOC branch, and the IRS, so that IRS officials with pertinent security clearances knew returns of CIA officers serving the Agency and the American people under employment and/or personal identification cover, such as a pseudonym or SSN or date of birth which was not "true" to them, were such officers (see, Doc 42-3:2816).

Cody was assigned, initially in 1979, to a joint US Army-CIA operation (see, also, Doc 42-3:2812-13, (A)(1)) involving (as his role) the development for further recruitment as agents, of foreign military officers assigned to the US Army courses conducted at the United States Army Intelligence Command schools at Fort Huachuca, Arizona, a military reservation adjoining the city of Sierra Vista, in Cochise county. Beginning in 1981 he served, as duly assigned by his interfacing controllers from NOC branch and CIA HQs, Langley, as a funnel for the transportation of millions of dollars in cash, and non-cash, money and materiel raised from private sources (in order to avoid the requirements of a Democratic-controlled Congress in the process of placing prohibitions on direct CIA funding for the Contra freedom fighters opposed to the Soviet-style enforcement policies (using law enforcement to suppress the freedoms of the individual) of the communist Sandinista government in Nicaragua, of Daniel Ortega (believed by the Agency to be, also, an intelligence asset of the Soviet KGB); and to avoid the requirements of the Intelligence Reform Act of 1980, 50 USC §3093, and its definition of reportable covert action limited to an operation funded from the US Treasury[redacted],

Cody's assignments, while assigned to living out of two apartments in Sierra Vista, were, circa 1982, expanded to include a counter-intelligence electronic (by "bug") surveillance of the offices of the Cochise county prosecuting attorney, Beverly Jenney, in order to determine the nature of any threat to the operational security of foreign, Latin American agents who were reporting to the CIA on drug trafficking, primarily cocaine trafficking, stretching from Bolivia and Colombia up through the isthmus of Panama to Mexico to the extensive Cochise county/Sonora border, where shipments worth billions of dollars on the street crossed into the distributorship network there run by Douglas, Arizona municipal court Judge Joseph Borane and his brother, the director of the Douglas, Arizona school board, for further distribution throughout our states west of the Mississippi, agents and assets who were also reporting on, and assisting on, the cash and materiel assistance program to the Nicaraguan contras. The Agency wished to assess any

prosecutorial threat out of Jenney's office to those Agency assets, who included the Panamanian Defense Forces head, and *de facto* Panamanian head of government, Manuel ("Manny") Noriega. That bug, and bugs, revealed Jenney having extensive conversations in her offices with her assistant prosecutors Dennis Lusk and James L. Riley, and the Cochise county sheriff Jimmy Judd, during which all four explicitly agreed that felony criminal cases would be publicly promoted throughout Cochise county against suspects not involving the Boranes' operation, in order to divert attention from, and to protect, the Boranes and their gigantic distributorship. The bugs placed in Jenney's offices, including one placed in Dennis Lusk's Bisbee office inside the same building (before he left to seek work in Pinal county), went, unexpectedly, dead in 1984. Shortly after that Cody began receiving notice, that his death was being planned by local government associates of Sheriff Judd, from four separate, credible government-affiliated sources, one of whom was a former deputy sheriff. The CIA physically extracted Cody by automobile, on short notice, from Sierra Vista, where Cody's law office was located, and "cancelled" his true identity of John Cody at that point, forever, in order to preserve his future operational usefulness to the Agency without further threat from Cochise county-related sources.

[Identity Fraud]

Cody had been assigned by officers of the federal government believed by him, reasonably, in his opinion, to be CIA (Cody would have identified, for field Deep NOC officers, coded procedures for the handing off of a NOC officer from one CIA NOC handler to another, establishing administrative, operational and personal security) all the identities and identifiers, the prosecution introduced at the first trial as acquired through "identity fraud" (as defined in the Ohio statute; see, Doc 42-3:2801), giving details as to where and when, along with the procedures relating to the acquisition and use of such cover identities he learned and observed while Cody operated under the auspices of NOC branch, CIA, and while attached to the USAR reserve unit co-home-based with the National Security Agency ("NSA") at Fort Meade, Maryland. CIA HQs Technical Services Division was particularly helpful in providing disguises and appearance guidance for Cody's different NOC identities and identifiers referenced in the State's discovery/ trial evidence [See, Doc 42-1: 1831-38; 1899-1901; 1917-25]. These acquisition and use procedures alluded to included[76] telephonic and non-telephonic meta data bulk collection programs by the NSA in which personal data and identifiers, not considered substantive content, are acquired, including from, as of 2000, over 250 million discrete internal communications acquired by NSA annually, although exactly how many targeted and non-targeted domestic telephonic and electronic communications, separately, are acquired, is unknown to Cody. Classified cooperation between NSA and CIA going back, at least, to Cody's personal observations made at Ft. Meade, and Agency HQs, Langley in 1975, leads to the referral of such data, and identifiers[77], if deemed appropriate, by NSA to CIA, for

[76] Cody's statements, *supra,* are made relevant to his indictment for periods prior to the passage of the USA Freedom Act of 2015.

[77] See pertinent revisions and editions of E.O. 12333, §§2.3, 2.3(d), 2.3€, 2.3(f), 2.3(h), 2.3(last para, unlettered).

determination of the "suitability" of the Subject's identifiers for operational use, pursuant to E.O. 12333, supra (see, Doc 42-3: 2880).

Cody would testify that he, along with other CIA NOC officers, concerned about their personal security, and their operational security, made ongoing, multiple comments in the nature of complaints, going back to 1976, to the effect that personal cover (false identity and employment cover) was not CIA-institutionally-strong enough, or good enough. Included in those complaints was the sub-complaint that such covers needed to be personally comfortable, subjectively, to the individual NOC officer, especially in the case of long-term use. Accession to this strongly made criticism of existing and complacent procedures, of the NOC officers, by NOC branch, included new policies and practices, that, among others, NOC officers could recommend specific identities, and that identities of actual persons propounded for possible cover use would be first circulated to a NOC officer by the Agency for the officer's recommendations and comments as to suitability for personal use as his or her identification cover, with the actual issuance of cover identities, along with the obtaining of identity documents, to be made, or directed by, the Agency. He would testify the Agency has no policy prohibiting the acquisition of, or use by, NOC officers, of cover identities of living, or deceased individuals without the subject's permission; and he would detail, from policy determination sessions he attended, the reasoning of operational officer managers that extreme personal and operational security issues are posed by the issuance of fictionalized identities to NOC officers in a world electronic environment in which a fictionalized identity can be detected simply by "googling" the identity, in a matter of seconds.

He would testify, to his personal knowledge, 1967-2012, of the routine use by CIA officers, of identities not their own, in executing government and business documents both within and without the United States, as a requirement of "living their cover," flowing lawfully from the mandate to the Director, CIA, under the National Security Act of 1947, to protect the "sources and methods" of American intelligence (see, Doc 42-3: 2801,¶I(A); Doc 42-3:2830).[78]

Cody would also testify to the role of witting CIA contacts at the Social Security Administration and state driver license offices in not creating issues for NOC officers operating under false name/identifier (personal) cover interfacing with their offices, and how cover documents purporting to be government issued are developed and obtained from both CIA counterfeiting, acquisition from private sources, and both the unwitting and witting provision of such documents from (non-CIA) governmental agencies, based upon his personal experiences as a CIA HQs officer, 1974-76, in obtaining and using, and in assisting other covert officers in the obtaining of such documents, repeatedly, since 1967, including the provision of such documents to officers, and the provision to them of domestic and foreign safehouse quarters because they were believed to be the targets of, or suspects of, a government criminal investigation perceived to threaten a lawful CIA operation or activity.

[78] *US v. Duncan,* 34 M.J. 1232, 1992 CMR LEXIS 582, HN 14 provides ample authority for a covert intelligence officer "living his cover" as a lawful purpose of the American espiocracy.

Because of his legal training at the Harvard Law School, Cody was, since 1974 at least, always concerned about legal authorities governing the scope of his covert activities. He requested, and received, in 1986 in Seattle, and in Washington, D.C. in 1992, briefings for his continuing NOC advanced operations education. These included instructions on controlling legal principles governing those activities. In 1986, he was instructed that *CIA v. Sims,* [his subsequent review referenced the citation as 471 U.S. 159, 168-69, with followed support [Cody now notes, in researching this brief, [redacted] referenced at *ACLU v. DoJ,* 681 F. 3d 61,74 (2d Cir 2012)], a 1985 Supreme Court case, held the discretionary power of duly delegated Agency officers to protect intelligence sources and methods was virtually unlimited pursuant to the National Security Act of 1947, 50 U.S.C. § 102(d)(3). That provision was later amended, Cody learned in another briefing in Washington in or around 2006, to transfer the protection authority from the director of central intelligence ("DCI") to the newly appointed director of national intelligence ("DNI"), but with specific exceptions granted also by amendment, in 50 U.S.C. §3507, to the CIA, from any reporting, including but not limited to financial matters, on subjects touching upon the protection of those sources and methods. At no time, however, after 2006, did anyone in Cody's USG covert intelligence chain of command notify, or suggest to Cody, that the DNI was withdrawing prior Agency or White House decisions respecting any operational mandate or discretionary permissions, including mandates or permissions regarding Cody's covers, including acquisition and use of personal identifiers, given or assigned to him, at any point in time, through his arrest in 2012.

In 1992, Cody was instructed that a military court of review case, US v. Duncan [which citation Cody later referenced as 1992 CMR LEXIS 582, at **41], established broad authority for the concept there could be no inference drawn of specific intent required to commit a crime involving an aspect of a covert officer "living his cover," including but not limited to all aspects of his operational and personal security, including his acquisition and use of cover identifiers and concerning all matters relating to both his personal and operational financing and accountability.

Cody would have testified to his personal involvement, while attached to CIA Office of General Counsel (an involvement which did not incorporate him using his true name) in lobbying Congress to successfully ensure that an element of proof in any propounded or existing federal identity theft statute was kept intact, that the acquisition or use of the identifiers of another by the accused not include such acquisition or use for a United States Government intelligence-related purpose; and in lobbying state legislatures for, at a minimum, an exception to any "identity theft" statute, for acquisition or use for non-law enforcement "lawful purposes," (like the affirmative defense written into Ohio's identity fraud affirmative defense statute, although Cody did not personally do any such personal lobbying in Ohio), with mixed results. See, Doc 42-3:2831.

The intent of the CIA lobbying "team" in these endeavors sprung from the fact that experienced –in-cover NOC officers were, and are, not satisfied with the notion that totally fictionalized identities and identifiers, even if they included utilization of a credit card issued by a CIA co-opted private issuer, a bank account issued by a co-opted bank, a passport, a fictionalized, sketchy history with the IRS, a co-opted state DMV or a credit reporting agency, or other private sector databases, are even remote substitutes for the operational and personal security of an undercover officer

provided by the "real McCoy" – identity from a real, non-fictionalized person, which would, could, and in a number of cases, including Cody's, did, provide. Speaking to his intent with respect to the crimes of which he stands accused, and his observations made over years of CIA covert experiences, he would testify that personal, religious-based morality has little place in making such a determination of the value arising from the use of such latter-case identifiers, nor did it enter into the determination of the Ohio State Legislature in passing ORC § 2913.49(F)(2)(b), providing an affirmative defense to the crime of identity fraud for the acquisition, use or possession of another's identifiers without consent, for any "lawful purpose," excluding use for law enforcement agency personnel. Cody was instructed, moreover, by teaching officers of the Agency over the years that personal morality has little place in intelligence operations in general; and that the overriding morality in that area, which nullified any conflicting intents driven by any conflicting moralities, unlike the commission of a criminal act where the actor may be subject to multiple intentions, was the doing of the overall mission for the patriotic purpose of serving the national security of our country, as determined by the responsible representatives of a special and unique nation, the United States. As a field NOC officer, Cody was instructed, he had broad discretion as to **how** he performed the mission, but that to refuse an assignment was unacceptable.

[Persons Witting of Cody's CIA/White House Affiliation]

Cody would testify, to his personal knowledge, including personal conferencing (briefly, in some cases, longer in others) with all of the following, that the following persons were witting or made witting of his CIA affiliation: Dick Cheney (as of 1974); former DCI William Colby (as of, at a minimum, 1972 (because of Cody's assignment to the residuary Operation Phoenix program in Saigon that year under the simulated military rank and identity (not the same, for the CIA, as "official cover") of Ensign Bobby Charles Thompson, USNR, Joint Army-Navy Mekong River Task Force, an assignment made upon Cody's completion of the US Army Infantry Officers Basic Course at Ft. Benning at CIA request, as had been his attendance at the Army Ranger and Airborne schools at Ft. Benning during his law school summer vacation in 1971 [Cody's assigned US Army branch was military intelligence, his attendance at the Army's Military Intelligence Officers' Basic Course having been waived entirely by the Army in 1972, highly unusual (outside the insider knowledge of the tight closeness of the Army/Navy/Air Force special ops community, with CIA) for a junior officer, because of Cody's [known to Department of Defense and Army officials] CIA training and experience] (Bill Colby was the head, or the immediate former head, of the CIA intelligence operation program in the Republic of Vietnam known as Operation Phoenix)); George H.W. Bush; and William Casey; Presidents Ronald Reagan, George H.W. Bush, and George W. Bush (first made witting by his father when he introduced Cody to his son as "Bobby Thompson" in 1998 in Houston, where Cody had taken a brief, unpaid leave of absence from his contract NOC job as a volunteer in Governor Bush's re-election campaign); U.S. Senators Mike DeWine, George Voinovich, John McCain, Mitch McConnell, Elizabeth Dole, Arlen Spector; former New York City mayor Rudy Giuliani; and Special Assistant to the President Karl Rove (first made witting when Governor Bush introduced "Bobby Thompson" to him in Austin in 1998).

To Cody's personal knowledge from working in the office of General Counsel, CIA, his personal conferences with directors of Central Intelligence Colby, Bush and Casey, and his CIA personal experiences working as a directorate of operations (now renamed the National Clandestine Service) officer serving in both staff and contract positions under both employment official cover (government cover officially backed by a non-CIA government agency originating the cover (in Cody's case, the Department of the Army (1974-75)); and the U.S. Army Reserve (1967-85), perceived by the Agency as official cover for certain Agency/Army joint intelligence operations to which Cody was assigned) and non-official cover (non-government agency originating (in Cody's case: the law firm of Conroy, Hamilton, Gibson, Nickelsen & Rush, Honolulu (early 1970's); the law firm of Sullivan & Cromwell, New York City (1973-74); the security consultancy firm of Barnett & Collins, Inc., New Orleans (1976); Weyerhauser Company, Federal Way, Washington (1976-79); Law Offices of John Cody, Sierra Vista, Arizona (1981-84); various organizations (1984-90); Canadian Parents Against Drugs, Vancouver, British Columbia (1990-92); United States Navy Veterans Association (from time-to-time herein, the "Navy association"), Washington, DC and Tampa, Florida (1992,1998-2010); Plymouth Rock Society, Boston ,Mass. (2010-11); Quaker Penn's Landing (Philadelphia, Penn. and Portland, Oregon (2011-12)); and government cover originated by the CIA without license from, or public record in, the facially apparent government agency (in Cody's case: Department of State (1967) and Department of the Navy (1972-73)), on a "need to know" basis, IRS officials and (after 1972), where FEC registrations had taken place for a CIA-employment cover organization organized as a federal political action committee, at least one cleared commissioner of the Federal Election Commission, were made witting, where, pertinent to documents which might have to be filed with those agencies, of Cody's , and other NOCs' covert cover employments and cover identities; and that the reasoning behind that notice was that the NOC officer and his or her intelligence operation could not function if subject to putative counter-fraud legal enforcement action of those agencies directed against either the officer, or the operation, because of lack of witting knowledge of CIA or USG intelligence function activity affiliation. See, Doc 42-3:2816.

At the audit of the Navy association chapter in Washington, the IRS auditors were informed, and knew, and believed the association was a cover for an intelligence operation, and were informed, and knew, and believed "Bobby Thompson" was a utilized cover. The auditors also had the social security number of the "real" Bobby Thompson because it was included in IRS filed documents for the audited association; they had the statement before them, as part of the same documents, that no association officer, including "Bobby Thompson" was paid or received compensation by the association for what he or she did; they had access to the same bank accounts and transactions State's witness Gus Palaibis (see, trial transcript reference, *infra*) did[79]; from Cody's personal observations as a CIA General Counsel lawyer: and his training as a CIA NOC officer, and his previous interfaces with IRS auditors, Cody knew the auditors knew tax reporting on a covert NOC officers' "real" compensation was covered by classified CIA/IRS protocols which did **not** include a covered identity covert officer filing a duplicate 1040 return with a living subject "real" possessor of the used identifiers; the association auditors did not raise, at any time during the audit, or subsequently, "personal

[79] The only State's witness to opine those transactions constituted crimes. Doc 43-13:6222,7-6223,16.

income from the Navy association" issues with either Cody, or the "real" Bobby Thompson (see, testimony of the "real Bobby Thompson," Doc. 43-17, 7060, 11-7061, 7); and they certainly made no accusations of federal charges of identity theft, tampering with records, money laundering, income tax fraud or liability or theft, with respect to the activities of the audited association Ohio Attorney General DeWine did with respect to the very same activities of the association in Ohio, and nationally; nor did they make any charge, or, any investigation into, that income reporting of either Cody, or the "real" Bobby Thompson (see, testimony of the "real Bobby Thompson," Doc. 43-17, 7060, 11-7061, 7). Cody would relate the IRS agent's invocation of privilege at the first trial (Doc 43-8: 5366, 10-5367,1; 5367, 16-5368,8), refusing cross-examination on any of these matters; and the details of the prevention of Cody testifying as to any of these matters.

Cody, although he knew in 2008, was notified in mid-2009 by his CIA case handler, "Hal Burke" (a cover name) that the Navy association was to be wound down in an orderly fashion, with a plan to "turnkey" the organization over, if possible, to non-witting-of-CIA-involvement persons (similar to the plan for winding down and turn keying over the CIA proprietary cover organization, Air America, which Cody had worked on, also, while assigned to CIA Office of General Counsel in 1974) or, if that was not possible, to dissolve the organization, 'because President Obama was not interested in its purposive activities because they were tied to the military policies of the Bush administration,' but that different, but similarly organized, projects were going to be developed by the Agency for White House approval in support of its new focus on more humanitarian-oriented foreign policies. These projects were later named Plymouth Rock Society, and Quaker Penn's Landing; and Cody was to be assigned (also later), in and for their development, "Burke" told him, under cover identities different from "Bobby Thompson." Based upon Cody's CIA directed experiences in and with fundraising and non-profit organization funding activities in the United States (Massachusetts veterans' groups in 1971-72; the Rockefeller and Ford Foundations in funding a cover school, the Asian Institute of Management in Makati, Philippines (from which Cody received the equivalent of an American masters in business administration in 1979, while the school served as a venue for Cody's development and analysis for suitability as recruitment for agent use [redacted] of the school's foreign attendees (1977-79)); religious and political-based non-profit organizations raising funds domestically in the 1980's for their charitable purposes, and spending those funds on anti-Communist government activity to collapse Soviet power in Latin America, and in the Warsaw Pact Soviet satellite Eastern European group of nations.

In his testimony, Cody would have detailed, down to the nth degree, month by month, if necessary, his experiences serving as a CIA operations officer serving under those above covers, and would do so here, but for the page limitations placed by the Court on this brief, and the Court's time deadline for filing this brief. It is the detail of Cody's projected self-testimony on the still classified experiences he had, and operations he worked on over the years (given Patitucc's (the trial defense counsel) denial of any responsibility for subpoenaing Cody's CIA records or corroborative witnesses (and assuming Cody would be prohibited, at a second trial, of contacting any evidentiary sources, as *pro se* counsel, with another no contact order)), and in the triers' of fact assessment of Cody's demeanor while testifying directly as to the charges made against him, a bite of the apple which, in Cody's case, has not yet taken place, which,

clearly and convincingly establish that reliability, and the outcome-determinativeness, of that testimony. No evidence in the trial record directly refutes any detail of Cody's self-testimony. The closest inferential evidence was, arguably, the testimony of BCI "forensic accountant" Gus Palaibis that, in his opinion, the making of real, publicly known purposive charitable expenditures by an organization like the Navy association was a "prop", or smokescreen, or mask, for nefariously intended theft. [See, Doc 43-13:6222,7-6223,16]. No state's witness claimed to have ever worked for the CIA, or to having any expertise on, or even familiarity with, CIA operations [and Cody relevantly urges, cross-examination of all of the State's witnesses who purported to give testimony thereby related, by a real CIA officer, to satisfy the 6th amendment's effectiveness of representation requirements in this situation]. Likewise, since any "overwhelmingness" of evidence at the first trial sprang entirely from circumstantial inferences of guilt[80], and largely from the opinions of "experts" like Palaibis, Cody would, based upon his own resume of education and experiences as both a lawyer, and CIA officer, assert expert status for himself, so he could likewise interject his professional opinion related to the evidence, an assertion he made in his "CIA-affiliation" PCRP/MNT affidavit and brief, at both the trial court and the appellate court level, without any substantive demurral made by either court, to Cody's asserted qualifications , or reliability or outcome-determinativeness of his substantive testimony by affidavit as to facts.

(B) Legal Argument on Reliability, Materiality and Outcome-Determinativeness of the Entirety of Petitioner's Projected Self-Testimony (in III (D)(1)(A) and IV (A)(1))

The point of the criminal laws is to codify the disapproval of specific behaviors, for the American body politic, in all cases, to collectively say certain things are not acceptable.

The Ohio body politic, in the first instance part of that American body, has said that, with regard to theft, money laundering and tampering with records, the specific intent of an American intelligence officer assisting (in the *actus reus* of an alleged crime) our national government on a matter of national security, by reason of his intent to provide that assistance, cannot serve as the intent which [redacted] is required to make his activities a crime.

Theft is an ORC specific intent crime, *State v. Rodgers*, 2017-Ohio-9191, at¶ 11 (1st Dist.); as is money laundering, *State v. Pugh*, 2010-Ohio-2941 (9th Dist.); as is tampering with records, *State v. Bliss*, 2014-Ohio-4357 (10th Dist.).

> "The main distinction between specific and general intent is the element of bad or evil purpose, which is Required for the former. Thus, a person who knowingly commits an act which the law makes a crime may be said to have general intent while the person who commits the same act with bad purpose... may be said to have specific intent." *James v US*, 366 US 213,221 (1969), accord, *US v Krasky*, 418 F 2d 65,67 (6th Cir, 1969), cited by *US v Haldeman*, 559 F 2d 31 (DC Cir, 1976).

[80] See, Statement of OAAG Mindy Kowalski, *voir dire*, Doc 42-3: 4230, 10-17.

"Criminal intent cannot be proven by direct evidence; it is therefore not only appropriate but also necessary for for the jury to look at all the circumstances in determining specific intent.... [I]ntent may [only] be inferred from all the circumstantial evidence introduced at trial." *Haldeman, supra, cert. den.* 431 US 933 (1977), accord *Moles v Procunier,* 744 F. 2d 475 (5th Cir, 1984), *US v Petzold*, 788 F 2d 1478, 1485 (11th Cir 1986)

Given the failure of trial counsel to develop evidence of Cody's/White House affiliation, there was no way to establish the circumstances of that affiliation other than through Cody's testimony on it.

"O.R.C.A. § 2945.59 specifically permits the introduction of evidence to prove intent...." *State v Gibson,* 69 Ohio App. 2d 91 (8th Dist. 1980).

As to whether obtaining, use or possession of personal identifiers simply for a "lawful purpose," without the consent of the "victim," found in that affirmative defense section of Ohio's identity fraud statute, O.R.C. § 2913.49 (F)(2)(b) (Cody's remaining identity fraud indictment count 12), the "lawful purpose" defense is simply a variant of lack of specific intent, and that, once Cody raises his intent for the *actus reus*, to carry out a noble and lawful intelligence agency function, the prosecution must still prove lack of that specific intent of lawful purpose, but with the defendant continuing to bear the burden of establishment of the lawful purpose by a preponderance of the evidence. See, ORC § 2901.05 (A).

"A mistake of fact [of the defendant as to whether a person having the appearance of authority to give him/her a particular directive had the actual authority to do so] is [also] recognized as a defense to specific intent crimes...since, when the defendant has an honest purpose, such purpose provides an excuse for an act that would otherwise be...criminal. *Rodgers, supra,* at ¶ 12.

US v Rewald, 889 F 2d 836, at HN 4 (9th Cir, 1989) also established reasonable reliance on apparent authority,[81] outrageous government conduct, and entrapment, as parts of a lack of specific intent defense (obviously all also relevant based upon what Cody would have testified to).

[81] It is the absence of subjective, not objective, belief of a person claiming to be an intelligence operative, in either the lawfulness, or the requirement, of the purpose of his directed activity, or the activity itself, which must be proven by the government. *US v. Smith,* 592 F. Supp 424,431 (E.D. Va. 1984), citing *US v. Behanna,* 552 F 2d 1291 (9th Cir 1982); *US v. Currier,* 621 F 2d 7,9, n. 1 (1st Cir 1980); *US v. Rosenthal*, 793 F 2d 1214, at **49 (1st Cir 1986).

"The Sixth Amendment contemplate[s] a norm in which the accused, and not his lawyer, is master of his own defense." *Gannet v. DePasquale,* 443 US 368,382, n. 10 (1979); *McKaskie v. Wiggins*, 465 US 168, 176-77 (1984).

Evidence necessary to develop a defense is always material and outcome-determinative. *US v Garner,* 507 F 3d 399, 405 (6th Cir 2007). To the extent *McCoy v Louisiana*, 138 S. Ct. 1500 (2018) merely repeats these holdings above on due process of law, Cody adds *McCoy*'s informing on the subject to *Gannet*'s and *McKaskie*'s, in support of the 6th Amendment interpretation; he does not here, however, seek to apply *McCoy's* holdings limited to capital murder cases, or limited to the subject of defense counsel admitting guilt contrary to the wishes of the defendant, retroactively, or otherwise, to his own case.

"Specific intent, if required by the statute, is an essential element of the crime that the state must prove beyond a reasonable doubt." *Burger v Kemp*, 483 US 776, at n. 5 (1987).

See, also, *James v US,* 366 US 213,221 (1969), accord *US v Krasky*, 418 F 2d 65,67 (6th Cir 1969). Evidence undermining the prosecution's circumstantial proof of "bad" specific intent is material and outcome-determinative. Mo*nroe v Angelone,* 323 F 3d 286,317 (4th Cir 2003). "Materiality" equates with the reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. *US v Bagley,* 473 US 667, 682, 685 (1985). Change of outcome equates with [a]lter[ing] at least one juror's assessment of the case." *Cone v Bell,* 129 S. Ct. 1769,1783 (2009), or, simply, "undermining confidence in the outcome." *Bagley,* at 678, 682 (plurality opinion)(Blackmun, J.).

A criminal defendant's subjective belief he was operating, or his actually operating, in committing the *actus reus* of the accused crime, pursuant to an intelligence function directive of the United States Government ("USG") is not just relevant, but also material, as a matter of law, to whether he had the specific intent to commit the crime. *Smith, supra* (defendant accused of espionage). Evidence of a defendant's covert classified intelligence agency affiliation, or even a reasonable belief in the same, because it can be asserted as a factual defense to any criminal accusation involving specific intent or moral turpitude, is (a) material evidence; and (b) outcome determinative. *US v. Poindexter,* 727 F Supp 1470 (D.D.C. 1989)(defendant accused of misappropriation of government proceeds from arms sales to Iran);[82] *US v Duncan*, 38 M.J. 476 (CMR 1993)(Army officer operating under commercial non-official cover in northern Virginia accused of diverting government-provided funds to his personal use; charges dismissed by reviewing court as appropriate remedy for failure of specific intent element; related charges brought also in federal district court, convictions also vacated, US *v. Duncan,* 816 F 2d 153 (4th Cir 1987)); *US v. McVeigh,* 954 F Supp 1441 (D. Colo. 1997)(defendant accused of exploding a fertilizer bomb, destroying the MacMurragh federal building in Oklahoma City, murdering hundreds); *US v Rewald,* supra (defendant accused of investment fraud); *US v Lopez-Lima,* 738 F Supp 1404 (S.D. Fla. 1990)(defendant accused of airplane hijacking). Where the defendant is left with no source to

[82] Evidence regarding the "knowledge of... high government officials... their authorization thereof, or their participation [related to the activities of the defendant] therein... may be material to a defense of lack of specific intent [because]... proof that the activities were known by many in government could help [the] defendant's claim that he reasonably believed them to be legal."

establish his classified intelligence agency affiliation other than his own testimony, and the government asserts no such affiliation existed, evidence of the affiliation from an official USG source is material and outcome-determinative. *US v. Wilson,* 289 F. Supp. 2d 801 (S.D. Tex. 2003) (charges dismissed by reviewing court as appropriate remedy; defendant accused of illegally selling arms to Libyan dictator Muammar Gaddafi for personal profit).

Cody had, and has, a constitutional right to have the prosecution be required to prove beyond a reasonable doubt every element of each crime with which he remains charged. Due Process Clause, 5th and 14th Amendments; *In re Winship,* 397 US 358, 364 (197): *Clark v. Ariz.,* 548 US 735, 766 (2006).

On the theft charge, Cody has never propounded that national government figures told him to steal money, or that such an order was a defense to such a theft, despite the State of Ohio's, and its proponents', exclusively in its Attorney General's office, continuing attempt to misrepresent, throughout all Cody's proceedings, including this one, that that is exactly what Cody is saying. See, Doc 42;1681 (Cody is propounding an "affirmative defense" theory that he was a CIA agent operating under orders to commit theft).

Instead, with regard to the theft count, Cody proffered, has proffered, and continues to proffer, that he did not take any donor money for his own personal inurement[83] and that, instead, money he did possess or spend on any "inurement" (including the $981,500 in cash he had retained as his life-savings, seized in Portland, Oregon by the State), was his from proper payments made to him by the CIA for his services over a 45-year period (1967-2012), an evidentiary statement, of course, premised upon the facts of his employment affiliation with the Agency over those years (and, therefore, subject to an accusation of lack of credibility, of reliability, or lack of truth, in the statement, but not lack of relevance). If, however, the State were saying Cody's acknowledged payments to the professional fundraisers ("PFRs") Associated Community Services ("ACS") and Community Support, Inc. ("CSI"), made out of Navy association funds, also constituted theft (the 'obtaining or exertion of' "control" over the "property" of the "owner" with a "purpose to deprive"[84]), then Cody is arguing lack of specific intent for theft because those payments were successfully intended to secure a massive American unique-donor base, with small per person dollar contributions, which could be, and were, presented to foreign leaders of influence to show American resolve in support of our veterans fighting in the Global War on Terror, along with cash payments, substantial in per capita amount, to those leaders, to influence them to share the burden of that war, with their own combat troops so that, for USG purposes, ours could come home.

In any event, on the theft Count II, Cody's "specific intent" point, or any point he makes referencing his CIA/White House affiliation, is not that he has an "affirmative defense" to theft because persons in the USG told him to commit theft, or told him to do things which resulted in theft.

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[83] See, Doc 42-3 (Cody MNT/PCRP affidavit, ¶ 23).
[84] See, O.R.C. § 2913.02.

On the money laundering charges and convictions (Counts III-IX), Cody acknowledges he is the one who engaged in the money-moving 'transactions', including cash withdrawals from Navy association bank accounts,[85] but that he did not have the specific intent to do any of those transactions for the purpose of promoting or furthering any unlawful activity,[86] but rather for the purpose of facilitating the intelligence Agency, and White House, directed purposes (cash payments to foreign leaders) of the Navy association, and cash gifts, or cash purchased gifts, to desperately needy veterans.

On the tampering with records convictions (Counts 10-11), Cody acknowledges he signed his cover name "Bobby Thompson" to the pertinent Ohio agency charitable registration forms, not from any specific bad intent, but from the "good" intent to, as properly directed by his CIA superiors and supervisors, protect his personal security, and the security of the operation from the prying eyes of those who might seek to ascribe direct Bush White House involvement with what amounted to bribes to foreign leaders to get them to put their own troops and sailors, and airmen in harm's way, instead of ours, in a common war against jihadi terror, something they should have been doing in the first place; protective activity which is part of the CIA's National Security Act of 1947 mandate to protect the sources and methods of intelligence operations.

As to all the specific intent crimes, Cody would testify that Cody's, and the CIA's intent was to provide the cover to the Bush administration, the USG, to be able to plausibly disclaim, to lie about, its involvement, if the operation were blown, which both the administration, and the CIA, proclaimed to Cody would happen, and which all USG executive administrations proclaim, will occur, to every NOC covert intelligence officer going in, in similarly situated operations worldwide, since at least 1947, as part of the risk those patriots take, out of their love of **their** country, that its government would abandon them, if caught or blown, telling execrating lies about the government's "non-involvement" in the process. See, US v. Wilson, 289 F. Supp. 2d 801 (S.D. Tex. 2003) (Prosecutors lied about Nixon administration's sponsorship of NOC officer Edwin Wilson's[87] sale of arms to Muammar Gaddafi (to obtain intelligence on Libya's weapons programs), for 25 years, to court after court, after the sales occurred, and after Wilson was charged, in order to sustain their theory of Wilson's greed as his motive for the sales).

The State's words on the subject of Cody's CIA/White House affiliation generically, whatever form those words may take, simply say that, for whatever purpose, or on whatever charge Cody may be offering it, his "CIA affiliation" is irrelevant[88] (and, therefore, *a fortiori,* cannot be outcome-determinative).

Respondent never offers, and the State of Ohio, in any related proceeding, has never offered, any authority, Ohio or otherwise, to support its claim of legal irrelevance, in the context of Cody's actual CIA-affiliation evidence. Respondent refuses to address, and the State of Ohio, in any related proceeding, has never addressed, Cody's

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[85] See, Doc 43-22: 8132, 15-8133,8.
[86] See, Doc 43-22, 8132,15-8133,8.
[87] An officer Cody knew in Old CIA headquarters, Langley, and of whose operation Cody also knew.
[88] See, Doc 42:1681, "...No such recognized affirmative defense in Ohio."

argument on the failure, in the context of that affiliation evidence as applicable to those sets of charges,[89] the "specific intent" requirements of the theft charge (which is different from his argument on the other two sets of charges), the money laundering charges, or the tampering with records charges. Indeed, the State's (and Respondent's) record is that they ignore the words, and concept, of "specific intent" entirely, and fabricate a mantra, repeated *ad nauseam*, that Cody's argument, with its pertinent respect to specific intent's application to the relevant remaining convicted upon indictment counts II-XII,[90] is something different from what it is.

Cody providing the details , none of which were directly refuted by any evidence at Cody's trial, over the number of years involved, of his CIA career, coupled with his educational accomplishments, no evidence of anything but honorable service in his public career as an Army officer for 18 years, coupled with evidence from the case record of the trial court-ordered prevention of his even being able to pursue supporting evidence or witnesses while appointed counsel pro se, is compelling evidence of that affiliation, which in turn establishes the cash dollar figure he brought with him into the Bush[43] administration restart of the Navy association and its Bush[41] administration mission concept, and his expenditures from those personal funds, as opposed to theft from donors, for all "non-acceptable" purposes the State catalogued at trial.

Those compelling details, none of which were directly refuted by any evidence at Cody's first trial, also would have established the furtherance of legitimate national intelligence and national security purposes as Cody's sole motivation for the transactional movement of funds which comprised the key *actus* of the money laundering charges, and relating to "Bobby Thompson's" signature on the Ohio charitable registration forms which comprised the basis of the tampering with records charges; and provided the "lawful purpose" for Cody's possession and use of the sole Ohio-identity fraud statute identifier, the name "Bobby Thompson," Cody used in Ohio, and, if not ruled out in a second trial on grounds of lack of territorial jurisdiction, the other identifiers of the "real" "Bobby Thompson" used outside Ohio. In other words, those compelling details, none of which were directly refuted by any evidence at Cody's first trial, provide the bases for the conclusion no reasonable juror would be able to find that Cody's possession and use of those identifiers was other than for the lawful purpose of an intelligence officer establishing and maintaining his personal, and his operational, cover. Those details, none of which were directly refuted by any evidence at Cody's first trial, delivered and argued, as they should have been at the first trial, with the vehemence of a counsel directed at politicians bringing political cases, more importantly, establish compellingly Cody's exclusive intent[91], in writing checks on the Navy association's funds, of funding the stated charitable purposes, and the legitimate administrative expenses, of the organization, and of funding the covert, and noble, purposes of the Navy group, the CIA and the Bush White House, even though those purposes were largely not achieved, of saving more of the lives and limbs of our men and women in

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[89] "Corrupt practices" (Count I) activity is predicated upon a conviction for two or more of the counts on theft, money laundering and/or tampering with records. O.R.C. §2923.31 (E),(I).

[90] See, n. 89, id.

[91] As pleaded before the Ohio courts. Doc 42-3: 3185 (Cody MNT/PCRP affidavit ¶¶ 23,24,25.

uniform fighting in the war on terror abroad, so that they could return safe, to the hearth and home of their American soil, and to their families.

V. Conclusions

For the reasons cited in this brief, a merits review of Cody's constitutional claims in Grounds 4 and 6 should be had, concluding he was denied the right to testify, and that defense counsel was ineffective in his role in denying petitioner the right to testify; and that petitioner was denied the right to access counsel of his choice, with appropriate relief ordered, in each case, of new trial: and

For the reasons cited in this brief, a separate merits review of petitioner's (arising out of the App. R. 26(B) proceedings) overlying constitutional claims should be had, concluding appellate counsel was ineffective for failure to raise any of the above paragraph's direct appeal claims, with appropriate relief directed, for the Ohio 8th district court's reconsideration, as part of those proceedings, of its conclusions on appellate counsel's ineffectiveness on those issues, or non-conclusions , in the case of the Ground 4 trial counsel ineffectiveness claim, and in the case of the Ground 6 denial of right to counsel claim, in light of this Court's requested determination of merit on one or more of the three App. R. 26(B) proceeding-arising underlying constitutional claims in the above paragraph; and

For the reasons cited in this brief, a merits review of petitioner's constitutional claims in Grounds 16/17, stemming from his state court MNT/PCRP proceedings on "new evidence" of his CIA/White House affiliation should be had, concluding petitioner was denied the effective assistance of trial counsel for his failure to investigate and pursue those affiliation-based defenses pre-trial, and for his abandonment of those defenses at trial, with appropriate relief ordered of new trial; and

As argued and presented in this brief, petitioner's claim of miscarriage of justice should be reviewed, concluding its merits justify the appropriate relief ordered of new trial.

Respectfully submitted,



John Cody A651040
O.D.R.C. Mansfield
P.O. Box 788
Mansfield OH 44901

Petitioner, *pro se*

28 U.S.C. §1746 Verification of Petitioner

Your petitioner pro se in this action, John Cody, declares under penalty of perjury all factual statements in the foregoing document relating to his affiliation with, or the affiliation of the United States Navy Veterans Association (the "Association"), an Internal Revenue Code §501(c)(19) veteran organization, with the Central Intelligence Agency, or such affiliations with individuals reasonably representing themselves to myself, and to the Association, as legitimate directional authorities, having the authority under federal law to issue such directions to myself and to the Association, because of those affiliations, with the intelligence community of the United States as defined in Executive Order 12333, are, to my personal knowledge and observation, true, truthful, accurate and correct.

Done at Mansfield, Ohio

John Cody A615040
O.D.R.C. Mansfield
P.O. Box 788
Mansfield OH 44901

Petitioner, pro se

Certificate of Service

I certify under penalty of perjury I sent U.S.P.S., 1st class, postage prepaid the original of the foregoing for requested filing and docketing to the Clerk of the United States District Court, 801 W. Superior Ave., Cleveland OH 44113 by depositing the same in the O.D.R.C. Mansfield prisoners' out going mail system on the 5th day of December, 2019

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Appendix J

Petitioner's Objections to Magistrate Judge's Report and Recommendations (App. B) Referenced in Decision of United States Court of Appeals (App. A). Appended merely to evidence petitioner's substantial showing of debatability under §2253 (c)(2).

Doc. 74-1

ORIGINAL - FOR REQUESTED FILING & DOCKETING

In the United States District Court
Northern District of Ohio

John Cody, etc.,
Petitioner

v.

Warden Ed Sheldon,
Respondent

No. 1:18 CV 1787
(28 U.S.C. § 2254 Habeas Corpus)

Judge Pamela A. Barker
Mag. Judge Kathleen B. Burke

PETITIONER'S OBJECTIONS TO
MAGISTRATE COURT'S REPORT & RECOMMENDATION
FILED 3.24.2020

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[Summary: A de novo review of these claims was and is required, and has not been provided. Trial counsel was ineffective, under Cronic, for promising the jury Cody would testify, and then not calling Cody, and for citing, without Cody's consent, Cody's mental inability to assist counsel, as counsel's reason for not calling Cody]

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[Summary: Pennell's and Smith v. Warden's standard for miscarriage, that 'actual innocence' is a misnomer and that the inquiry is on legal proof, not 'factual innocence' and English's standard of "at least one juror" as outcome-determinativeness, are the correct ones, not something else, the R&R ignores, entirely, as if it did not exist, petitioner's sworn-to evidence proffer at Traverse, ¶¶ 31-48; and [redacted] misanalyzes and misapplies Cody's evidentiary sworn-to Mahlendorf mailbox, id., at 14-32, not in Cody's MNT/PCRP record affidavit. Cody's evidence meets Schlup's "new, reliable" standard; miscarriage applies.]

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[Summary: No habeas procedural bar applies to the "claim 17" portion of Claim 16/17, or to Claim 16/17 as a whole.]

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In the United States District Court
Northern District of Ohio

John Cody, etc
Petitioner

v.
Warden Ed Sheldon,
Respondent

No 1:18 CV 1787 (Habeas Corpus)
Judge James A. Barker
Magistrate Judge Kathleen B. Burke

OBJECTIONS BRIEF HOUSEKEEPING MATTERS

Petitioner follows in this brief, unless necessity dictates otherwise, the R&R's page flow starting with its Ground 4 analysis. Cody's page citations to the ROR and Traverse[1] are to their originally numbered pages. Citations to traverse page numbers in the R&R are, from time-to-time, in error, although one can reference what, and where, in the traverse, Cody's subject presentation/argument occurs by the content the R&R references.

SPECIFIED ANALYSIS OF R&R ERROR

Claim 4 Objection # 1

The R&R, pp 28-40 failed to recommend the granting of the petition[1] as to the two underlying claims of Ground 4 (Doc. 42: 1666) and, as to ineffective assistance of appellate counsel ("IAAC") for not raising either underlying claim in Cody's direct appeal (the "overlying claim"). The R&R uses, many times, dispositional in themselves, "building blocks" of analysis referencing, sometimes, petitioner's or respondent's argument. These dispositional analytical "blocks" involve clear errors of fact (including but not limited to misconstruction of the Traverse's presentation of fact as to what happened in the courtroom, or in the relevant pleadings), and law, and error upon mixed question of law and fact. These errors have the following specifications:

Specifications on Procedural Aspects of the Ground 4 Recommendations

(1) The R&R's application, p. 28, of a federal procedural bar, based upon a state court procedural defense to an underlying claim (in an Ohio App. R. 26(B) proceeding) of denial of right to testify (without reference to IAAC) because "evidence within the trial court record must be brought on direct appeal" is erroneously based upon the R&R's misinterpretation of Hill, omitting, first, Hill's holding at ***30-31 (following Ayala v Martin, cited, Traverse, p. 2) that, for a state court procedural defense to become the operable basis for a habeas bar, the state court must clearly and expressly state that the judgment rested on that procedural defense, which did not occur in Cody's App. R. 26(B) decision. See, Traverse, p. 10.

Second, Hill's res judicata based bar is, by the explicit words of the decision itself (842 F. 3d at *936) limited to an Ohio R.C. §2953.21 ("PCRP") based default, nullifying nothing in the (App R. 26(B)) applicable-to-Cody Davis decision, infra. It is Davis (cited at Traverse, p. 5), for example, not Hill,

1. Magistrate Court Order (Doc. 18) provided that Cody would be given his first opportunity to present facts or argument on his claims in a 55 page traverse.

which controls the issue of the requirement of de novo review, instantly because Davie, 547 F. 3d 297, 312 et seq. and at **43, says the one-of-a kind fed judicata bar in an App. R. 26(B) context, according to Ohio law by definition, turns upon the unique purpose of the App. R. 26(B) proceeding, that there was IAAC for not raising an underlying claim on direct appeal, and thereby the underlying claim is not preserved for habeas review. The conclusion was "unremarkable" because of the qualifications the Davie opinion also put on it: Davie also held (unmeaded by Hill): (a) any review of IAAC, likely excluded some sort of review that the underlying claim appellate counsel ("AC") omitted did or did not have merit (Davie at **34-35), and Davie itself made a de novo review of the underlying claim(s) there; (b) if the App. R. 26(B) state court determined the underlying claim lacked merit, then the underlying claim is preserved as well for habeas review (Davie, at **43-44); and (c) if the App. R. 26(B) state court adjudicated the underlying claim with "little analysis on the substantive constitutional issue," the underlying claim is preserved as such for habeas review and a "careful and independent review" of the record and the state court decision is required to be performed by the habeas court. While Hill, 842 F. 3d 910, 936 (6th Cir. 2016) (FBK, 125), does raise res judicata default linked to not raising an Ohio PCRP claim on direct appeal, it also however actually makes other holdings, mentran of which is omitted by the FBK, applicable outside the PCRP context and applicable to procedural bar. On Cody's claim, nesting the par. (a) IAAC claim in any Ohio proceeding turns on "dehors record evidence" (even as an off-record defendant-counsel communication as to, e.g., the client's express desire to testify, present on the IAAC claim in

1. This limitation on Davie's "unremarkable preservation" statement, the heart of Davie, is accurately explained, following it, in Jones v. Houk, 2013 U.S. Dist. LEXIS 135662, at *30 (N.D. Ohio).*

The R&R does not make the requested review or recommend one be made. The R&R's substantive review, pp. 30-31 was limited to whether Cody's AC was ineffective for failing to raise the "pure" (without reference to the IATC) denial of right to testify separate claim in Ground 4, infra.

2. The App. R. 26(B) decision, in its *P13 analysis (Traverse, p. 2) provided a very scanty analysis of only one portion of Cody's Claim 4. An independent and careful review of *P13 (see infra) is required which should produce, as argued, a merits determination of the underlying claims in Ground 4 are valid. IAAC is not bringing the claims also serves as an excuse for habeas bar.

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* On the other hand, a failure to rule, expressly, on a petitioner's claim, at all, in the pertinent state appellate court decision, means "de novo" federal habeas review of the claim is not precluded. Coleman v. Dretke, 395 F. 3d 216, 220 (5th Cir. 2004). And, where state law procedural default is not invoked by the pertinent state appellate court or, if an invoked state procedural default does not meet the standards for federal habeas procedural bar,

(* contd p. 2A)

Ground 4 (see, infra), there is no [redacted] res judicata trial-court-record-based bar, and (ii) if there were any state-court-based res-judicata-procedural default it was excused by IATC. Hill 842 F.3d 910, at ***33-***35. Finally, Hill, like Davis, supra, proceeds to review de novo the substantive merit of the particular defaulted claim there, an IATC claim, Id. at ***39-46, IATC, IAAC, as well as Cody's miscarriage points, all excuse any Ground 4 Rahrau bar. [also]

(2) IAAC also applies as cause and prejudice, to excuse any Rahrau bar to either underlying claim in Ground 4 because the claims are meritorious; the strength and obviousness of both claims overwhelm that of the appeal's only assignment which remotely justified new trial on the convictions leading to the 27 years (+5 PRC) sentence imposed, because the latter error (R&R pp. 28-29) was only tenuously prejudicial (res gestae evidence of other non-profits established subsequent to the Navy veterans association dissolution), was forfeited and based upon a violation of discretionary state law (OEVIDR bad acts evidentiary rules), and the assignment falsely implied Cody was not a CIA operative at all such times (contra Cody's strategic desire expressed to AC); there was no issue in either underlying claim of lack of preservation by failure to object on an evidentiary or other issue; and there was no denial by the trial court entitled to a state law referential review (question of law: Ohio Bell v. PUC 64 Ohio St. 3d 145, 147 (1992)) or questions of law as applied to specific facts (State v. Belton 149 Ohio St. 3d 165 at ¶P 100 (2016)) and questions of constitutional law (State v. Taylor 135 Ohio App 3d 182, 184-85 (1999)) all require de novo review. See Smith v. Warden 780 Fed Appx 208 (6th Cir 2019), at **34-41 (HN1 30, 31)

Specifications of Recommendation on "Pure" Denial of Right to Testify:

3) The R&R erred (pp. 30-36) in its substantive review (see above discussion) of the "pure" (without reference to IATC) underlying claim of Ground 4 denial of right to testify,[1] concluding Cody was not denied that right because the R&R (a) relied on its misapplication of fact specificity in the 7th Circuit's Wash decision, ignoring Ward's broad reliance on Rock v. Arkansas (Traverse p. 9) holding that counsel cannot waive the defendant's right to testify; ignores the Traverse's all other authorities for the proposition the defendant has no obligation to personally and directly advise the trial court, explicitly uttering the words "I want to testify" in order to avoid a finding (not made anywhere in Cody) of his personal waiver (see, Traverse p. 10, and Chang v. U.S. (a 9th 2255 case), 250 F.3d 79, 83 (2nd Cir 2001) collecting, in part, the p. 10 cases and their rationales, and others, in support, and concurring especially with Cody's cited trial court record as justifying a defendant's silence or even his ambiguity; see, also, in support, U.S. v. Mullins 315 F.3d 449, 455 (5th Cir. 2002)) also, separately supporting the IATC claim in Cody's Ground 4, infra)); erroneously (pp. 35-36) presents Hodges as establishing such an obligation, when Hodges holds, instead, that "[having any statements or actions] from the defendant indicating ... desire to testify [are relevant],

1. That the trial court, without making a record finding that Cody waived his right to testify (or, even if it did), conversely with defense counsel waiving that right for the defendant without the defendant's permission, express or implied.

the trial court is [not] required to ... ensure that the defendant has waived the right on the record." [Emphasis added], and otherwise), it does, in order to avoid a violation, charged to the court, of denial of right to testify (Hollis, 579 F.3d 627, 639-41); the R&R concerning manner as to Wade, supra, the contextual similarities between the Wade and Cody defendants outweighing the dissimilarities; both defendants [affirmatively positive personal answers to the trial court's, Cody's response] at worst tentatively and positively indicative his desire to testify, and that indicating clearly does not fit the "Cody refused to respond [personally] at all" misconstruction the R&R, p.35, places upon it. [Cody's glasses were never returned to him during the trial. Cody could not read without them. Circa 50,000 pieces of writing had been published to the jury at the time of Cody's statement. Traverse, p.8) the R&R ignores these spectacles issue as it pertains to the right to testify claim]. Cody's response, supra, fn.1, this page, in the abstract, was a direct and positive expression in response to the expert, sole premise of the trial court's question, "... if you would like to testify ..." not an equivocal "I don't Know" at all, from which it is unreasonable for any court [considering the statement alone or in connection with the other relevant circumstances the Traverse posited, p.9, to form from it an inference of the conclusive waiver required. Cf. Wade, supra, at 706; R&R pp.34-36;

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1. Tr.Ct.: "... [I]f you would like to testify on your own behalf, I'm happy to give you some time, if you so desire, to ... fix your hair ... button[] your shirt, put a tie on, if that's what you choose to do..."
Cody: "I would like to put myself in physical appearance state (sic). I think is reasonable .... (sic). have my hair combed; have it washed, with my spectacles returned to me. I feel that is ... reasonable ... under the circumstances."

T. Tr. Doc 43-21: 8040, 18-8041-12. Cf. R&R pp.31-32.

both defendants suffered from head injuries (Ward's petitioner, to the brain);[1] (b) ignored, or misconstrued, factually, numerous Traverse cited record facts evincing any purported obligation on Cody to personally and repeatedly address the trial court on his desire to testify, or to specifically say the words "I wish to testify" to the Court in order to avoid waiver; (i) by transposing the trial court's explicit statement to Cody that he "... [does not] have to answer any of the questions I may impose upon you" (Traverse, p.9, citing Doc. 43-1: 3681, 8-10). [Emphasis added] into,

1. The Traverse, p.7, cites the conditions in Cody's pre-trial jail confinement as motivating his attempt to injure himself, as opposed to some mal-reason within him (and includes his head-bashing, by a guard, as proximately, and jointly, causing the injury inflicted); these continuing conditions as applicable to Cody's shocking to the conscience of any reasonable person not intent on rationalizing them, are detailed in the Traverse by a non-self-serving source, an officer of this Court, the U.S. Marshal. The R&R argues the record may challenge whether Cody's intent was suicide, but does not, more relevantly, challenge that a head injury occurred, a head injury visible in the App. R. 36(b) record (see, Traverse, pp. 7-8; R&R, p.36). Moreover, the trial court stating in the record the R&R references, supra (Doc. 43-21: 4322, 7-11), to the effect Cody did not have "mental health issues that required attention," does not seem to be particularly apropo to the specific issue at hand, and does not address the desire of Cody not to testify.

Moreover, the Traverse's citation to the record, or counsel's words, indicates, if anything, counsel, in waiving, is explicitly waiving independent of Cody's volition, not that he is informing the court of the outcome of his discussions with Cody. Cf. R&R, p.39. Assuming Cody either did or did not concur that he had a head injury, there is no evidence here being presented by the R&R, from which to infer, as the R&R would have it, p.39, interpreting the trial court's comments after counsel specifically told the court Cody wished to testify, that, then and there, Cody was not consenting to a new theory of waiver based upon mental deficiency. Such illogical reasoning provides an incubator for distortion of what really occurred.

instead, in the R&R's words, to "be careful when answering questions posed by the court;" (ii) by ignoring that, during the colloquy, Cody never told the court he did not wish to testify (Traverse, p.8)[1]; (iii) by ignoring the fact Cody's defense counsel, literally minutes before he waived Cody's right, "alerted" the court, at least twice, that Cody personally and explicitly "reiterated" to counsel Cody's desire to testify (Traverse, p.8);[2] (iv) by ignoring Cody's personal oral response to the trial court's explicitly predicated proposal that, if Cody wished to testify, he would be allowed to repair himself from

1. As to the R&R's citation to Cody's purported statement, seven days before the colloquy, that he did not wish to participate in a "sham" trial, the statement attributed to Cody, was made, instead, by defense counsel who, at the same time (unmentioned by the R&R), said the statement was directed at him (Doc. 43-21: 7995), in the context Cody points out here, of the same charges of ineffectiveness against counsel Cody makes in his petition claims and not in the context, as the R&R misconstrues it by implication, that Cody did not wish to testify; only minutes later, indeed, the same counsel correctly tells the court, twice, Cody is saying he wants to testify. Fn.2, immediately below.

2. Trial Court: "What's your desire, sir? Do you intend, on taking the stand and testifying in your own behalf, or not;" Mr. Patrick: "... My client indicates he wishes to answer to his complaint." Doc. 43-21: 8038.
Trial Court: "I want it "on the record and there can't be no mistake, ... that there's a clear intention on your behalf ... if you would like to testify. So what would you like to do?"
Mr. Patrick: "... [H]e is reiterating the same. He wishes to answer to all the charges." Doc. 43-1: 8039.
It is unreasonable to factually conclude, given the context of the trial court's explicit questions during the colloquy, as the ignored by the R&R's analysis, as well as ignoring counsel's second statement, that defense counsel's two responses are not "statement [s] ... that [Cody] wished to testify," although every one agrees they were not statements made personally out of Cody's mouth to the trial court.

his disheveled state, that he would like) to do that, i.e. that he would like to repair himself because he would like to testify, and that he would like to have his reading glasses (taken by jail guards) returned to him, because he needs to read the many documents required in, and for, his examination by counsel; and, by misconstruing that Cody's repeated prior attempts, of record, to discharge their defense counsel were denied explicitly by the trial court, with trial court warnings they would not be entertained further, as reported by the R&R, p.34, instead, as the trial court merely "remind[ing Cody] that he is represented by counsel."

In sum, no holding or contextual finding of any Federal court, no less the Supreme Court, clearly established, or established at all, that Cody had to do more than what the record reflects he did, in order [redacted] not for it to be unreasonable to conclude it can be inferred that Cody waived his fundamental right to testify. Given Cody's non-waiver of the right as a matter of fact and law, the underlying "pure" denial of Cody's right to testify portion of this claim II was more than "potentially viable" to establish a reasonable probability of favorable objective analysis, especially in light of the appellate court's scanty P13 analysis not even referencing the word "waive" or "waiver" (Traverse, p.30) under Hand v. Houk, and McFarland's standard (R&R, p.36), thus also making any conclusion of appellate counsel's effectiveness unreasonable.

Specifications on the R&R's Review (pp.38-40) Relating to this Overlying IAAC Claim and Underlying IATC Deficiencies Orbiting the Occurrence of Cody Not Testifying

(A) The provided "substantive" review errs at law by being neither de novo nor without AEDPA deference, while only conclusorily, but equally erroneously, by, on the mixed fact/law matters presented, reporting that even under a de novo review, this claim portion fails. The R&R cites, for its support of its non-de novo, deference review, authorities, including Johnson (R&R, pp. 37-38), holding that, where there is "some" state court review on the merits constituting, merely, a neglect to "explain" the review, producing a "summary ruling on the merits" (see R&R, p.37, citing Moore), de novo review is not required. Here, there was no review of this arguably distinct claim by P13 [redacted]'s dispositive ruling (R&R, p.30), and there

was no summary (or any other type) of ruling on this articulably distinct claim (IATC, for counsel invoking temporary (or, worse yet) non-existent mental deficiencies to permanently waive the defendant testifying, is a Drope (and D.R.C.) violation) (mentally deficient defendant incapable of assisting counsel cannot proceed to, or through, trial to conviction (Traverso, p.11)) by the state court; there should be, thusly, a de novo, no deference review.* The rational construct of the claim is fundamentally distinct from a claim simply that the defendant was denied his right because he did not personally waive that right. The alleged fact that the defendant consented to counsel's reasoning for such temporary, or non-existent, incapacity, would vitiate the claim, neither makes the two claims, supra, the same; nor makes either one a portion or a subset of the other. A "claim" is not a habeas "ground" even if the two terms are mistakenly interchanged; the "ground" is that the prisoner is "in custody in violation of the Constitution ..." 28 U.S.C. §2254(a).

(5) The R&R erred factually, (a) by ignoring the partial fact and reasoning of the IATC claim, that the IATC lay in counsel promising to the jury Cody would testify (although the R&R, p.33, concedes the fact counsel did expressly that), then not calling Cody to testify (see, Traverso, pp. 11-13; Doc. 42-3: 2830; Doc. 42-3: 3345, n.3)[1,2] and, in counsel very specifically using, as his sole reason

1. Based upon Ayers (Traverso, pp.11 & n.30, 24 & n.60) and, Cody adds here, in support of Ayers, Plummer v. Jackson, 491 Fed Appx. 671 (6th Cir. 2013), the R&R, p.40, explicitly ignored this presentation, and this portion of the claim, as "irrelevant." The reasoning of this IATC claim, from both those authorities, is that counsel's action is a Cronic-type violation for counsel promising, outcome determinative, or even just relevant, testimony of the eyewitness defendant, and not producing it thus creating an insurmountable presumption, in any reasonable juror's mind that there is no defense case, and thus creating a fundamentally unfair outcome. English v. Romanowski, 602 F.3d 714, 730 (6th Cir. 2011).

2. EVIDENTIARY HEARING OBJECTION #1. Based on Plummer supra, if counsel's statements of record or waiver are deemed insufficient to establish his deficiencies with regard to both denial of right to testify per se; and IATC for citing mental deficiency as his sole reason; and/or his failure to investigate relevant evidence ("Claim" 16), then further hearing to establish the relevant communications of intents of defendant and counsel was necessary, and Cody's motion for evidentiary hearing (Doc. 88) should have been granted; and Cody OBJECTS to the denial (Non-Doc., 4.27.2020).

* As required by Harrington. See, supra, *, p.2A.

for waiving Cody's right to testify (and not "in the waiver per se"), an invocation of ambiguously stated mental deficiencies preventing, without Cody's express or implied consent, Cody, not just from withstanding cross-examination, but also from assisting defense counsel in Cody's own defense on direct examination (Traverse, p.11, with record citations); and, as a matter of law and fact, (b) in [redacted] finding, on the aspect of the underlying claim it tangentially considers (counsel citing Cody's alleged mental deficiencies as his sole reason for not calling Cody to testify)(counsel's statements being made outside the presence of the jury), [redacted] making its conclusions, flowing from its statement (pp. 34-40) Cody was not mentally deficient, a fact which, if true, establishes, not detracts from, the IATC claim as meritorious: defense counsel cannot offer a non-existent, or false, evidentiary assertion for a waiver, literally moments after telling the trial court Cody did not consent to the waiver, without that action being a Cronic-type fraudulent denial of adversarial testing offensive to the very nature of a fair proceeding, and unreasonable regardless whether the decision of counsel was tactical or strategic. Cronic, 466 U.S. 648, 657, n. 21; see, also, Nix v. Whiteside, 475 U.S. 157, 167 (1986) ("... [C]ounsel is precluded from taking steps or in any way... presenting false evidence ..., citing Strickland; see, also Licyatos v. Cooke, 106 F.3d 1381, 1387 (7th Cir. 1997) (defendant entitled to "trial at which the truth will [not] be undermined").

The E&R's finding, moreover, at p.36, that the trial court "observed that it did not find cause to believe that Cody had mental health issues that required attention..." accentuates, not

detracts from (1) IATC for counsel stating mental deficiencies as his sole reason for waiving Cody's right; (2) the record citing the trial court promoting, and then concurring, and agreeing with counsel's statement of mental deficiency as the sole reason for waiver (Doc. 43-21: 8045, 1-18); and (3) the trial court's failure to record any finding Cody waived, [redacted] explicitly or implicitly, his right to identity.

Claim 6 Objection #1

The R&R (pp. 40-46) failed to recommend granting habeas relief on Claim 6 (found at Doc. 43: 1666-67, limited as stated, Traverse p. 1) denial of Cody's right to access private, non-appointed counsel, to be retained, because and while, Cody was ordered by the trial court, without reason given, pre-trial, confined to solitary, "no contact" confinement in a maximum security disciplinary conditioned cell in the Cuyahoga county jail's restricted housing unit ("RHU") (Traverse, pp. 13-17)

The R&R's failing analysis used the same types of "building blocks" referenced in the Claim 4 Objection #1 section, supra. Those errors have the following specification:

Generalized Misidentification of the Claim

As an initial matter this "claim" Cody identified (also correctly identified in the R&R's words, p. 40, as the trial court "... block[ing] [Cody's] right to access counsel") and argued in his Traverse, pp. 13-17, more specifically, as a denial of "Cody's right to access private counsel for the purpose of securing representation", the one to be considered, and not another. After identifying this claim, however, the R&R leaves the impression its analysis fails to fully comprehend the claim is for denial of the right to access prospective retained counsel, i.e. the denial of the activity of choosing (not the choice itself), and not the actual denial of counsel once retained, or denial of specific counsel appointed or requested to be appointed, to assist an indigent; and ignores that U.S. v. Gonzalez-Lopez ("fair opportunity to secure counsel" is the distinct right), citing Powell v. Alabama (Traverse, p. 13);

and U.S. v. Johnston (Traverse, p.14); U.S. v. Inman, 483 F. 2d 738, 739-40 (4th Cir. 1973) cert. denied 419 U.S. 988 (1974) citing Crocker v. Calif., 357 U.S. 433, 439 (1958) and Powell ("[included in] [t]he 6th Amendment ... is the right of any defendant to a reasonable opportunity to obtain counsel of his own choosing" [Emphasis added]) establish the former as a fundamental right the denial of which is structural error (Gonzalez Lopez), distinct from the latter. Even though case law may discuss (1) denial of right of access to a private attorney prospective of retention, and (2) displacement of counsel (retained or appointed for an indigent), or (3) appointment of indigent counsel (including so-called "counsel of choice") in the same opinion, analyses of the latter never, on their facts, is never relevant to an analysis of the denial of the act of attempting to retain private counsel. The R&R, contra, pp. 40-44, intertwines its argument, drawing upon court analyses dealing with the latter issue, and not the former, as if the choice and adequacy of counsel, and not the activity of choosing, were the issue or the right. See, R & R references, "... his right to counsel" (p.42, line 7)'s "... right to assistance of ... counsel" (p.44, lines 21-22); "... right to ... assistance of counsel does not include the right to appointment of counsel ...." (p.44, lines 23-24). Claim 6 does not, by definition, involve [redacted] as the R&R misconstrues the claim as a general matter, a situation where counsel is allegedly or actually already retained, or indigent appointed; nor does it involve a request for appointment of specific counsel to an indigent, or a claim of inadequacy of representation.

Specification on De Novo Review Required and Not Provided:

The R&R admits the claim, as raised in the App. R. 36(B) proceeding, is "undiscussed" in the appellate court opinion, Cody 2017 WL 1507211, at *3 (Opinion, ¶¶ 13, 14). The R&R implies the appellate court's ¶¶ 13 and 14 (R&R, pp. 42, 43-44) consider the claim, thereupon. Neither paragraph "discusses" the claim, at all. These two paragraphs address, instead, other claims made within the first tier assignment of appellate counsel's failure on direct appeal, or underlying claims the state court perceived as having

2. R&R, p. 44, line 17.

been made within the first tier assignment, to wit (1) denial of the right of self-representation based upon colloquy error in the four trial court hearings on self-representation (January 14, 23, 30 and April 23, 2013) (P 14) and (2) that Cody was "going insane during ... 2013" (P 12) (the latter a distortion, or misunderstanding, of two of Cody's other, actual claims, that Cody was not given a required mental competency examination (relating to the charges in CR-12-568050 A as opposed to the charges in CR-10-545577 (see, R&R, p. 2)), and that Cuyahoga jail specific solitary confinement constituted cruel and unusual punishment (or a due process denial) (Cody's denied U.S. Supreme Court certiorari petition from the 3(c)(B) decision was taken solely on the latter issue); [redacted] argument on these two claims was traverse-dropped. Neither of the "discussions" in ¶¶ 12 or 14 have anything to do with Cody's right to access (or to have contacted for him) private counsel. P 14's Cody quote, "I wish to turn the case over to Mr. Pattuce," has nothing to do with an implication that Cody does not desire to access outside counsel, or to have outside counsel represent him; and is made on 3.26.2013, after it has been made clear to Cody that "state action," infra, is not going to permit him that access, and that the choice presented to him by the trial court is, solely, self-representation or Pattuce, and that the trial court, and that state action, is not going to permit him any pro se ability to obtain discovery or even to copy any state-provided Brady material (300,000 - 500,000 pages), or to research the law.

Claim 6, however, is contra the R&R's conclusory language (citing Brewer citing Johnson only for its general proposition) without analysis, neither "too insubstantial," being barred upon a 6th Amendment, distinct fundamental right involving structural error (see, Daniels, infra); nor is it "covered by another claim by implication" (the claim of denial of right to access was explicitly stated in Cody's 3(c)(B) application as "... the trial court's 3.19.2013 order caused violations of the defendant's fundamental rights (involving structural error) to access counsel of choice" (Doc. 43-31, 2807; see, also,

Traverse, p.3, n.7); clearly this is more than the "fleeting" reference the R&R omits to mention as Brown's standard for denying de novo review. Claim 6 is also not simply covered by implication in any other claim since the petition (Doc. 1) distinctly identifies the claim as "In violation of ... rights ... under the 6th Amendment [I... the trial court's no contact order... and other court and jail imposed conditions pretrial... blocked [Cody's] fundamental right to access counsel of choice..." R&R, p.21. De novo review was required, and was not provided by the R&R's mere footnoted comment, p.44, n.12, the claim would not sustain de novo review. Brown, 845 F.3d at 712, also focuses on the importance of the federal right at issue as directing analysis on whether the claim is merely subsumed into another, related claim by implication, in order to avoid de novo review. This federal right is of such importance.

~~Specifications~~ Relating to Recommended Procedural Bar.

Claim 6 was Ohio App. R. 26(B) originated, as the R&R p.42 admits; a discussion of possible O.R.C. § 2953.21 ("PCRP") origination, between the factual basis for the claim may involve off-record evidence (see R&R, p.44) is neither necessary nor relevant, because the evidence (the court order barring Cody from contact with prospective counsel) and Cody's objections to that bar by motions (Traverse, p.16(8)) are part of the trial court record. The underlying error of the R&R, p.41, default asserted is that the assertion is based on Hill v. Davis (Traverse, p.2), not Hill, is the applicable authority for the same reasons this brief discusses on the same issue in Ground 4 supra, pp.1-2. Claim 6 is not PCRP originated, and, if the R&R is correct, at p.44, that the App. R. 26(B) decision's *p14 provides some "consideration" of Claim 6 it would certainly be provided with "little analysis" and Davis, id, would apply, barring state law-based res judicata as a basis for a federal habeas bar. IAAC, moreover, applies, contra the R&R, p.41, as cause and prejudice, to excuse any habeas bar to Claim 6, because the claim was meritorious; the structural error strength and obviousness of Claim 6 overwhelm those of appellate counsel's ("AC") three assignments because it, unlike them points to relief of automatic new trial on the convictions leading to the 27 year (+5 post release control) sentence actually sustained by the state courts; there is no issue in Claim 6 of lack of preservation of an evidentiary or other issue; and there was no denial by the trial court entitled to state-law based claim deferential review (questions of law (Ohio Bell v. PUC, 64 Ohio St.3d 145, 147 (1992)); questions of law as applied to specific facts (State v. Belton, 149 Ohio St.3d 165, at *P 100 (2016)); or questions of

1. Since there was no discussion of the claim at all in the pertinent state appellate decision, de novo review is required. See Harrington, supra, *, p.2A.

constitutional law (State v. Taylor, 135 Ohio App. 3d 182, 184-85 (1999)) all required, as a matter of Ohio appellate law, de novo review. See, Smith v. Warden, 780 Fed. Appx. 208 (6th Cir. 2019). Miscarriage, infra, pp. 28-29, also excuses any Ground 6 habeas procedural bar.

~~Specification on Causation of the Blocking of Cody's Right~~

The R&R does not deny Cody was blocked by "state action" from accessing outside counsel; it merely shifts focus from that fact to whether it was the trial court's 3.19.2013 no contact order, or "sheriff's regulations" which caused the blockage, stating, or strongly suggesting, it was the latter, not the former. Dispositional relevance or denial of Cody's right to access, however, does not depend on whether it was the custodian of the jail, jail authorities, the trial court, or a combination thereof, who blocked Cody's activity in trying to secure outside counsel. Factually, however, the R&R's comment, p. 42, to the effect Cody admitted (without any record reference provided) the trial court's no contact order was a result of the attempt to smuggle a note (for help in contacting outside, retained counsel) to another prisoner in the jail's RHU, errs. This error appears to be based upon another (this time inherent) misanalysis of fact (R&R, p. 42 & n. 11) that the Ohio Court of appeals observed the trial court did not order Cody into solitary confinement ... [citing Doc. 42-3, p. 82 (Ex. 75), because] Cody agree[d] that it was ... sheriff's regulations that caused him to be placed in solitary confinement as a result of the trial court's no contact order." [Emphasis added]. It is clear Cody is stating there, and has stated consistently, that the no contact order caused the no contact confinement, not the other way around, or that the no contact confinement was for some other reason. The no contact order gave no reason for it, and there is no evidence of record other than it, for Cody's solitary confinement. Cody was already in solitary confinement (as a result of the order) at the time of the "note smuggling." "No contact" equals solitary confinement; and solitary confinement equals "no contact." The trial court's no contact order is the operable activity of the government in

denying Cody his right of access, but, even if it were "sheriff's regulations," instead, the right to a fair opportunity with reasonable time to contact prospective private counsel still would have been violated by government action. "A state [can] not infringe in any way the right of individuals ... to be fairly represented in lawsuits ...." Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964).

Moreover, it is clear from the explicit language of the 3.19.2013 order that the trial court is ordering Cody to have no contact with prospective retained counsel, and with family members and social contacts to request funds, or the making of such retention for him, or with any other person other than "advisory counsel" Patitucci; and there is no evidence the sheriff or jail authorities, at any time, blocked Cody's access to any of these persons other than to enforce the 3.19.2013 order, which is exactly what happened, in just one example, when Cody, after the issuance of the no contact order (read to Cody by a jail officer), and Cody's placement in solitary confinement, attempted to smuggle a note, in the jail's (violative of federal guidelines on in-jail access to counsel (see Traverso, p.27, n.70)) RHU, to another inmate Cody knew, from attending jail church services with him before being thrown into no contact confinement, and before the inmate was subsequently placed [redacted] into a nearby cell in the RHU (restricted housing unit), requesting he ask private attorneys in Cleveland if they would like to represent Cody.

~~Supplemental Issue Waiver, Estoppel by Gain of Argument, Right to Access~~

The R&R errs:

- In reporting, p.46, the waiver form Cody signed, in January, 2013, explicitly or implicitly constituted a statement by Cody he did not desire then, or subsequently, to attempt to retain private counsel. It is clear, first, from the record the R&R cites, id. (the same January hearings, supra, p.12, at which Cody is permitted to become counsel for himself), that Cody is not making a statement about future retained counsel at all, but is rather simply waiving his right to have Patitucci, in particular, whom Cody neither needed nor wanted, as his attorney (after the trial court had repeatedly told Cody Patitucci's discharge) would not be permitted: see Traverso, p.9(3) record citations), and stating that he does desire (also disallowed by the trial court), if the court persists in sua sponte declaring him qualified for appointed counsel, up to ten hybrid (not advisory) appointed counsel (to be chosen by the court) to assist him with discovery, examination and cross-examination of trial witnesses;
- Likewise, when Cody states, in his App. R. 26(B) application, related to the issues of, solely, whether solitary

confinement is, constitutionally, cruel and unusual punishment, and whether his fines can be imposed on one found indigent of record, that "[his] indigency is of record" without any motion or claim made either by him or by his counsel, he is not stating that he cannot find (fact-to-be-determined-at-that-point-pre-trial) resources it may take to acquire private retained counsel of choice. Cf. R&R analysis, p. 45: the two affidavits of indigency Cody supplied (truthfully) were made to courts post-trial, as to Cody's financial situation after trial, lacking relevance to the issue of the situation during the time pre-trial he wanted to access potential trial counsel, because prospective counsel, at that point, pre-conviction, would be making different subjective calculations as to terms of retention with acquittal a possibility, than counsel would be making for retention on a post-conviction motion or appellate practice requesting new trial;

- There was, moreover, no full Faretta colloquy made, and no constitutionally mandated showing made that the requirements of a full Faretta colloquy had been met at a minimum, as to the nature of the charges and possible penalties. (See U.S. v. McBride, 362 F.3d 360, 366 (6th Cir. 2004); U.S. v. Jones, 452 F.3d 223, 228-29 (3d Cir. 2006)), at any of the hearings by the trial court on self-representation (January 14, 23, 30 2013; see Doc. 43-1: 3673-3742) leading up to Cody's execution of the 1.30.2013 waiver form. When the Faretta colloquy is made, in April, 2013, instead, Cody refuses to sign the waiver form. All this is ignored by the R&R's one sentence statement of fact that on January 30th Cody signed a waiver form. Moreover at the 1.23.2013 hearing on waiver, Cody's counsel, after discussion with Cody, informs the court, "[Cody] remains diligent in that he wants ... to maintain ... his 6th amendment ... rights," Doc. 43-1, 3727, 3728: 13-18;
- Likewise, when Cody states in his December, 2012 mandamus action, brought simply to order the trial court to hold a Faretta colloquy hearing on Cody's motion to be granted pro se status (filed without hearing, at that point, for two months (Ex. 101)) that "I have been found indigent in this case"

(R&R citation, p.45; Doc. 1-14, pp.4-9[1]), Cody is propounding that factual statement in the context of the Mandamus document, i.e, if the trial court, sua sponte, desires to find me indigent, I want to be appointed, pro se, with up to ten counsel to assist me (not to include a Petitioner operating contra Cody's strategic desires) with discovery, trial examination and cross-examination" (the same position Cody took at the subsequent January 14, 23, 30 and April 22, 2013 hearings, supra, on self-representation and "waiver" issues). See, Mandamus petition attached to Doc. 1. as its Ex. II, originally numbered pp. 1-4; App. I, pp. 4-6, 8; App. II, pp. 2-9 (containing a 7 page list of requests and motions (never allowed by the trial court) naming discovery, pro-se trial preparation and trial procedures upon which Cody was conditioning, rightly or wrongly, any effectual waiver, the issue, instantly, not being the [multiple] ~~whether~~ of Cody's requests, nor any other issue, other than Cody was intentionally and effectually waiving, permanently, the right to access outside counsel for trial retention purposes, the evidence not establishing that at all;

- In implying that the January 'waiver' form was dispositive of any issue, the analysis omits mentioning the operable superceding 4.22.2013 hearing, after the no contact order had taken effect, started with the trial court noting a previous waiver form had been signed (Doc. 43-2: 3870, 16-17), then indicating a new waiver form is necessary because the court had been informed "[Cody] now wished to have [retained] counsel representing you." (Doc. 43-2: 3869, 3-6), and that the court wishes to clarify the matter, including, apparently, the absence of any full Faretta colloquy prior to Cody's execution of the 1.30.2013 waiver form (invalidating any purported 1.30.2013 waiver; see, King v. Bobby, 433 F.3d 483, 492 (6th Cir. 2006)) and, supra, p.16). At that hearing, Cody then refuses to sign the form (Doc. 43-3: 3880, 5-6), now considering the court's statement, above, as indicating (along with the no contact order) its purpose may be to prevent or bar Cody's access to retained counsel, because, since the time of this solitary confinement caused by the no contact order, while pro se,

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1. Cody notes this citation is to a documentary attachment to Cody's first petition (Doc. 1), the contents of which, other than for a summary paragraph apiece, bare-bones statement of the original claims, were stricken by the magistrate court from the habeas record (Doc. 18) and not re-included by Respondent's subsequent cherry picked record submission. See, Doc. 64: 8489.

Cody is experiencing numerous difficulties with representing himself (Doc. 43-2: 3880, 3-25; 3881: 25-3882: 30; 3883: 10-12 (retained counsel would have filtrable discovery documents, but Cody, pro se, does not)); Doc. 43-2: 3884: 16-19 (Cody cannot have subpoenas issued; indeed Pattiroe, as advisory counsel, never gave Cody Cody's requested subpoenas sub duces tecum forms, and the trial court refused to recognize all Cody's requests for subpoenas to issue). Cody's 4.22.2013 hearing refusal to waive the right to access outside counsel, after the no contact order has taken effect, is the operable, relevant and dispositive fact on "waiver," not the January 2013 form; and

- By omitting reporting that Cody, further to the above, made known to the trial court, after the no contact order's effectuation, by motions of record his desire for a fair opportunity, and reasonable time, to contact outside counsel for retention purposes, and his objection to any state action barring that access. See, Traverse, p. 16(2), with record citations. The denial of a request to be able to inquire into retention of counsel has the effect of denying the defendant his counsel of choice, infringing upon his 6th Amendment entitlement. U.S. v. Santos, 201 F. 3d 953, 958 (7th Cir. 2000). The R&R, in its analysis of its created waiver/estoppel issue, ignores these clearly-relevant-to-a-waiver-issue motions (see, U.S. v. McBride, supra, 362 F. 2d at 367), whose titles, appearing in the docket sheets, speak for themselves, erring [illegible] (as did the district court in its preliminary decision (Doc. 64)) (to which errors Cody again OBJECTS here) overruling Cody's timely made objections to the magistrate court's denial of Cody's requests for the inclusion of the text content of these motions (Traverse, p. 16(3) record citations). Further, in stating (R&R, p. 4, n. 3), "Respondent discussed [and filed as part of the habeas record] only relevant [trial court] filings." Respondent's brief, in fact, made no discussion whatsoever of the instant substantive waiver-by-Cody issue as the R&R raises the issue (nor, for that matter, of any other substantive issue for which trial court filings were pertinent, as the R&R raises them), and omitted to file the cited motions. Respondent's omissions, just on this issue alone, disinform the factual record creating a force multiplier for the R&R's advocacy of irrelevant "record statements" of Cody into distortion beyond recognition of the speaker's true intent in the context in which the statements were made, by transposing them to a totally different context, purported intentional waiver of a desire to access, and for, outside counsel; and purported inability to negotiate on the issue of "resources" to obtain that counsel prior to trial.

Under Daniels v. Lafler, 501 F.3d 735 (6th Cir. 2007); since Cody has, and had consistently criticized Patitucci for denying any responsibility to pursue effectively the entirely CIA/White House evidence trail, and was attempting to contact outside counsel [redacted] for his/her employment at trial, it is clear Cody, at the relevant time he was pro se, [redacted] "was not adequately" represented" by Patitucci, or any other attorney, "appointed" as advisory counsel; indeed, he was not "represented" by Patitucci, or advisory counsel, at all, and did not "require" Patitucci, or appointed trial counsel. See Daniels, id. at HN 4, and also, Cody's traverse citation, p.15, to his denied attempts to discharge Patitucci. What Cody did require, at that point, instead was access with a fair opportunity and reasonable time, to contact outside counsel. Cody's statement (R&R, p.43) that Cody "wished to form the case back over to Mr. Patitucci," was likewise made in late August, 2013, after Cody had been punished by jail authorities for attempting to contact prospective counsel and after Cody's motion, supra, p.18, to be permitted to contact such counsel went ungranted by the trial court; and was only an expression of choice of the lesser of two evils he was permitted to choose from, and not an expression of a desire previously, then or in the future, to not exercise his right to choose outside counsel of "real" choice.

Specific Errors at law in R&R's Assumption that Caplin and Gonzalez-Lopez do Not Bar State Action Forbidding a Pro Se Defendant Previously Found Indigent, and Not Requiring Appointed Defense Counsel, from Outside Contact to Attempt to Retain Counsel.

Daniels, supra, the most explicative circuit authority on the issue of clear, established Supreme Court precedent on waiver of counsel in the context of indigency, cites Caplin & Drysdale v. U.S., 491 U.S. 617 (1989), along with Gonzalez-Lopez, infra,[1] on

1. The R&R, p.44, does cite these two authorities, but only on issues irrelevant to Cody's claim: Gonzalez-Lopez, on the issue of an indigent demanding a particular court appointed-at-government-expense counsel, and Caplin on the issue of a claim the trial court must accept, or appoint, an [illegible] who asserts a conflict.

any qualified constitutional bar of indigents to "adequate [retained] counsel" of choice. Caplin, read in conjunction with Gonzalez-Lopez, in turn, explicitly extends the dual aspects of the 6th Amendment right [to adequate representation; and to the act of choosing; see Daniels at 738] of a defendant who cannot "afford to hire" an "otherwise qualified private attorney," to be able to choose, and to be represented by, an attorney "... who is willing to represent the defendant even though he is without funds" [Emphasis added]. Caplin, id., at 625. It would seem logical that the exercise of the client's inquiry to private counsel, the right to choose, was a necessary predicate to determining what, exactly, if any, the terms of compensation for an agreement of retention were to be, i.e. there is no way to determine whether the defendant is to be represented by an attorney he "can afford to hire" if the defendant is barred by state action from the activity of that very inquiry.

Moreover, one's "indigency" status, if that word is to be defined, as providing a presumption, or a finding, that that status is to be inherently equated with the inability to obtain private counsel can change, even with changed conditions over time, even pre-trial time. The growing notoriety of Cody's case, after 2012 progressed into 2013, and the drib and drabs of rumors of Cody's CIA/White House employment defenses finding their way into the local and national media, with no real/really set trial date in sight, factor heavily into this "change" at this point, i.e. assuming Cody was going to be barred from contacting relatives, or others to provide immediately available funds to retain counsel, and did not have those funds himself, the "publicity" or "career marketing" value of representing Cody was exactly the kind of "resource" Cody had at the time of the no contact order was effectuated, to be able to negotiate with prospective outside counsel who, Caplin, supra, at 625, read in

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1. See, Gonzalez-Lopez, 548 U.S. 140, 144, quoting Caplin at 624-25.

conjunction with Gonzalez-Lopez, says Cody had a right to contact, and a right to be represented by one "... who is willing to represent the defendant even though he is without funds." Commencing 5.5.2017, Cody was incarcerated, pre-trial (Respondent-provided habeas record docket sheets), the cognizance of his need and desire for outside counsel growing over time, with the CIA's, and the FBI's successful attempts to stonewall against release of his identity, and his CIA employment, through September, 2012 and thereafter, into January, 2013 (see, Doc 43-1, 3642 (9.2.2017); Doc 43-1, 3674 (1.14.2013); with Cody's repeated unsuccessful attempts, through January, 2013 to have Joseph Patitucci discharged as appointed counsel for failure to pursue pre-trial investigations of, or a trial strategy related to, Cody's CIA and White House employment (based upon Cody's off-record confidential communications to, and with Patitucci, at those points in time); with the beginnings of his pro se status, and the 4.22.2013 "waiver" hearing, supra (arguably the first record indicator (more than five months before trial began), in the trial court's words, that it is known Cody desires to retain outside counsel), and Cody's realizations, as a result of state action caused by the no contact order, that he was not going to be able to conduct any CIA/White House employment-related affirmative defense discovery, or even to have printable copies for use at trial of the (minimally) semi-exculpatory documents the State may have failed to exclude from its [redacted] Brady materials; and with his motion practice, supra, p.13, requesting access to prospective outside counsel for purposes of retention. So, if Cody's "indigency" can change over time, pre-trial, so can an explicit, or implied, waiver of outside counsel.

> "... An initial decision to proceed pro se does not automatically bind a defendant to self representation for the entirety of the remaining proceedings." U.S. v. Ortiveros, 550 Fed. Appx. 624, at **21 (10th Cir. 2013), citing Menefield v. Borg, 881 F.2d 696, 700 (9th Cir. 1989).

That change can also occur over pre-trial time, with the ability, e.g., to contact friends or family pursuant to the Gonzalez-Lopez enunciated right (Traverse, p.11a), i.e. the ability to make outside contacts over the issue of what resources are necessary for retention of counsel, a resource determination which is, in turn, necessarily as an actual predicate to a factual determination

the defendant has no ability to, and therefore cannot, and may not, obtain private counsel of choice. Indigent defendants are not barred, as a matter of course, by state action, by the mere legal fact of their "indigency," from contacting private attorneys regarding representation, nor are they barred from entering into retainer agreements with private counsel, based in whole, or in large measure, on I.O.U.'s, which, as a commonly known fact, are frequently, the financial "recourse" basis of the agreement (Traverse, p.15). Nor should cases dealing with indigent defendants demanding the substitution of a particular, named appointed counsel for a sought-to-be-discharged appointed counsel be transposed into holding such a bar is permitted.

Lack of "indigency" is, moreover, not an unmade "claim" of Cody relating to procedural default under Williams, 460 F.3d at 806 (cf. R&R, p.45). Lack of indigency, or, more particularly, a finding of an inference of waiver of right to access outside counsel to be drawn from "indigency," is merely a rebuttal to the R&R raising that inference, or its raising waiver. But, on the subject of substantive analysis relating to such a rebuttal, there was no state appellate court "decision" rejecting Claim 6 (see R&R, id., citing Burt, at 18; and 28 U.S.C. §2254(d)(2)) based upon a determination of facts on "indigency," or waiver based on indigency," in light of ... evidence presented in the State court proceedings;" on that same subject, there was never a trial, court hearing on indigency, and neither Cody, nor any of his counsel (in any capacity) ever made any statement to the trial court that Cody was or claimed to be, indigent. The docket sheets (Ex. 101) show that the defendant is was sporte "declared" indigent commencing 7.31.2012, consistently through the last assignment date of Patituce as "actual" defense counsel 2.15.2013 and, thereafter, including all hearings on 4.22.2013, 7.16.2013 and 8.1.2013, while Cody is pro se and until Cody is forced to turn representation back over to Patituce because Cody cannot contact outside counsel, on 8.26.2013, no such "declaration" is made.

1. See, U.S. v Yepez, 844 F.3d 1078, at HN5 (9th Cir. 2016).

Contra to Caplin and Gonzalez-Lopez, supra, the primary dispositive error the R&R makes, at pp. 44-45, is premising its analysis, without authority, on the assumption that a defendant, sua sponte "declared" by a trial court financially qualified for appointed counsel, does not retain a right (while, in Cody's case, after pro se appointment) to obtain, or even to attempt to obtain, private counsel. Any purported waiver of right to access outside counsel, purportedly made prior to the time Cody was experiencing, in the spring of 2013, pro se representation difficulties, was, moreover, revocable. U.S. v. [redacted] Proctor, 166 F.3d 396, 405 (1st Cir. 1999); Ontiveros, supra; Mercfield, supra.

Claim 16/17 Objection #1

The R&R, pp. 46-54, upon a required, substantive de novo review of Claim 16/17 (erroneously, at law, never made),[1] failed to recommend the petition's granting of Claim 16/17 (which is found at Doc. 42: 1669, but limited as stated, Traverse, p. 1) and which is, contra to the R&R's varied descriptions of it, supra, IATC for failure, pre-trial, to pursue, discover and develop evidence continuing, consecutively into counsel's abandonment at trial, of Cody's

1. Because the R&R's procedural bar was erroneously applied (R&R, pp. 52, 54; see, infra, pp. 34-38, 29-30), there was no real substantive review of the meritorious 16/17 claim upon which habeas relief should have been recommended. Moreover, non de-novo review of state court procedural default reasoning, which the R&R applied to both "claims" 16 and 17 (or, merely made conclusory statements about the procedural bar analysis meeting de novo standards) was erroneous because procedural bar analysis must always be de novo (Abela, supra, 380 F.2d at 922; Alexander, supra, 311 Fed Appx 875); and because the instant issues addressed involved mixed questions of fact and law; and because Schlup "new" evidence (see, infra, pp. 28-29) is involved. See Traverse, pp. 5-6, with cited cases.

defenses factually based upon Cody's employment by the Central Intelligence Agency and the Office of President George W. Bush, as arising out of, pertinent to the Claim, Cody's 2018-19 state court motion for new trial/PCRP ("MNT/PCRP") proceedings on a claim made therein of evidence of those employments, detailed at Traverse, pp. 17-29, 30-54. In so failing, the R&R's analysis used the same types of "building blocks" referenced in Claim 4, Objection #1, supra. The errors in that analysis have the following specifications:

(1) The R&R errs factually and at law in misconstruing Claim 16/17 into two distinct claims,[1] presenting reasoning for dismissing each considered separately (pp. 46-53). These separations inevitably the erroneous recommendations, contra the intertwining argued and factually detailed (Traverse, pp. 22-25), as to the continuum of counsel's actions failing to investigate and develop evidence on the pertinent CIA/White House employment-based defenses → his failures to affirmatively present or argue those defenses at trial, or to argue at all (abandonment of those defenses at trial, including refusing to call Cody to testify at trial), an intertwining IAC doctrine holds can, and should, be considered, because IAC actions are to be cumulated, and are to be considered under a totality of the circumstances. See, Strickland, 466 U.S. at 690 (1984); Dugas v. Coplan, 428 F.3d 317, 332 (1st Cir. 2005); Morales v. Mitchell, 507 F.3d 916, 936 (6th Cir. 2007); Goodman v. Bertrand, 467 F.3d 1022, 1023-31 (7th Cir. 2006).

1. The R&R, pp. 53-54, also misstates Cody's argument on IATC in "Claim 17" as being based on McCoy. R&R, pp. 53-53, p. 52 n. 15. Cody used McCoy, in the Traverse made to serve as his petition, only in McCoy's reference to Price U.S. Supreme Court authority on the requirement that the defendant, not the defense counsel, is the master of his defense, and in McCoy's factual context - as pointed out by three justices - that Mr. McCoy was being allowed to be that master by the majority decision, making it irrelevant whether his factual theory of his own case was incredible or "bizarre." None of Cody's pertinent argument in the traverse had anything to do with the retroactivity of McCoy, death-penalty cases, or admissions of guilt by defense counsel.

Specification: Habeas Procedural Bar of "Claim 16" Portion of Claim 16/17 (R&R pp. 47-49)

(1) The R&R, p. 47 cites, on a mixed matter of fact and law, in its first reasoning for a procedural bar, [1] reaching, erroneously, the conclusion Cody cannot argue IATC [2] as excuse, based, in part, on the R&R's assertion the "claim 16" portion of Claim 16/17 did not "arise out of" the 2018 MNT/PCRP proceedings, but, instead, arose out of a 2015 state court PCRP decision, which means, therefore, we must turn to the latter proceeding [3] to analyze procedural default of, or substantive issues pertaining to, "claim 16."

As the R&R takes cognizance of the "arising out of" concept initially contrary, procedurally a number of other consequential issues which are, or might be, dispositive of "claim 16." The R&R, p. 47 clearly errs, as a factual matter, by arguing that Cody did not exhaust, but fair noticed, his IATC "claim 16" in the 2018 MNT/PCRP proceedings (Respondent's Ex. 87) dealt with identical subject matter, divided initially into two trial court ("t.c.") actions arising under two separate state statutes; the appellate court combined the actions. First Heading itself, counsel determined himself as having no responsibility for discovering any evidence of Cody's CIA/White House affiliation at any time." Traverse, p. 25, citing Doc. 42-3: 3051 (Cody's MNT/PCRP affidavit, ¶ 44). The R&R also ignores, on this point, the explicit assignments to the appellate court of counsel's IATC for failing to investigate and develop this evidence, in Cody's opening merit brief, Doc. 42-3: 3318-19, #'s (5) and (10); and Cody's Ohio Supreme Court filing the Traverse cites, p. 4, n. 9. In the MNT/PCRP t.c. proceedings, Cody alleged, as part of

Cody's combined appeals opening brief argued, in the

1. One aspect of this reasoning deals with waiver by Cody of argument. Cody did not contradict himself in arguing, on Claim 16/17, counsel's ineffectiveness in not investigating, developing and attempting to acquire, and use, evidentiary item after item of Cody's CIA-based defense, and, simultaneously, that counsel was unavoidably prevented from providing one piece of that evidence, the 2017 CIA letter. See, infra, p. 26. (Cody's unavoidable prevention argument relates to an "actual compliance" Maupin nullification of the "untimeliness-based-on-avoidable-prevention" state law procedural default; see, infra, p. 30).

2. Cody does not allege IAAC as an excuse for a procedural bar to "claim 16."

3. In the MNT appellate court decision no procedural default is invoked, other than "untimeliness-based-on-avoidable prevention" which only was applied by the state court to the "claim 17" portion of Claim 16/17 present in that proceeding. Both "claims" were present in the proceeding, text, infra, this page.

the claim, trial counsel took no responsibility to attempt to acquire any CIA documentary evidence of Cody's affiliation or to pursue a "CIA agent" [State's brief wording] defense at trial. T.C. Motion for Leave to File a Motion for New Trial (Doc 42-3:3032-33); T.C. In-Limine Motion for New Trial (not included in Cody's copy of record; Cody's habeas motion for record inclusion denied) (same) motion language also contained at Doc. [redacted] 42-3:3032-33, Doc. 42-3:3147-48, and Doc. 42-3:3163; 2018 T.C. PCRP (Doc 42-3:3147-48; Doc. 42-3:3163). The operability of the 2018 MNT PCRP decision to "claim 16" is argued further, p. 27.

(2) Supplementally, the R&R's reasoning also fails because counsel's ineffectiveness in "claim 16," as argued by Cody, dealt with counsel's failure to investigate Cody's CIA/White House background, separate and apart from his failure to produce the CIA's FOIA letter, a request for which by counsel would have been futile for the reasons Cody factually presented in his MNT affidavit (Traverse, p. 24); the fact such an FOIA request by counsel to the CIA would have been futile, thus making that evidence not "newly discoverable" under state law, however, does not mean that counsel did not ignore his responsibilities in not making such a request, nor that he was otherwise ineffective in failing to even attempt to make any other investigatory effort related to Cody's CIA/White House affiliation defense evidence, including failing to even produce Cody's own testimony at trial. More important, however, to the failure of the R&R's reasoning related to its procedural bar conclusion, is that counsel's ineffectiveness in failing to obtain the CIA FOIA response (and Cody's, and the OGIS explanation of it)[3] (whether Cody argued it or not), identified as such in the MNT appellate court's conclusory decision that the evidence was discoverable (relevant to Ohio's MNT statute, but not to Schlup's "new" test; and an off-record "fact" not available for consideration in the 2015 state court PCRP proceeding; a "fact"

3. By definition, those explanations of the response could not chronologically have been made until the CIA response letter was issued; and counsel did not know what, if any, or how, the CIA response to an FOIA request would be, until he attempted it. It is the MNT appellate court, not Cody, who charges counsel with the deficiency of failing to produce the CIA FOIA response.

shedding new light and perspective on Cody's allegations of counsel's other failures to investigate Cody's CIA/White House employment defenses all the above making inoperable the findings of the 2015 PCRP court cited by the R&R, p.48. Moreover, the 2018 state court (the same court) never invoked res judicata related to either the App.R.26(B) or its 2015 PCRP decision as a procedural default to the 2018 MNT/PCRP claims or action (or as any other form of controlling precedence),[1] making the use of res judicata as a habeas bar invalid under Hill's (supra), at 842 F.3d at ***30,31, "clearly and plainly state" proscription; and making the new CIA response and Cody's and the U.S. Office of Government Information Services ("OGIS")'s analysis of it, and the 2018 decision on "discoverability" itself, the root of the "stem" of the "claim 16" IATC allegations upon which the "...[H]abeas Court may... consider [the substantive] claim of federal constitutional error stemming from the denial of [the] motion for new trial." [Emphasis added]. Bolan v. LaRose, 2014 U.S. Dist. LEXIS 140565 at *49 (N.D.Ohio), adopted, 2014 U.S. Dist. LEXIS 139639. The R&R's reference, p.48, to no IATC procedural bar excuse applying to Cody's "claim 16" as raised in his 2018 state MNT court case, by reason, this time, of the R&R (not state-court decision) raised res judicata bar re/ating backward to Cody's App.R.26(B) case, would, on the other hand, push "claim 16" back into the App.R.26(B) case, whereupon this Court should make a de novo, supra, independent and careful review of what would be an underlying "claim 16" there, pursuant to the clearly merits discussion of the claim there. See, App.R.26(B) decision, Doc. 42-3: 2949-50. Such a review, however, needs to consider all the "miscarriage" evidence testified to in Cody's traverse sworn statement ("55"), pp. 19-22; 31-48.

(3) Even if the 2015 PCRP decision were the "operable" one (in reality, an R&R conclusion of a res judicata bar to "claim 16" in the state court 2018 MNT case based on the 2015 PCRP case) for decision-making on "claim 16" no such habeas bar of procedural default would apply to the claim in the 2015 PCRP decision because counsel's failure to investigate or pursue any affirmative evidence of Cody's CIA/White House employment defenses (see R&R, p.47, n.13) was evidenced by counsel's IATC activities off-record evidenced, in part, by discussions with Cody, also off-record. See Hill, supra, 842 F.3d at *936; Hutton v. Mitchell, 839 F.3d 486, at *504 (6th Cir. 2016).

The 2018 state court decision, by its own terms, considered evidence shedding new light on Cody's CIA/White House employment-based defenses not introduced at trial

1. "State procedural bars are not immortal; they may expire because of later actions by state courts." Ylst v. Nunnemaker, 501 U.S. 797, 801-02 (1991).

(the 2017 CIA response to Cody's FOIA request, and the Cody/DOJ's explanations of it (including Cody's MNT affidavit), as invoking National Security Act of 1947-authorized state secrets privilege to deny Cody his CIA files relating to his covert career, including the Navy association operation) which emphatically inform the requirement of habeas intertwining of that evidence, in fact, on both procedural default of Cody's state law forfeiture cases and a "merits analysis" of miscarriage as a stand-alone claim.. Schlup, 513 U.S. at 327; Herrera v. Collins, 506 U.S. 390, 400, 404-05 (1993); McQuiggin v. Perkins, 569 U.S. 383 (2013).

Miscarriage of Justice Objection #1 (R&R - pp. 49-52).

In making its analysis reaching its reports on miscarriage of justice the R&R ignores argument and the traverse's 55 found at both pp. 19-22 and 31-48 (including, but not limited to, the nature of "actual innocence" being "legal innocence" under Fenley v. U.S., 870 F.3d 459 at *9-10 (6th Cir. 2016) and Smith v. Warden, 780 Fed Appx. 208, 221 (6th Cir. 2019); the "one juror" standard for outcome-determinativeness of miscarriage (English v. Romanowski, 602 F.3d 730, 731 (6th Cir. 2011); the standard for consideration of "new" evidence found at House v. Bell, 547 U.S. at 537-38; the relationship between a procedural default and an independently applied substantive miscarriage analysis under Schlup; the nature of the "new, reliable" Schlup standard (See, in part, Reed v. Shelden, 2020 U.S. Dist. LEXIS 7658, at *7 (N.D. Ohio) (miscarriage evidence presented in the habeas proceeding is "new" under Schlup if it was not presented at trial)); fails to focus on the MNT proceeding evidence described above, this page, 1st four lines, as the only habeas-relevant Schlup "new" evidence present in that state court proceeding for miscarriage analysis purposes; ignores the private fundraising by Cody, as a covert operative in support of CIA operations, not just as "decades old" activities, but as establishing the history of such programs (Nixon administration (1972 veterans group fundraising in support of military/veterans affairs policies); Reagan administration (1980's, religious charity fundraising in support of overthrowal of Nicaraguan Sandinista regime and Communist regimes in Eastern Europe); George W. Bush administration (2001-2009, Navy association fundraising in support of substituting foreign military forces for ours in the Afghan and Iraqi theatres of operation in the Global War on Terror)); ignores Cody's specific testimony on the direction (the R&R mistakenly labelling it "acquiescence") by identified CIA and White House officers to Cody to make the Navy Association expenditures and to take the other administrative and operational acts he did under the lawful authority of the President, and the CIA established in the SS; ignores the relevance and outcome-determinativeness (traverse, pp. 48-54) of the SS "new evidence, including but not limited to the distinction between no acts/rea of theft (and therefore no money laundering) because all money raised was spent, in all cases, on activities

and purposes which did not "deprive" the donor (as required by O.R.C. § 2913.02(A)) of his property or purposes in making the donation, as caused by Cody operating under CIA and White House direction; ignores, as a separate, and distinct mens rea issue (from any actus reus issue), no specific mal-intent (including ignoring the standard for proof of intent, in weight of circumstantial evidence, under State v. Collins, 2013-Ohio-488, at ¶P16 (8th Dist.) and Dir. v. Grimes, 332 F. 2d 1014, 1017 (6th Cir. 1964); ignores the inviting of the specific mal-intent to the tampering counts by Cody signing his name "Bobby Thompson" to OAG charitable regulatory office records, and the remaining identity fraud counts requirement of that intent for an unlawful purpose; ignores the required statutory tying required, of an Ohio Corrupt Activity verdict to convictions on Cody's other "crimes" above (Traverse, p. 53, n. 89); ignores or minimalizes (in its erroneous (factually) "decades old" CIA employment comment) the length (1967-2013) of Cody's SS detailed covert activities establishing (1) relevant to the State's burden of proof at any new trial, as Cody's CIA compensation, his cash life-savings of the money seized in Portland, $981,500, and greater sums legitimately available personally to Cody, during the years 2001-2010, and (2) Cody's access cachet in his personal and operational contacts with both presidents Bush, over all, the R&R ignores the substantive content of the Traverse SS, pp. 31-48, as if it had never been proffered. In these procedures described, the R&R arrives at dispositional error in each case, of law, of fact, or upon mixed questions of fact and law, in recommending non-applicability of miscarriage, Cody's miscarriage claim also applies as a habeas bar excuse, on all other claims the R&R, at pp. 59-63, summarily reports contra.

Procedural Default re "Claim 17" (R&R, pp. 52-54)

The R&R correlates habeas procedural bar of "claim 17" erroneously because (1) it does not apply the requirement of de novo review to the "untimeliness" procedural default announced by the MNT appellate court, required by Abela v. Martin, 380 F. 3d 915, 922 (6th Cir. 2004), followed Alexander v. Smith, 311 Fed. Appx. 875 (6th Cir 2009); (2) it ignores the Traverse, pp. 24-30, argument for excuse of actual compliance; (3) it ignores the inherent finding by the MNT state appellate court, of IATC deficiency for failure to produce the 2017 CIA FOIA response (and the fact-based explanation of it) earlier, serving as habeas procedural bar excuse, separate from any excuse argument made by Cody[1]; (4) it ignores (p. 53, without citation(s)), on

1. As argued in the Traverse, counsel was "unavoidably prevented" from producing the 2017 FOIA response. However, this failure to produce does not affect, or excuse, his refusal to investigate, develop or produce any other affirmative CIA/White House employment defenses evidenced (Traverse, p. 24), including Cody's own testimony. Claim 16/17, as referenced in the state MNT action, informed the state court about. That latter IATC, as Cody argued, excuses the procedural default of Claim 16/17 in the MNT action, as does, separately, actual compliance.

IATC, Maupin's "independence of the constitutional claim" prong as part of its "plainly applicable" requirement for state-law procedural default to be the basis of the habeas bar, nulling the state court's basis of "untimeliness" for its default because that reason is intertwined with counsel's failure to produce the CIA response and following explanatory evidence, an IATC federal law question, see, Lee v. Kemna, 534 U.S. 362, 375 (2002) and, supporting further, holding a nexus between counsel ineffectiveness and the claim does not bar that ineffectiveness from serving as the excuse, Restrepo v. Kelly, 178 F.3d 634, 641, 642-43 (2d Cir. 1999), citing Murray v. Carrier; Cook v. Lynaugh, 821 F.2d 1072, 1078-79 (5th Cir. 1987); Dietz v. Money, 391 F.3d 804, 811 (6th Cir. 2004); Sanders v. Cotton, 398 F.3d 572, 580 (7th Cir. 2005); (5) the R&R erroneously asserts p.53, without citation, that Maupin-based excuse be "newly discovered;" (6) the R&R erroneously contends, pp. 52-53, the "adequacy" prong excuse of Maupin, Stone, Beard and Walker (as applied to a discretionarily definitional aspect of an Ohio statute or, by extension, to a rule of court)[1] with Maupin's "plainly applicable" excuse (see, Traverse, p.26 (ii)), and "no enforcement" nulling excuse (Traverse, p.25 (i)), producing the implied erroneous conclusion the MNT appellate court did not, simply, for its procedural default decision substitute the words "no unavoidable prevention" for the word "untimeliness" without explaining what the unavoidable prevention was[2] (which did not, additionally, make the decision a "summary ruling" on the merits, that absence nulling Harrington's applicability (cf. R&R, p.37); and (7) it ignores, in reporting that a de novo review of the MNT court default decision is barred by law, firmly established habeas law in this Circuit, that AEDPA's "presumption of correctness" does not apply to a state court conclusion, however reached, on an IATC claim. Higgins v. Renico, 470 F.3d 624, 630 (6th Cir. 2006).

Conclusion

Your petitioner, John Cody, pro se, timely, and pursuant to F.R.Civ.P. 72(b)(2)-(3) and F.R.Civ.P. 6(e) respectfully objects to the Report & Recommendation dated 3.24.2020, and respectfully requests de novo review thereof.

1. These "adequacy" holdings cited may negate Traverse, p.26 argument contra the discretionarily definitional aspect of O.R.Crim.P. 32(B), but do not affect the still applicable Maupin "plainly applicable", "independent" excuse to the MNT court's default decision.

2. Required as part of no deference review by Akula, supra, and Higgins, infra.

Respectfully submitted,
John Cody
Petitioner, pro se

John Cody A605040
O.D.R.C. Mansfield
P.O. Box 788
Mansfield OH 44901-0788
Petitioner, pro se

Certificate of Service

I certify, under penalty of perjury, that I sent, U.S.P.S., postage prepaid, 1st class, the original of the foregoing, for requested filing and docketing, to the Clerk of the U.S. District Court, 801 W. Superior Ave., Cleveland OH 44113, by depositing the same in the O.D.R.C. Mansfield's internal prisoners' outgoing mail system on the 6th day of August, 2020.

John Cody A615040
O.D.R.C. Mansfield
P.O. Box 788
Mansfield OH 44901

Petitioner, pro se

Appendix K

Petitioner's United States Court of Appeals Invited (USCA Form 4) In Forma Pauperis Affidavit Statement of "Issues Which [Petitioner] Wishes to Raise on Appeal" appended merely to evidence petitioner's substantial showing of debatability Under 28 U.S.C. § 2253 (c)(2).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: July 29, 2021

Mr. John Cody
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901

Re: Case No. 21-3462, *John Cody v. Tim McConahay*
Originating Case No. 1:18-cv-01787

Dear Mr. Cody,

We received your financial documentation from the district court, however, in order for your motion for pauper status to be considered, the enclosed form must be completed and returned to this office by **August 30, 2021**.

Sincerely yours,

s/Maria T. Welker
Case Manager
Direct Dial No. 513-564-7025

cc: Ms. Stephanie Lynn Watson

Enclosure (Form 4)

Appendix K

Appendix K

FORM 4. AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

United States Court of Appeals
for the Sixth Circuit

John Cody,
Petitioner]
]
v.] Case No: 21-3462 (mw)
]
Tim McConahay, Warden
Respondent]

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. §§ 1746; 18 U.S.C. §§ 1621.)

This affidavit is only for the temporal scope and limited event of this proceeding only. The affidavit and the answers in it do not apply, nor are they intended to apply, to any proceeding in the Ohio state courts, nor do they constitute any statement of petitioner relative to his qualification for appointed counsel, or his ability to obtain private counsel, in any other proceeding. Nor are these answers an ascertation of petitioner about his desire or intent, financial condition or otherwise, for the retention of private counsel in the trial court proceedings in the state court.

Signature: August 16, 2021.

John Cody
Petitioner, Pro Se

The [illegible] petitioner relies to make the appeal are contained in the attachment to this Affidavit. Attachment A is incorporated herein as if re-written. This statement is made [illegible]

Affidavit

Attachment A

Issues Which Petitioner Wishes to Raise on Appeal

(Revised from Previous Filings, Which Petitioner Requests Be Ignored)

Petitioner's objective in drafting these issues is to raise only issues which are, or were, dispositive or outcome-determinative, to the granting or denial of certain grounds/claims the habeas petitioner raised, issues involving dispositive errors of fact, of law, or on mixed questions of fact and law, which occurred explicitly or implicitly, in the judgment opinion. Having said that, however, sometimes those errors deal with matters of procedure; and sometimes they deal with substantive matters; and, sometimes they deal with both. Sometimes a dispositional procedural error was dispositive because it was a predicate to a denial of a full or further substantive review which should, or would, have produced an outcome favorable to petitioner's substantive habeas position and argument requesting new trial as the appropriate remedy or, in certain cases, an evidentiary hearing. Sometimes a preliminary substantive error, as a matter of substance, was dispositive because it became a linchpin, or *sine qua non*, substantive predicate for, and therefore became a part of, a subsequent substantive ruling.

Issues petitioner requests this Court consider pertaining to these dispositional errors are organized here in presentation to bring certain of the, because of the issues' similarities or cohesiveness, together for a more comprehensive understanding, even though the same may be addressed, or referenced, at different, or even disparate, segments of the judgment opinion of the district court.

These issues are:

Cody v. Sheldon, 2021 U.S. Dist. LEXIS 73493 (herein "Opinion"), U.S.D.C. No. 1:18CV1787 (Herein record citation "Doc. 75")(Decided April 16, 2021)

SUMMARIZED ISSUES

Ground 4 Issues:

I. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of ineffective assistance of direct appeal counsel ("IAAC")(the overlying claim), for failure to raise the claim of denial of the petitioner's "pure" right to testify at trial (the underlying claim), was to be denied on the merits?

(Issue discussed, with error and prejudice explained, infra, pp. 11-28 , Issues 1-3)

II. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of ineffective assistance of direct appeal counsel ("IAAC")(the overlying claim), for failure to raise the claim of ineffective assistance of trial counsel("IATC")(the underlying claim) for not calling the petitioner to testify at trial, was to be denied on the merits?

(Issue discussed, with error and prejudice explained, infra, pp. 11-28 , Issues 1-3)

III. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim) for failure to raise the claim of IATC because of counsel's belief and and statement that he could not call petitioner because petitioner was temporarily mentally and physically incapable of assisting counsel during examination and cross-examination (the underlying claim), was to be denied on the merits?

(Issue discussed, with error and prejudice explained, infra, pp. 11-28 , Issues 1-3)

IV. Did the Opinion err, on law and the facts, in concluding that the underlying claims in Ground 4 Issues I, II, and III above, were procedurally defaulted?

(Issue discussed, with error and prejudice explained, infra, pp. 28-35 , Issues 4- 7)

Ground 6 Issues:

V. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 habeas claim of IAAC for failure to raise the claim of denial of petitioner's right to access prospective counsel of choice for retention (the underlying claim) was without merit?

(Issue discussed, with error and prejudice explained, infra, pp. 35-45 , Issues 8 - 13)

VI. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 underlying habeas claim of denial of petitioner's right to access prospective counsel of choice for retention was procedurally barred?

(Issue discussed, with error and prejudice explained, infra, p. 45 , Issue 14)

Ground 16/17 Issues:

VII. Did the Opinion err, at law, in concluding that petitioner's Ground 16/17 (or, as referenced in the Opinion's nomenclature, Grounds 16 and 17) were procedurally defaulted?

(Issue discussed, with error and prejudice explained, infra, pp. 45-52 , Issues 15-17)

Miscarriage of Justice Issues:

VIII. Did the Opinion err, on law and the facts, in concluding that petitioner's miscarriage of justice (A.K.A. actual innocence) claim was denied for lack of merit?

(Issue discussed, with error and prejudice explained, infra, pp. 53-77 , Issues 18- 20)

Denial of Motion for Evidentiary Hearing Issue:

IX. Did the Opinion err, at law and on the facts, in denying petitioner's motion for a habeas evidentiary hearing?

(Issue discussed, with error and prejudice explained, infra, pp. 78-79 , Issue 21)

...

For portions of the Magistrate's Report ("R&R") carried over into the Opinion, the Opinion correctly does not invoke any lack of specificity in petitioner's Objections for failure to object to such positions. Where such carryover took place, and petitioner has taken issue herein with the carried over position, the district court was fairly noticed in Cody's Objection's of the gist of his issue herein.

...

Expanded issue discussion is designed to establish that positions of law taken by the Opinion were atleast debatable, or wrong; and that findings of fact made by the Opinion were clearly erroneous.

Ground 4:

Summarized Issue:

I. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim), for failure to raise the claim of denial of the petitioner's "pure" right to testify at trial(the underlying claim), was to be denied on the merits?

II. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim), for failure to raise the claim of IATC (the underlying claim) for not calling the petitioner to testify at trial, was to be denied on the merits?

III. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim) for failure to raise the claim of IATC because of counsel's belief and statement that he could not call petitioner to testify because petitioner was temporarily mentally and physically incapable of assisting counsel during examination and cross-examination (the underlying claim), was to be denied on the merits?

Expanded Issues Pertaining to Ground 4:

Ineffectve Assistance of Appellate Counsel for Failure to Raise Denial of Right to Testify; and Ineffective Assistance of Trial Counsel with Respect to His Refusal to Call Cody to Testify (Opinion Analysis at Doc. 75:8731-8748):

First Set of Issues:

The first set of issues, with Opinion analysis beginning at Doc. 75:8738, concern Cody's claims (raised first by Cody in his state court App. R. 26(B) application, decided in, and reported at, State v. Cody, 2017 Ohio 1543, 2017 WL 1507211 (Ohio App. 8th Dist.)), of IAAC for failing to raise (first overlying claim).

(see Doc. 75:8732-8742) denial of the "pure" right to testify (the first underlying claim)(see Doc. 75:8746-8749); and for failing to raise (second overlying claim) (see Doc. 75: 8732-8742) ineffective assistance of trial counsel, upon prompting by the trial court, for using a constitutionally impermissible reason [trial counsel alleging Cody's physical and mental incapacities in assisting trial counsel on direct and cross-examination at trial] for trial counsel's refusal to call Cody to testify (the second underlying claim,[1] which, in turn, has two parts: trial counsel's ineffectiveness and the standards for ineffectiveness in general; and, second, an alleged violation of Drope v. Missouri for counsel making Cody's mental and physical incapability to assist counsel his reason for proceeding through trial to conviction with a defendant unable to assist counsel) (see Doc. 75:8742-8748), the overlying claim correctly assumed by the Opinion to be, based upon the legal posture of the case, a conclusion to be reached by the Opinion's basing its findings and holdings on the IAAC claims on nothing but the Opinion's analysis of the lack of merit

[1]: This claim in the first instance can be said to be two separate claims, as first separated by the Magistrate Court's Report ("R&R"). divided by actor culpability (trial court vs. trial defense counsel). See, the Opinion's interpretation of what Cody propounded on this subject at Doc. 75:8744-45,

to the underlying constitutional claims (see Doc. 75:8739, 8745; and 8746[2]), if either underlying claim was meritorious (i.e., if as we will see, Cody did not waive his right to testify), a cause to excuse the procedural default of appellate counsel not raising either claim in Cody's direct appeal. Thus Cody challenges Opinion error on this first set of issues in a context of an Opinion which sets up the framework, that, if petitioner is

[2]The Opinion ties together both appellate counsel ineffectiveness claims to the merits, as to all the underlying claims, of the Opinion's mixed question of law and fact "waiver" defense to the latter claims, denying, in the process, based upon that merits determination, the failure of cause and prejudice, as to the fundamental constitutional rights which are the subject of Cody's constitutional claims, to excuse procedural default based upon appellate failure to raise. Petitioner realizes it is possible, under precedent, to find lack of appellate ineffectiveness while at the same time finding failure to raise a meritorious claim, but neither the Opinion nor the R&R raises that possibility in this case.

found to be correct on appeal on the merits of non-waiver of his right to testify, he prevails on those merits and , at the same time, prevails

on cause and prejudice[2] to excuse any procedural default (see Doc. 75:8746)

---

[2] In the larger context of defense counsel's refusal in which Cody raises his denial, and because the denial affected the framework in which the trial proceeded, as well as the right protected in Cody's personal case, there is a fundamental legal principle being violated here, that a defendant, pursuant to his 6th Amendment autonomy at trial, must be allowed to make his own choices about the proper way to protect his own liberty, and this violation may have signalled fundamental unfairness. McCoy v. Louisiana, 138 S.Ct. 1500, 1511-12 (2018). The larger context of defense cousel's refusal to call Cody to testify relates to his larger refusal, as alleged throughout Cody's numerous post-conviction collateral proceedings on or related to IATC, to pursue, develop or present evidence relating to Cody's CIA employment as defenses to his charges.

This McCoy based point was argued by Cody in his Objections, Doc. 74-1: at originally numbered page 24, n.1 as referenced in the Opinion , in a slight misinterpretation, that the kind of error this denial was, was not to be treated under the harmless error standard. McCoy's description of what rights qualified for structural error were and were not, was not new law (McCoy, id., citing to numerous Supreme Court opinions prior to 2012 in support of the finding, including Arizona v. Fulminante , 499 U.S. 279, 310 (1991)); and that restrictions on this finding, based upon non-retroactivity, did not apply.

Neither the R&R nor the Opinion challenges, on Ground 4 based upon right to testify, that a violation of Cody's right to testify in the context of the claim as made, and his trial, would be structural error; neither raises a harmless error standard. Counsel not calling Cody was not addressed as it being prejudicial or not prejudicial, by either habeas court. However, if in counsel's actions in not calling Cody, if Cody did not knowingly and intelligently waive his right to testify, its IATC is established per se, it was prejudicial per se at law.

Where, without the "new" evidence petitioner presented to the habeas court, the jury that convicted the petitioner had no reason to question the inferences the state drew from its circumstantial case, and trial counsel was ineffective because he failed to investigate and develop leads of, or related to, that new evidence, the standard for miscarriage has been met. Henderson v. Sargent, 926 F.2d 706, 713-14 (8th Cir. 1991), citing Murray v. Carrier, 477 U.S. 478, 496 (1986), Digger v. Adams, 489 U.S. 401, n.6 (1989). "Failure to pursue the defendant's only realistic defense constitutes ineffectiveness." Henderson , 926 F.2d at *18, concur, Richey v. Mitchell, 395 F.3d 660, at *55 (6th Cir. 2005)(counsel's failure to raise, explicitly, defense based upon lack of specific intent, constituted ineffectiveness; "In making that determination, a court should keep in mind that counsel's function... is to make the adversarial testing process work in the particular case.")

If Cody did, on the other hand, have to show outcome-determinativeness on this issue, of his proferred testimony, he did so in the proffer, in his Traverse, Doc. 57, at originally numbered pages 19-22 and 31-48; and in his description of the evidence's outcome determinativeness in Doc. 57, at originally numbered pp. 48-54, and in his Objections, Doc. 74-1, at originally numbered pp. 28-29, and this matter of what the that proferred evidence would or would not achieve at a new trial, including what the Opinion had to opine about it by summarily adopting the R&R's analysis, is analyzed, supra, for Opinion error, in the Issues section on miscarriage of justice.

of appellate counsel's failure to raise any and all of the underlying right to testify claims, and on any procedural default of the underlying claims (and all their "parts") themselves.

First Set of Issues, on the Standards for Review of Ground 4: Preliminary Issue Dealing with Habeas Standard for Analysis, As to Whether the Opinion Erred in Denying DeNovo Review of the State Court Decision as to Cody's Claim of IAAC for Failure to Raise the "Pure" Denial of Cody's Right to Testify:

1. The Opinion errs factually (starting at 2021 U.S. Dist. LEXIS 73493, at *40) in concluding the App. R. 26(B) decision adjudicated Cody's claim of ineffectiveness of appellate counsel for failure to raise (first overlying claim, supra) the "pure" denial of Cody's right to testify ("first" underlying claim, supra) on the merits (and in performing, therefore, a fully deferential habeas review of this claim) because the sole "analysis" in that App. R. 26(B) decision of that claim, occurring at the decision's P13, constituted "little analysis", a decision issued in scanty fashion, which omits, so important in this day and age, any discussion of fact within its real or as-alleged context, and which, simultaneously, merely moves forward an assumed narrative, and therefore the district court's habeas review of that claim was to be careful and independent of the state court decision, showing only modified deference to it, and further, because, after the Opinion calls, id., at *40, the state court's analysis "somewhat brief:"

(a) P13 was so "brief" on the IAAC for failure to raise and on the underlying claim of denial of "pure" right to testify, it failed to reference the word "waive" or "waiver" by Cody of the right , the habeas Opinion's sole defense for defeating both underlying

claims on the merits and, therefore, the IAAC claims overlying them; and cannot be said to fall into the Opinion's (at Doc. 75:8735) factually inaccurate categorization of P13 as a "careful discussion;" and because

(b) the Opinion cites Williams v. Curtin, 613 Fed. Appx. 461, n.1 (6th Cir. 2015)(unpublished) as its sole authority for the Opinion's ruling on fully deferential review, that "modified AEDPA deference" [the Davie v. Mitchell, 547 F.3d 297, 315 (6th Cir. 2008) doctrine of independent and careful habeas review where there was "little analysis" of an underlying constitutional claim] lacks "continuing vitality," with one of a three judge Curtin panel dissenting on that point, when an unpublished decision in this circuit "is not binding precedent" (Honigman v. Comerica Bank, 126 F.3d 945, 948 (6th Cir. 1997) and "...has no precedential force" (U.S. v. Ables, 167 F.3d 1021, 1031 (6th Cir.), cert. denied, 527 U.S. 1027 (1999)); and the Davie doctrine is still being followed in district court habeas reviews in this circuit (Rice v. Bottoms, 2015 U.S. Dist. LEXIS 18829, at HN 5 (E.D. Ky.)).

Ground 4 Second Set of Issues:

Ground 4 Issues on Opinion's Substantive Analysis of Claim of IAAC for failure to Raise Denial of Cody's "Pure" Right to Testify Claim, and Failure to Raise IATC for Refusing to Call Cody (Doc. 75:8736-8746):

2. On both these overlying claims of IAAC, the Opinion, id., in reviewing with

full deference what the habeas district court erroneously and unreasonably concludes is a state court analysis (albeit "somewhat brief), one on the IAAC on failure to raise the denial of "pure" right to testify ("first" underlying claim, supra)[4], erroneously interjects, as dispositive to the Opinion's rulings on both IAAC claims, and all underlying claims, its own, solely dispositive on "waiver" grounds, erroneous determination of fact, and debatable or wrong at federal law, that "Cody had declined to testify due to counsel's concerns regarding Cody's physical and mental capabilit[ies], " or that counsel had told the trial court that (Opinion,

4. Opinion, Doc. 75: 8742 concurs with Cody that the state appellate court "did not specifically address Cody's separate [overlying] claim that appellate counsel was ineffective for failing to argue that defense counsel [prompted by the trial court] was ineffective for failing to call Cody to testify at trial [or, Cody points out here, on Cody's "second" underlying claim, supra)]."

Doc. 75: 8739, 8745)[5] because

5. As part of this issue for consideration on appealability, this Court should note the Opinion's change of wording on these two pages of, factually, what the record shows as to Cody's alleged waiver:

"... defense counsel assured the trial court ... Cody had declined to testify, due to counsel's concerns regarding Cody's physical and mental capability to withstand cross-examination"(Doc. 75: 8739) vs. " ... the state court recessed to allow Cody and defense counsel the opportunity to speak [about Cody testifying];[*]... defense counsel subsequently advised the trial court that Cody would not testify [Counsel's exact words were, " ... I do believe he will not be taking the stand .... I certainly believe that he would not be able to survive the prospects [of cross-examination]."Doc. 75:8738-39]; and "... Cody did not object or otherwise engage in any behavior that would alert the trial court that he disagreed." Doc. 75:8745.

[*] The Opinion erroneously factually implies here, and elsewhere, that the "40 minute" recess was spent by Cody and counsel conferring. If that had taken place, we could infer there was strong "give and take" between counsel and client on whether Cody should or would testify. In fact, what took place during the recess is undocumented. What did in fact occur was a good 30 minutes of walking Cody through a byzantine maze of medieval dungeon-like alleys, passageways and subterranean chambers by jail guards who had not even been in the courtroom, back to Cody's solitary psychiatric cell, placing him in the cell, where he proceeded to agitate and yell for his reading glasses (of which the guards knew nothing) so he could read documents during his testimony, and then, without his glasses, escorting him back through the same subterranean maze, to the courtroom, for what was, at best, in the adjoining holding cell, a 3 minute meeting with defense counsel, in which counsel visually assessed Cody's physical appearance, announced to Cody he was resting; counsel left the room; Cody was led back into the courtroom by a courtroom deputy sheriff, and on-record proceedings commenced. See, also, Cody's argument on denial of his motion for a habeas evidentiary hearing, [redacted] infra.

(a) Cody did not waive his "pure" right to testify, at all, because he did not expressly state that he did not wish to testify, and because his actions, and words relating to the colloquy, considering all the circumstances, did not, under precedent, unequivocally rise to the level of implied waiver, it being factually unreasonable to conclude, as Doc. 75: 8741, n. 13 does, that Cody's counsel's two-times during the colloquy - made alerts of Cody's desire and intent to

testify[6], and Cody personally answering the trial court's premised question,

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6. Prior to the colloquy defense counsel also definitively "alerted" the court twice more Cody would testify, as argued expressly by Cody in his Traverse (Doc. 57) serving by order of the magistrate court as his petition's sole explanation of fact, and argument, at Doc.57, originally numbered p. 8, et. seq., when counsel promised the jury and court Cody would testify (Doc. 43-21: 892, 9-13) and when the trial court noted on record that Cody's counsel had noticed the court off-record Cody wished to testify (Tr. 43-21:8037, 16-17). Cody's thereupon made argument in the promise to the jury by counsel being part of counsel's larger IATC in alerting the Court and in refusing to call Cody (Doc. 57, pp. 11 & n. 30, 12, 24 & n. 60);Objections (Doc. 74-1),originally numbered pp. 8-10; this argument on how many alerts were given was based upon, in support, in this circuit, Plummer v. Jackson, 491 Fed. Appx. 671 (6th Cir. 2013), and not a separate habeas "claim", making it erroneous for the Opinion, at Doc. 75:8746, n. 15, to claim this argument should be procedurally defaulted (i.e. ignored) because "... it does not appear that Cody asserted this particular claim" in the instant habeas petition , when the magistrate court orders (Doc. 18: 1381, 1383; Order [non-document] 9/12/2019) barred any explanation of fact, or argument, from that petition, "and that Cody did not raise it [as a claim] in his App. R. 26(B) application," when Cody, again, in a page-limited by order document, did raise it, by stating "... Defendant repeatedly through counsel expressed his desire and intent to testify, " [Emphasis added] (Doc. 42-3: 2830) and , again in his App. R.26(B) Ohio Supreme Court appeal memorandum (Doc. 42-3:2989) by stating that "Defense counsel told the trial court Cody ... would testify," and referencing, in both documents, "[i]n" "Sheen v. Reeves ... et al" as authorities.

The Opinion's point on non-raising in Cody's App. R. 26(B) application is irrelevant, in any event, as Cody [further] explicitly raised the facts of the Plummer violation in his Opening Merit Brief on his "PCRP" appeal (Doc. 42-3, at 3345, fn. 3); stating " ... Petitioner [told] the jury (opening statement) Cody would testify" as part of a larger explanation of counsel's IATC, and state appellate courts did not invoke res judicata in rejecting anything, be it argument, explanation or claim, about this statement (referenced at Opinion, Doc. 75: 8719-20).

if you would like to testify, time would be given to repair yourself, that he would like that time, including having his glasses returned, for that purpose, and that he would like to consult with counsel about testifying, did not merit the conclusion, at least, of an equivocal response on wish to testify; nor did it merit the conclusion that Cody " ... did [not] equivocally respond to the trial court questions as to whether he wanted to testify;" and because

(b) Defense counsel never [before or after the recess] told the court Cody told him Cody would not be testifying, or did not wish to testify, or that Cody gave counsel any reason whatsoever for not testifying, or not wishing to testify, and the Opinion's Adams, 2021 U.S. Dist. LEXIS 73493, at *49, that "... defense counsel assured the trial court ... that Cody had declined to testify"[for any reason], citing Doc. 43-21:8037-45, is clearly erroneous on the facts; instead, what defense counsel did, at this point in the colloquy, where the trial court refuses to address Cody, and addresses counsel instead[7], was to change his sentence structure and mode, from when he was making his statements

7. The language of the trial court is shown at Doc. 75:8738. It shows the court concluding Cody's previous personally made answer was unclear, and that, thereupon, the court refuses to address Cody again, and directs its questions and points to defense counsel, reflecting the result of a trial court rejecting previously twice-made-by-counsel alerts, but now accepting, as finally determinative, counsel's retraction of the previously made alerts.

to the court of Cody's alerts, from, "[M]y client indicates he wishes to answer to his Complaint" [Emphasis added], and "[H]e is reiterating to me the same. He wishes to answer to all the charges" [Emphasis added] (Opinion, Doc. 75: 8736-37), to, now, in refusing to call Cody to testify, "I do believe he will not be taking the stand," and "I certainly believe [he cannot assist me]" [Emphasis added] (Doc. 75:8738-39), referencing his, and the trial court's, unfounded belief that temporary incapacity authorizes counsel to default a defendant's trial; and because

(c) Precedent does not hold that the defendant's assent is presumed "when a tactical decision is made by an attorney that a defendant should not testify," (cf. Doc. 75:8745), when counsel's decision is explicitly expressed as being based upon a constitutionally impermissible outcome, instantly, Drope v. Missouri's (infra) proscription against trying, or convicting, a defendant with physical or mental deficiencies, infirmities, conditions or impediments; and because

(d) there is no record evidence Cody affirmatively or expressly "agreed" with the fullness of defense counsel's own stated reason, upon trial court prompting, for justifying counsel's refusal to call Cody, and to thusly default trial; and because

(e) the record shows Cody did not contest(as part of the underlying claim of IATC, upon prompting by the trial court, using a constitutionally impermissible reason for justifying counsel's refusal to call Cody) that Cody was,at the time, suffering from some temporary mental and physical injuries (as counsel did speak to) (caused by petition-detailed cruel and inhuman treatment and conditions

inflicted by jail authorities, and defense counsel's cooperation with the State's position that Cody was "never" CIA," in failing to pursue Cody's CIA employment to negate the intentional deprivation of donor funds as an element of that charge (i.e. , that spending the unaccounted for donations to the Navy association for the (state secret) purposes to make payments to 76+ foreign leaders to secure the substitution of their front-line troops for ours in Iraq and Afghanistan, so fewer Americans came home in body bags, was as much to do with "helping veterans" as providing them with care kits, or arts and crafts to make, or more) and the elements of the other offenses of which Cody was charged)) (and, only to that extent, in a few minutes long, off record, communication with defense counsel, did Cody "agree" with counsel, but only on the point injuries did exist), but that, rather than default trial, they were to be alleviated by a continuance, permitting Cody, thereupon to testify, and (as argued in Cody's traverse/petition and Objections), Drope v. Missouri, 420 U.S. 162, 178-83, constitutionally forbade trial leading to conviction (this aspect of the Opinion on this subject being error at law; this point of law being ignored by both the state appellate courts and the Opinion; and because

(f) the district court erroneously assumed, 2021 U.S. Dist. LEXIS 73493, at *49, as a debatable question of federal law,claiming it was following a state court decision (petitioner's App. R. 26 (B) decision) which, if made, would have been contrary to federal law, holding petitioner had an (unfulfilled, in Cody's case) obligation to address the trial court affirmatively, stating the exact words, "I wish to testify ," in order to establish the "alert" required by precedent in the 6th Circuit, when that is not what precedent requires; and because

(g) the clear, substantive gist of the underlying claim of IATC (which is itself the underlying claim of the overlying IAAC claim), the Drope issue, is that

it is irrelevant to disposition of the claim whether Cody was mentally infirm or not[8] (due both to his attempted suicide, and, a justice center guard

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8. The Opinion's further argument on this issue, found at Doc. 75: 8740, also seems irrelevant. First, Cody did not argue IAAC because the trial court was aware Cody had head injuries; Cody certainly argued the trial court was aware of the head injuries; defense counsel had just told the court of such. Undecipherable to petitioner as to the purpose of the argument being made, the Opinion then relates the trial court saying Cody has no mental health issues that needed to be dealt with at this time' [made at the same time Cody has been placed in a jail psychiatric cell, in a strait-jacket while celled, under jail staff prescribed cylexa, an anti-depressant/psychotic], and then, moments later, addressing only defense counsel, prompts him by stating, "And you indicated [in an obvious reference to an immediately preceding off-record conference] his physical and mental abilities...referring...if you wil, being cross-examined...?" [Tr. 4322:7-11], leading to counsel explaining his reasons , thusly, for not calling Cody, reasons the trial court accepts, without addressing Cody. If Cody had no mental incapacities, the trial court should not have accepted that as the sole reasoning offered by counsel, either as to refusal to call, or as to Cody's alleged acceptance of that reasoning, for a knowing and intelligent "waiver" to apply, NOT constituting a structural violation of the fair trial principle that defendant and society are entitle to "trial at which the truth will [not] be undermined" (Liegelos v. Cooke, 105 F. 3d 1381, 1387 (7th Cir, 1997), explaining Nix v. Whiteside, 475 U.S. 157, 167 (1986), citing Strickland, and Cronic, 466 U.S. 648 at 657, n.21 (as argued at Objections, Doc. 74-1, p. 9). If Cody were suffering from the kind of incapacity counsel said he was suffering from, on the other hand, then, contary to the Opinion's argument Cody's reliance on Ward v. Stemes, 2003 U.S. App LEXIS 13688 (7th Cir. 2003) is misplaced (Doc. 75:8741, n. 13), as to the issue of required alerts, if it is determined that Cody had an obligation to speak out over counsel at this point, it should be excused for the simple reason counsel gave.

slamming his head against the trial courtroom holding tank cell concrete wall, the first hand evidence of which is for an event, again,which occurred off-record, as did what Cody told defense counsel about those injuries at the time they occurred (prior to the "40 minute recess" this segment of Issues has been talking about, supra), which was that he (Cody) was temporarily disoriented by the residual effects of those injuries, but wanted to testify, and had to testify, given the situation counsel had placed him in at trial at that point, by failing to develop evidence relevant to Cody's acquisition of his cash savings from his CIA employment of over 40 years, and CIA and White House direction for made and unaccounted for (in the State's case) expenditures of the Navy association for national security purposes "helping" Armed Forces personnel and veterans (see, Doc. 43-21:7995, referenced at Objections, Doc. 74-1, p.6, n. 1, for defense counsel telling the trial court about the results of this separate and before-the-one-during-the-recess off-record attorney-client conferring event); or, even if Cody agreed with counsel telling Cody mental inability to assist counsel on examination and cross-examination (and re-cross-examination) legally justified counsel not calling Cody and defaulting trial (not even to mention counsel's failure to present any closing argument), because counsel's statement was in defect to and of a fundamental right Drope v. Missouri establishes, the right of a defendant who cannot assist counsel effectively with and at trial because of a physical or mental issue cannot be tried or convicted during the existence of that incapacity. Counsel's statements on this issue, expressly prompted, and then approved, by the trial court, are of record, lie at the heart of the IATC alleged here. Thus, if as the Opinion finds, as it did at Doc. 57: 8739, "...that Cody had declined to testify [i.e., Cody waived his right] due to counsel's concerns regarding Cody's physical and mental capability...," [10] Cody's "waiver", whether express or implied, still is disqualified, under well-established precedent, by its lack of its being knowingly or intelligently made, because counsel used a legally fallacious argument to secure both the "waiver" and an outcome (non-testimony and defaulted trial) which violated a defendant's fundamental

10. Such a finding should have been dispositive in Cody's favor to the merits of his Ground 4 IATC underlying claim, and, since the Opinion cites, solely, the lack of such substantive merit for its defeat of the overlying IAAC claim (appellate counsel need not make an unmeritorious claim; see Doc. 75: 8742, 8745-46), the Ground 4 IAAC/IATC claim should have been decided in petitioner's favor.

constitutonal right, and which was therefore constitutionally prohibited. The dropping of any discussion of the Drope -based basis for this IATC, by and in the Opinion, where, in the district court's arguments, lack of merit to the Ground's IATC underlying claim is the only reason given for substantive denial of the overlying IAAC claim, causes an ignoring of this gist, advancing the cause of appellate briefing before this Court on this at least debatable issue, and claim.

3. The district court erroneously assumed, 2021 U.S. Dist. LEXIS 73493, at *49, as a debatable, or wrong determination of federal law, and a clearly erroneously determined fact, claiming it was following a state court decision (petitioner's App. R. 26(B) decision) which, if made, would have been likewise erroneous, that, after defense counsel alerted the trial court at least twice of record that Cody wished to testify, and thereafter Cody personally, of record, answered the trial court that he wished to redress his dishevelled appearance, caused by jail deputies, because he "would like to testify" (Opinion, id., at *45-46: Trial Court: "...if you would like to testify, I'm happy to give you some time [to repair your appearance]." Cody: " I would like to put myself in physical appearance state....[sic]"), Cody had to, at that point or thereafter, utter the explicit words, "I wish to testify," of record, because trial court right to testify colloquy law requires nothing more than the defendant "somehow alerted" the trial court he desired to testify (Holt v. U.S., 2021 U.S. App. LEXIS 159, at *6-7 (6th Cir., decided January 5, 2021); [10(a)] does NOT require the defendant to put repetitive alerts to the trial court at the time of a colloquy, nor does it permit the trial court to repetitively badger the defendant with, in Cody's case, on top of these previous "asked and answereds", yet another parsing inquiry having the effect of creating ambiguity as to the defendant's "intentions" with respect to testifying (Opinion, id., at *46), in violation, by analogy or not, of the Supreme Court rule that once a constitutional right of this importance has been invoked, the state cannot employ techniques to elicit information designed to create ambiguity about the assertion of the right (see, e.g. Mich. v. Jackson, 89 L.Ed. 2d 63, 475 U.S. 625, 640 (1986)), as opposed to simply directing defense counsel to call the defendant to take the stand in accordance with the defendant's express wishes, and alerts, to ascertain whether the defendant does so, or refuses to do so (cf., "...

10(a). "Somehow (adv.). In a way not specified..." Webster's II New Riverside Dictionary (Rev. 1966). An alert made by counsel clearly is not disqualified; and no case justifying implicit or ambiguous waiver by the defendant's actions had this element present instantly of explicit statement(s), right before the defendant's time to testify, of defendant's counsel that the defendant wished to testify.

after the recess, Cody [had to] alert[ ] the trial court [again]... he wanted to testify." (Doc. 75: 8745)).

Ground 4 Summarized Issue IV

Did the Opinion err, on law and the facts, in concluding that the underlying claims in Ground 4 Issues I,II and III above, were procedurally defaulted?

Ground 4 Expanded Issues on the Opinion's "Analysis of Underlying Claims" of Denial of "Pure" Right to Testify and Ineffective Assistance of Trial Counsel for Refusing to Call Petitioner to Testify (Doc. 75: 8746-8748):

The Opinion errs in a number of ways in ruling that there was a "procedural default" based upon the non-presentation of these claims in the direct appeal, and in ruling that there was a failure of that default's excuse by reason of cause and prejudice:

4. First , the Opinion incongruously holds [Doc. 75:8741-47] Cody was procedurally defaulted on the IAAC/IATC claim because of the Davie App. R. 26(B) doctrine defaulting for failure to preserve the underlying claim because it was not raised in the direct appeal, when, four pages earlier the Opinion [Doc. 75: 8742], from the record, correctly "... agrees with Cody that ... the state appellate court ... did not separately address Cody's separate claim that appellate counsel was ineffective for failing to argue that defense counsel was ineffective for failing to call Cody to testify at trial," [Emphasis in original], correctly citing Barton v. Warden , 786 F. 3d 450, 460 (6th Cir. 2015) (per curiam) for the holding that, in a habeas proceeding turning upon, and stemming from, an Ohio App. R. 26(B) case, when the appellate court did not address an underlying constitutional claim (here, IATC), the habeas court presumes a state court appellate full merits review which justifies bypassing the Davie default reason, and decides the underlying claim de novo, applying 28 U.S.C. §2254(d), per se, as dispositive. (See, also, Carter v. Mitchell, 693 F. 3d 555 (6th Cir. 2012), citing Maples v. Stegall, 340 F. 3d 433, citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)). The Opinion then engages in what it calls a de novo review (Doc. 75: 8745-46), substantively denying the claim, a denial which was substantively in error, as was the review itself procedurally in error, both subjects discussed infra.

5. The Opinion incorrectly states Cody argued that the filing of the App. R. 26(B) application "preserved" the claim (when, in fact, Cody's habeas pleadings

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11: Five pages previous, the Opinion says, calling Cody's argument disagreeing with the R&R, a "suggestion," stating the district court "need not decide the issue."

stated no such thing, petitioner realizing that the filing of an App. R. 26(B) application, per se, can never "preserve" per se the underlying claims, in the absence of raising them on direct appeal or in some other, appropriate, state court post-conviction collateral proceeding, because the two actions (direct appeal, App. R. 26(B)) cover distinct subjects for analysis) when, instead, Cody's argument was that habeas review of the underlying claims outside the context of IAAC for failure to raise was possible and, in context it is clear it is only to that extent Cody uses the term "preserved" and argument concerning "preservation" in his Objections; the Opinion, on the other hand, uses the term to mean that the petitioner is claiming per se preservation established by the filing, per se, of the App. R. 26(B) application. That possible review, Cody argued, was to be based on any of the following reasons, upon which the Opinion erred, at law or on the facts, because:

(a) the Opinion clearly errs in stating, at Doc. 75:8748, n. 17, that Cody, in his Objections (Doc. 74-1), did not argue on "cause or prejudice" on these issues other than IAAC for failure to raise and, on the IAAC claim for citing an impermissible reason, pursuant to Drope (unrecognized, erroneously by the Opinion as the "underlying claim" to the underlying claim of IATC), for not calling Cody and defaulting his trial, evidence outside the trial record (Doc. 75:8747), when

(1) Cody argued, at Doc. 74-1, p. 2, that "little analysis" on the underlying claim of denial of "pure" right to testify required a Davie- authorized "careful and independent review" on the the underlying claim independent of analysis on the overlying IAAC claim[12] - not performed by the Opinion (see, supra, on IAAC claims);

(2) Cody argued, id., that if there were no review by the state courts of the underlying claim of actions impermissible under Drope rationalizing defaulting Cody's trial by the Opinion, Doc. 75:8742, as to the claim underlying IAAC that, as stated by the court, defense counsel was ineffective for failing to call Cody to testify, then a merits review by the state court is presumed (under Barton v. Warden, 786 F.3d 450, 460 (6th Cir. 2015) (per curiam)), and a habeas de novo review, independent of the analysis on the overlying IAAC claim - needs to be made - the Opinion erroneously, on

12. "... to see if the decision on the underlying claim is an unreasonable application of federal law" [Emphasis added], Davie, supra, at 315.

this issue, making what it calls, at Doc. 75:8745, a "de novo" review, but only within the context of "appellate counsel [not being] ineffective.... [id] [T]he Court finds ...appellate counsel was not ineffective .... (Doc. 75:8746);[13]

(3)Cody argued, at Doc. 74-1, p.3, as to the R&R citing Davie's rule to block review of the claim of the underlying IATC, that "any state court-based res judicata procedural default[14] is excused by IATC," and then cited, as evidence of the same, at Doc. 74-1, pp. 8-9, IATC for telling the jury Cody would testify

13. "To reach [habeas] substantive merits review of the underlying issue separately [from the IAAC claim]...." Davie v. Mitchell, 547 F.3d 297, 312 at HN 12 (6th Cir. 2009) [Emphasis added].

14. In the context of all his habeas pleadings, it is clear Cody concludes that Davie's analytical distinction under state law between the subjects of a direct appeal and an App. R. 26(B) application proceeding has to do with the latter's underlying constitutional claims already having been decided in the direct appeal under the 'could have been raised but wasn't' type of preclusion of res judicata state law procedural bar, and that it is fair to classify the bar Davie announced as such.

and then not producing him;[15] and counsel's violation of the Drope mandate itself, as such IATC.

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15. This event as either an evidentiary statement from the record shedding light on the ground as stated, or, as to the claim as explicitly fairly noticed to the state courts throughout all Cody's post-conviction collateral proceedings related to IATC, meeting the requirement of "specificity" for fair notice, of a claim of IATC, not in general, but for 'failure to investigate, develop, pursue and present evidence of Cody's CIA/White House employment relevant to the defense as to the charges', or, to be cumulated with counsel's other alleged ineffective acts or failures to act, need not be stated explicitly as a separate habeas 'claim', and the Opinion errs in assuming otherwise, at Doc. 75: 8746, n. 1.

The Opinion errs there, also, as to exhaustion as to this item, the promise to the jury unfulfilled, under Osber and Plummer, by stating Cody did not mention counsel's promise in his App. R. 26(B) application. In the application, Cody stated , at Doc. 42-3:2830, that he "repeatedly through counsel, expressed his desire and intent to testify." Moreover, contra to what the Opinion implies, id., Cody was not limited to this application for exhaustion (fair notice) purposes: he could have referenced the claim anywhere in the post-conviction collateral action process (Carter v. Mitchell, 693 F.3d 555, 566), and, in his PCRP's appellate brief (repeated in his memorandum in support of jurisdiction brief to the Ohio supreme court (Doc. 42-3: 3345, n. 3) Cody specifically references counsel promising the jury Cody would testify, and then not calling Cody.

6. In denying Cody's claim of bar excuse for the de novo and independent-of-the-IAAC claim review of the underlying IATC claim (in both its parts), the Opinion erroneously, first, states that Cody provided only one vaguely worded example (the major relevant example, in fact, under Plummer, Cody points out, since the Opinion/R&R's sole substantive reason for denying all the underlying right to testify claims was the lack of merit of the claims based upon Cody's waiver of the right) of evidence outside the trial record, i.e. off-record discussions between Cody and counsel as to their respective intents [16] with regard to "the client's express desire to testify" (Doc. 75:8747); and second, erroneously states that if Cody raised the IATC claim in his first post-conviction petition ("PCRP") the claim would have been [habeas] procedurally defaulted because the state courts denied the claim on res judicata grounds, when

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16. This was not Cody's only relevant example of such off-record discussions. In the same Objections section, Doc. 74-1, p. 8, n. 2, Cody also mentioned counsel's statements, or lack thereof, on mental deficiency as a cause for non-testimony, and his statements about failure to investigate CIA-related evidence on Cody's defenses and, in general, statements "of intents of defendant and counsel as to Cody testifying." Cody also vigorously referenced, as occurring off-record during the "40 minute recess", as relevant to his non-waiver, the refusal by guards to return his reading glasses to him so he could read the documentary evidence, and the refusal by guards of the ability to repair himself (Doc. 57, p. 8; and Doc. 74-1, p. 4).

In specifically identifying off-record defendant-counsel communications referenced specifically in the record (e.g. the 40 minute session) Cody is specifically identifying such communications as providing statements of counsel and defendant going to Cody's and counsel's plans and intentions regarding testimony, or waiver. See, also, Doc. 75: 8747; and the Issues section, infra, on denial of Cody's motion for a habeas evidentiary hearing.

(a) the habeas petitioner may "preserve" an underlying App. R. 26(B) constitutional claim by bringing it somewhere else in the exhaustion process (Carter v. Mitchell, 693 F. 3d 555, 566 (6th Cir. 2012); and the existence of relevant off-record evidence in an Ohio PCRP case, such as there were in the PCRP actions brought by Cody, eliminates the federal habeas bar even if the state court invoked state-rule-based res judicata (Hill v. Mitchell, 842 F. 3d 910, 936 (6th Cir. 2016); Hutton v. Mitchell, 839 F. 3d 486, 504 (6th Cir. 2016);
(b) the PCRP decision referenced and invoked by the Opinion did not invoke res judicata to defeat the underlying claim of denial of right to testify, but only the overlying claim of IATC (Doc. 42-2, Ex. 65); and
(c) de novo review of the state court's procedural default analysis is required (Abela, infra, at 922), instead of the Opinion merely finding, as it did, at Doc. 75:8746-47, that the state court "imposed the procedural default." The Opinion erroneously ignored Cody's argument (made at Doc. 57, p.2, and again in his Objections (Doc. 74-1, p. 1), stating that it was not made (Doc. 75: 8748, n. 17)), that Davie's established App. R. 26(B) state procedural bar is not exempt from non-application for a violation of Abela v. Martin, 380 F. 3d 915, 924 (6th Cir. 2004)'s rule that the appellate court must, clearly and expressly, announce the default as applying to independent review of the underlying claim as a reason for the judgment, if the federal habeas bar is to apply. See, in support of Abela's applicability, Smith v. Warden, 780 Fed. Appx. 208, 223-25 (6th Cir. 2019) (App. R. 26 (B) appellate court must specifically invoke the procedural default [which Cody's court did not do] or Maupin's second prong of [non] "enforcement" applies, denying the habeas court jurisdiction to invoke this habeas bar).

7. The Opinion erred by reiterating, summarily, by error on law and fact, that Cody waived his right to testify, and that the non-meritoriousness of Cody's right to testify underlying claims, for that reason (as discussed in the Opinion's section on the IAAC, supra), was the sole reason for the Opinion not approving the IAAC claims as meritorious, and erring by ruling erroneously at law, that therefore IAAC may not serve as the Opinion's sole allowable excuse for the Davie-established state law procedural bar.

...

Neither the Opinion nor the R&R invokes, as to their respective analyses on and in their Ground 4 sections, that a prejudice prong of "cause and prejudice" is necessary of consideration, as to Cody's testimonial evidence, if there were to be a meritorious case of "cause" made as to either IAAC or IATC.

...

Ground 6: IAAC for Failure to Raise Denial of Right to Access Counsel of Choice (Opinion Analysis at Doc. 75: 8748-8758):

Summarized Issue:

V. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 habeas claim of IAAC (the overlying claim) for failure to raise the claim of denial of petitioner's right to access prospective counsel of choice for retention (the underlying claim) was without merit?

Expanded Issues pertaining to Ground 6:

IAAC Portion of Ground 6 (Overlying Claim) (Opinion Analysis at Doc. 75: 8749-57):

8. As a preliminary matter, the Opinion factually misstates Cody's explanation of the claim in his Traverse with the mis-consequence of limiting what is and is not relevant to it: Cody did not, in the Traverse serving as his claim explanation, Doc. 57: 8391-8395, as the Opinion misalleges at Doc. 75: 8749: "... limit[s] his argument [on the underlying claim] solely to that portion of Ground Six that alleges that the trial court's 'no contact' order denied him his right to access counsel of his choice." Instead, what Cody said on this subject, exactly, at Doc. 57, p.1, was "Ground 6 (Doc. 42: 1666-67), limited as follows: ... the trial court's no contact order [JE 3.19.2013] ... and other court and jail imposed conditions of pretrial confinement while he was in pro se status ... blocked his fundamental right to access counsel of choice ...." [Emphasis added].

9. As a preliminary matter , the Opinion (Doc. 75: 8750) errs in implying petitioner may not have put the state courts on fair notice because, specifically on the factual allegations cited, id., made by petitioner (as opposed to his

statement of claim proper (see Doc. 57, p. 1) that the error complained of "blocked his fundamental right to access counsel of choice..."), petitioner did not specifically state or reiterate prohibition of contact with outside prospective counsel of choice, when, in fact, Cody's language cited in the Opinion at 8750 mentions Cody trying to get to see "...counsel...about potential representation" and states "[H]e was permitted no contact with any other human being (except for the jail guards) ... and other than advisory counsel Patituce..." [Emphasis added], the words "any other human being" by definition incorporating prospective outside counsel other than advisory counsel; and Cody pleaded, with mention also omitted in the Opinion, explicitly in his application to re-open his direct appeal (his only filed pleading permitted in his App. R. 26(B) case), at Doc. 42-3: 2807, "[T]he trial court's 3.19.2013 order caused violations of the Defendant's fundamental rights (involving structural error) to access counsel of choice, " citing Sullivan v. Louisiana.

10. As a preliminary matter, on standard of review for the claim, the Opinion erred in not making a de novo review of the underlying constitutional claim as dispositive of the ultimate issue, and appropriate remedy that Cody should have been ordered a new trial, because he was denied his right to access prospective counsel of choice, or as dispositive of that issue as penultimate to the further conclusion, that the merit of the denial (the underlying claim) argument was determinative, that appellate counsel was ineffective for not making the claim.[17] The Opinion errs in inappropriately applying (in what we will call the "fleeting reference" rule issue) in Johnson v. Williams, 568 U.S. 289 (2013),[18] an application in which the Opinion, in any event,

17. This "flowing" conclusion, on prospective merits of any of Cody's particular underlying claims meaning likewise ineffectiveness for failure to raise, is not challenged in the Opinion.

18. The "fleeting reference" charge against Cody's application is not specifically made in the R&R, the magistrate court seemingly implying, instead, in what was a real fleeting reference, that the App. R. 26(B) application's claim may have been "too insubstantial" or "covered by another claim by implication." These are dropped, as charges, in the Opinion. See, Doc. 75: 8753.

misinterprets Johnson's holding on the admittedly tricky subject of degrees of specificity in petitioner's claims necessary for different purposes, and degrees of specificity in review of claims in state appellate court opinions necessary for different purposes, as the framework for reaching its "no de novo review" conclusion. Instead of the Opinion's erroneous interpretation and application, Johnson's is a rule that a state court may disregard (in its opinion) "a fleeting reference to a provision of the Federal Constitution ... as sufficient to raise a separate federal claim " [Emphasis added] (Johnson, 568 U.S. at 298-299), the presumption disregarding avoidance of de novo review of the claim being required[19] because the claim was "not adjudicated on the

19. The Opinion discusses what are, in a Johnson/Richter-based analysis, two separate presumptions. The first one is that one presumes a state court decision to be on the merits, and the habeas court thereupon applies deferential review. But when it is not, de novo review is applied. Johnson, supra, at 302. So that presumption, to achieve de novo review, places the burden of that rebuttal on the petitioner, with Cody instantly, saying that rebuttal is met by the wording of the App. R.26 (B) decision, and the Opinion agreeing with Cody, stating "... the Court agrees with Cody that the state court did not directly address his specific claim as it relates to the alleged denial of right of access to counsel of choice...." (Doc. 75: 8752). The district court then opines (and not from the R&R's opinion), as its sole basis for its decision on deferential review, that the state court had an excuse under AEDPA, established by Johnson, for not addressing the merits, and that was that Cody only raised the claim in the state court proceeding in a "fleeting" reference, as that term and concept are used in Johnson. Thus, Cody must raise a cognizable issue here, for his requested briefing on this "second rebuttal", as to the "fleeting reference" issue to be issued, in the Notice of Appeal, that the Opinion erred, under Johnson's analysis of what such a "fleeting" reference was, and is.

merits "[20].

Instead of the Opinion's erroneous interpretation and application:
(a) Johnson does not change the widely established rule that cognizable constitutional claims in state court proceedings are to be "fact based," i.e. simply an identification of the facts and the constitutional violation (Poindexter v. Mitchell, 454 F. 3d 564, 567 (6th Cir. 2006); Onifer v. Tyszkiewicz, 255 F. 313, 315 (6th Cir. 2001); Johnson is distinguishable from the facts in Cody instantly because:
(b) Cody's referent passages are distinguishable from the objectionable Johnson passages because Cody's passages do not have the Johnson-complained about objections of (1) only a vague and uncertain reference to a federal constitutional right constituting insufficient notice of the right addressed, (2) an insubstantial right or claim; or (3) treating the alleged violation of the federal right as *interchangeable* with a violation of a state-law right;
(c) Cody's referent passages are distinguishable from the Johnson's petitioner's state court pleadings (petitioner's state court of appeal direct appeal brief stated: "' Juror No. 6 was a holdout juror for acquittal: Williams was denied her Sixth Amendment right by dismissing him; the 'Sixth Amendment right to a jury trial' could be offended by 'the dismissal and replacement of ...jurors' under Cal. Penal Code section 1089.'" See, Williams v. Cavazos, 646 F.3d 626, n. 8 (9th Cir. 2011), quoting Pet'r Cal. Ct. App. Br. 41-42, 14-15 & n. 12) because there is no confusion in the state courts being created by Cody between a state law based ground and the federal constitutional ground which lies at the heart of the Johnson-objected to "fleeting reference to a provision of the Federal Constitution" [Emphasis added]; and

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20. See, Opinion, Doc. 75: Cody argues "...the state appellate court ignored the particular claim at issue.... [T]he Court agrees with Cody that the State court did not directly address his claim as it relates to the alleged denial of right of access to counsel of his choice...." The claim was not addressed at all, invoking de novo review under Johnson's presumption unless the claim can be said to have been stated as a "fleeting" or "passing" reference.

(d) unlike the full briefing permitted to petitioner Williams in the California appellate courts, Cody was only permitted the "first stage" of the Ohio App. R. 26(B) proceeding, the "application to reopen," in which the applicant is permitted to present "one or more assignments of error or arguments". [Emphasis added] (App. R. 26(B)(2)(c))," which may [but need not] include citations to applicable authorities and references to the record" (App. R. 26(B)(2)(d)), and in which all the applicant need do is "put forth a colorable claim" of IAAC, to be followed, only if the application is granted, by the full "appellate briefs" [provided by, and in, Johnson]. Rules Staff Note, 7-1-93, App. R. 26(B) Application for Re-Opening.

Clearly, Cody did not violate the fleeting reference rule because Cody pleaded before the state courts, in quantitatively what amounted to a more than a "fleeting" or "passing" reference Johnson found, in its context, objectionable: first, at Doc. 42-3:2807 (omitted of reference by the Opinion), that a violation of his fundamental right involving structural error to access counsel of choice occurred, and , second, as quoted by the Opinion, Doc. 57:8750, in ¶¶1, 2 and 4, (1) that the trial court issued its no contact order, and that enforcement of it meant no permission to contact "any other human being, no telephone calls, and no access to writing materials , other than paper and pens"; (2) that Cody was thrown into solitary confinement thereupon; (3) that he was apprehended by jail guards for writing on a piece of scrap paper he found, for the purpose of contacting outside counsel and smuggling the note to another inmate in a nearby cell who was getting out, in violation of the quoted order, and placed in further "disciplinary" solitary confinement (See, the App. R. 26 (B) application itself, Doc. 42-3: 2827, ¶ 3. The word "disciplinary" is dropped, as to what Cody pleaded, from the Opinion's presentation at Doc. 75: 8750). Likewise omitted of mention by the Opinion, as to what Cody stated to the App. R. 26(B) state court, is Cody's statement complaining, as part of the claim, that the denial of his trial court "6.12.2013, 7.17.2013, 7.18 and "7.26.2013" motions that the "no contact restrictions be lifted, for the explicit reasons cited in the Application proper, Assignment IV," which included the denial of desired access to prospective retained outside counsel

to secure representation (Doc. 42-3: 2828). On these omissions, see, also, n.24, infra.

Cody's count is that he used 128 words to plead these things in this document, both factually, and referencing the constitutional reference at law without conflating it with a state law violation, a count which does not include the fact the state court of appeals ordered the full record to be provided, including Cody's filed and pro se permitted, but denied, motions to the trial court complaining about the prohibition of his right to access prospective private counsel (as referenced by Cody to the habeas courts at his Doc. 57, p. 16).

Opinion's Substantive Analysis of IAAC Portion of Ground 6, by Denying the Merits of the Underlying Claim, and therefore the Merits of the Overlying Claim (Opinion at Doc. 75: 8754-57):

The Opinion's sole reason for denying the IAAC portion of the Ground 6 claim is that appellate counsel was not ineffective for failure to raise the underlying claim because the right to access prospective private counsel Cody asserted does not exist, or because, if it does exist, "under the circumstances" that "Cody never indicated that he wanted to attempt to retain private counsel or that he was prevented from doing so, by virtue of the 'no contact order.'" (Doc. 75:8756-57).[21] In other words, the IAAC decision in the Opinion turns upon the Opinion's deferential substantive analysis, found at Doc. 75: 8754-57, of the merits of the underlying claim.

ii. The Opinion's primary analytical error, at law, is that it would create new law, containing a new proposition, that a defendant "declared" indigent, by a trial court in which he never alleged or demonstrated that he was indigent, has no right to contact or access outside counsel to inquire if and how he can obtain

21. The Opinion does not adopt the R&R's opinion on these issues, offering, instead, its own new and newly worded conceptualizations about what the underlying claim is about, and why it lacks merit. In Cody's instant section's "issues," therefore, petitioner addresses these newly presented, salient points and argument.

representation,[22] without precedent, on the subject of a defendant's constitutional right to access prospective retained counsel (the denial of which , the Opinion does not contest, would be structural error), and then alleges, again without precedent, that Cody's actions/failure to act violated this new proposition because he never told the trial court he was not

22. The Opinion does not challenge one of Cody's fundamental premises, although the R&R did, that under Gonzalez-Lopez, infra, it is the right to access prospective counsel of choice, not the right to choose particular counsel per se, which is at issue instantly. But, even though the Opinion may "get" this statement of law, it does not "get" that the defendant cannot determine the exact compensatory "things" prospective counsel might want for retention, until the "access" has taken place.

indigent[23] or that he wished to attempt to retain

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23. Although it is not relevant under Caplin, infra, or Gonzalez-Lopez, infra, whether Cody was indigent, or that Cody did not tell the trial court that he was not indigent (Cody , contra to the Opinion's factually erroneous (and irrelevant because of the underlying issue) statement that he did not direct the trial court's attention to a purported "non-indigent" status (Doc. 75: 8756), argued in his Traverse, Doc. 57, p. 16, and in his Objections, Doc. 74-1, pp. 20-21, that, by the time he was counsel pro se (and subject to the no contact order), had he been permitted to contact them, friends, relatives, and public supporters could, and would have, provided funds sufficient to at least negotiate with prospective counsel about money fees, if that is what they wanted; on this "lack of direction" point, the Opinion also ignores Cody's extensive Objections discourse, Doc. 74-1, pp. 15-18, that he refused to sign the trial-court provided "waiver of counsel" form, because he wanted to attempt to obtain retained counsel, at the only Faretta-valid hearing held on the issue of self-representation); the Opinion errs, on the facts and at law, by ignoring that Cody never told the trial court, of record, that he was indigent, and never claimed, of trial court record, that he was indigent, at any point in the trial court proceedings (including the only relevant points in time while he was appointed to represent himself). Instead, he was "declared" indigent even before his personal appearance began, in May, 2012 (Doc. 42-1, Ex. 5) in a case filed under an indictment twice removed from the one Cody was tried on.

> "Due process does not permit a judge to decide ... whether a defendant is unable to afford counsel without [a] hearing...." Bradley v. Henry, 510 F. 3d 1093, at HN 4 (9th Cir. 2007). "Decide first [for the court, : to appoint counsel; for the defendant, on pro se status, or to accept appointed counsel], defend later, is not an axiom of constitutional law. To deny assistance of [retained] counsel on account of the impecuniousness of the defendant requires a hearing to explore the case." Id., at HN 6, citing Caplin &Drysdale v. U.S., 491 U.S. 617, 624 (1989), Wheat v. U.S. , 486 U.S. 153, 159 and Powell v. Alabama, 287 U.S. 45, 53 (1932) (Clifton, J., concurring, 510 F. 3d, at *14-17).

As the Opinion evidences, at Doc. 75:8754-55, in its factual review of the many relevant trial court proceedings, Cody never tells the trial court he is indigent, the Opinion citing, as its' sole example, in support of its claim, its not explicitly stated, but implied, proposition that Cody did tell the trial court (or any court during the trial or pre-trial time) that he was indigent, id., one off-Pinholster-record-statement (Doc. 1-14 (stricken from the record by Magistrate Court order Doc. 18) Cody made, not to the trial court, but to the 8th district court of appeals in a separate original civil action, not that he was indigent, but that "I have been found indigent in [the criminal] case;" the facts (the stricken document from the court of appeals action the Opinion relies on) then clearly showing, the opposite of what the Opinion asserts as fact (id., at 8754), that Cody declined to attach, and did not attach, as opposed to the Opinion saying he did attach, any "affidavit of indigency" to the pleading (and, even if such an affidavit had been attached, it would have been relevant only to the waiver of filing fees and costs for the particular court of appeals civil action).

counsel;[24] in other words, as to the Opinion's frequently, clearly and erroneously made statements of fact, from which the Opinion attempts to establish vitiating waiver by Cody, again, without any specific precedent in waiver law that Cody's actions constituted such waiver.

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24. Even though it is irrelevant to any requirement of existing precedent, the Opinion clearly errs factually on the latter part of that statement. In his Traverse acting by court order as his explanation of, and argument on, his petition, at Doc. 57, p.16, at ¶ 8, and again in his Objections, Doc. 74-1, p. 18, Cody explicitly told the habeas courts that at the time jail guards, enforcing the no contact order, punished him for attempting to have a jail inmate smuggle a note to prospective counsel to inquire of them their requested compensation for representation, with a view to retaining the same, he moved the trial court, pro se, to vacate the no contact order to allow him to access prospective retained counsel, citing that court's journal entries 5/31/2013, 6/21/2013 and 7/26/2013 , made with summarized titles of the respective motions filed by Cody on those dates, and entries made part of the habeas record by Respondent, at Doc. 42-4: 3555 ("Motion to Vacate [No Contact] Order," "Defense ...Other Motions," and, citing the trial court's journal entry 7/26/2013 (appearing at Doc. 42-4:3554), "Defendant's Continuing Objections of Record to Retain Outside Counsel" [Emphasis added]; these are more than mere "making mention" of Cody's planning to retain counsel on his own; and that his magistrate court motion (Doc. 52) to include the content of these trial court motions as part of the habeas court record had been denied (Order [non-document], 9.12.2019), which denial was separately affirmed by the district court in its preliminary decision (Doc. 64), and that Cody was objecting to that decision as well in his Objections (Doc. 74-1, p.18), and Cody notices his request for appeal here, also, from the 9.12.2019 magistrate's order and Doc. 64's affirmation of it. Likewise to the above, the Opinion omits to mention that Cody also explicitly complained in the App. R. 26(B) application about the denial of his trial court "6.12.2013, 7.17.2013, 7.18.2013" and "7.26.2013" motions, that the no contact "restrictions be lifted for the for explicit reasons cited in the Application proper, Assignment IV," which included the denial of desired access to prospective outside retained counsel to secure representation (Doc. 42-3: 2828).

12. Leaving aside the factual errors the Opinion makes pursuant to its misstatements and missassumptions about what clearly established federal law requires, the legal issue is contained in, and the law presented by, simply, Caplin's clearly stated holding, Caplin & Drysdale v. U.S., 491 U.S. 618, at 624-25, even though argued vigorously by Cody, ignored by both the R&R and the Opinion, that an indigent defendant does have the right to acquire an attorney "... who is willing to represent the defendant even though he is without funds," with that right extended to "access" of such a lawyer, by Gonzalez-Lopez, infra.

The Opinion's sole attempt to imply these holdings are not clearly established federal law invokes one off-point quotation from Gonzalez-Lopez, infra, and another off-point quotation from Daniels v. Lafler, 501 F. 3d 735 (6th Cir, 2007) (Doc. 75:8756). The Gonzalez-Lopez, 548 U.S. at 151, quote is on the facts of, and applied solely to, a context of Gonzalez separate from the instant issue, [25] not a defendant attempting, but forbidden to, access outside counsel for prospective representation, but, instead, one who has appointed counsel, and wants another one, by name, appointed instead, at state expense (the words the Court uses clearly indicate it is talking about having "counsel of choice," not "access" to the prospective outside counsel of choice at issue instantly; likewise, no defendant in Cody's approved pro se status, which is the point in time Cody is seeking to access outside counsel, can be said, by definition, "to require appointed counsel"). The Daniels quotation is, likewise, meant to be limited to the facts there, different from Cody's facts: the Daniel's defendant, first and fully, accepting one appointed counsel, then, after the trial court appointed a replacement counsel , saying he wanted the first appointed counsel back. These quotations both deal with choice of counsel of defendants with appointed counsel and satisfied with their being appointed counsel, it only being the identity of the appointed counsel the defendants find at issue. Caplin's holding about indigents having access to outside counsel for prospective representation inquiry is not disputed by either Gonzalez-Lopez or Daniels.

13. There is no law that a defendant declared or found indigent can be prohibited by state action from attempting to contact outside counsel to negotiate the terms of

25. "...the right to counsel of choice does not extend to defendants who require counsel to be appointed for them."

Instead, Gonzalez-Lopez, 548 U.S. 140, 144, indeed, quotes Caplin at 624-25, in support of Caplin's relevant holding there on indigent defendants accessing counsel willing to represent them even though they are without funds.

prospective representation;[26] indigent defendants do exactly that every day, yet that is exactly what happened, uniquely, in Cody and, on the merits, was approved of by the courts; this aspect of the Opinion's denial of the Ground 6 IAAC claim because the merits of the underlying claim fails is primarily why there is something in the Opinion's dispositive determination on ground 6 which is debatable, or wrong.

Ground 6:

Summarized Issue:

VI. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 underlying habeas claim of denial of petitioner's right to access prospective counsel of choice for retention was procedurally barred?

Procedural Default Analysis of Underlying Claim Portion of Ground 6 (Opinion, Doc. 75: 8757-58):

14. The Opinion errs in procedurally defaulting the underlying claim based on Davie, because Cody cannot apply IAAC as cause and prejudice, solely because appellate counsel had no obligation to raise an underlying claim lacking merit. In other words, procedural bar turns on the lack of merit in the underlying claim itself, a proposition with which Cody effectively takes issue with in Ground 6 Opinion error Issues, immediately supra.

Ground 16/17:

Summarized Issue:

VII. Did the Opinion err, at law, in concluding that petitioner's Ground 16/17 (or, as referenced in the Opinion's nomenclature, Grounds 16 and 17) were procedurally defaulted?

26. Indeed, such action is clearly proscribed by a clearly established Supreme Court holding: "A state [can] not infringe in any way the right of individuals ... to be fairly represented in lawsuits...." Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964), cited at Cody's Objections, p. 15, and ignored by the Opinion.

Issues Pertaining to Combined Ground 16/17 (Opinion, Doc. 75: 8758-63):

Grounds 16/17 are one ground[27] as applied to IATC as a PCRP matter, of a continuum of counsel's ineffective actions and failures to act to investigate and develop evidence on the pertinent CIA/White House employment based defenses, including, but not limited to, his failure to obtain a CIA FOIA response to a request for all documents related to Cody's CIA employment,[28] continuing into, and leading to, his failure to affirmatively pursue, present or argue those defenses at trial, or to argue at all (abandonment of those defenses at trial, including refusing to call Cody to testify at trial), under a totality of the circumstances. The existence of off-record evidence of this IATC makes this IATC, under Ohio law, a PCRP and not a direct appeal matter.

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27. Whether they are one ground or two stems not from Cody's arguments, but from the Ohio court of appeals combining Cody's 2018 PCRP and his 2018 motion for new trial actions into one appellate case, although Cody's other arguments are compelling. The appellate court case's (the last state court case dealing with all of these matters) decision invoked one sole reason for denying Cody's claims under both actions, a state law - based procedural default based upon untimely filing because unavoidable delay in discovering the evidence did not apply.

28. As a standalone matter, this is a proper subject for an Ohio motion for new trial proceeding. See, infra, discussion on motion for new trial.

15. Addressing procedural default of 16/17 in the state courts[29], the Opinion errs, as the R&R did, mixing law and fact, in adopting without the de novo review required by Abela v. Martin, 380 F. 3d 915, 922 (6th Cir. 2004), followed Alexander v. Smith, 311 Fed. Appx. 875 (6th Cir. 2009):

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29. The Opinion rejects the R&R approach to, and framework for, analysis of Claim 16/17 procedural default, which was , from a number of post-conviction collateral attack proceedings originally dispositive of the IATC issues in combined Claim 16/17, to pick solely one of the proceedings the magistrate court believed was the "correct" one ("[T]he [sole] operative court opinion for the Court to review [on claim 16] is the Ohio court of appeals 2015 decision denying relief on appeal from [Cody's] 2014 postconviction proceeding." Doc. 65, p.47) and to apply a finding of habeas procedural bar to it. Instead, the Opinion, at Doc. 75: 8759-63, impliedly concludes it must apply habeas procedural bar to each one of these decisions separately (which it does, erroneously, in each case) in order to conclude a habeas procedural bar applies to combined Claim 16/17. Petitioner recommends the Opinion's approach and framework, which flows correctly from the analysis of this Court in Carter v. Mitchell, 693 F.3d 555, at 566 (6th Cir. 2012), to this Court, and addresses here the issues for non-application of a habeas procedural bar, likewise, in each of the Opinion-designated Claim 16/17 actions separately. However, as to excuse for procedural default allegedly created in the PCRP actions, and by their decisions, the Opinion adds the opinion of the trial court in the 2014 PCRP to the one referenced in the R&R, supra, so this statement of Issues by Cody is Cody's first opportunity to apply federal court error to that decision.

In citing, correctly, to, first, the trial court opinion in the 2014 PCRP, the Opinion points out, Doc. 75: 8759, the trial court gave no reason which noted or addressed either cause for federal habeas bar, or Maupin-based reasons for cause and prejudice excuse, stating only Cody's PCRP affidavit was "speculative," without citing how or why [a non-procedural state law-based (O.R.C. 2953.21) grounds for denying a PCRP without hearing, which need not be addressed here because the Opinion's sole reason for rejecting 16/17 is procedural default; and this state court statement does not invoke a state law based procedural default; if, on the other hand, this statement is a procedural default reason being given by the state court, the details of why Cody's affidavit was "speculative" needed to be analyzed by the habeas courts de novo under Abela, supra, and they were not, with a view to see if the non-speculativeness constituted state-law compliance under the first prong of Maupin, supra. In these affidavits [Cody used the term correctly; there were more than one], Cody stated affirmatively, as fact, based upon first-hand knowledge presumed from the wording of his affidavit oath, that defense counsel never subpoened any of the witnesses Cody listed (who, Cody had stated, in his trial court Motions for Subpoenas to Issue for them, referenced at Doc. 42-1: 2228, would have testified he was CIA); since subpoenas may be served under the Ohio Rules of Criminal Procedure without filing them of record, this is a "fact outside the record;" it also impliedly turns on conversations between Cody and counsel off-record; that defense counsel withdrew his own motion for a private investigator to pursue discovery of Cody's CIA/White House employment; Cody proferred his testimony to matters clearly dehors the trial record (as well as the need for subpoening Michael DeWine's testimony at an evidentiary hearing) that DeWine, while a U.S. Senator on the Senate Select Committee for Intelligence, was informed of Cody's CIA employment on the Navy association operation (the subject of the Counts 1 - 11 Cody was convicted on); that DeWine had assisted the Navy association with its Ohio fundraising as part of his official duties, also dehors trial evidence; and that DeWine had solicited Cody for an unrequited substantial contribution to his U.S. Senate 2006 re-election campaign, also dehors trial evidence. It is obvious almost all of Cody's proferred evidence related

to conversations and communications made dehors trial record; and these statements, cited in this paragraph, do not, facially or otherwise, constitute speculation; Martinez v. Ryan, 566 U.S. 1, 14-15, followed, Hill, infra, at 842 F. 3d 910, 938, likewise excuse procedural default here because Cody was not appointed counsel, although requested, for the PCRP trial court action]; and that Cody provided no "documentation" [Emphasis added]"from outside the record" to demonstrate why the IATC claim could not have been considered on direct appeal. In addition to the erroneous reasons given, cited in this paragraph above, the most important reason for the error of the Opinion, with regard to the trial court's opinion as applied to the Opinion's procedural bar, is that the turning of relevant evidence of any kind, not just documentary evidence, outside the record, as applied to a non-held Ohio post-conviction relief action hearing, establishes an excuse for a habeas federal procedural bar based upon the state-law based procedural default (Hutton v. Mitchell, 839 F.3d 486, 504 (6th Cir. 2016); Hill v. Mitchell, 842 F.3d 910, 936 (6th Cir. 2016) (if any claim in any Ohio post-conviction collateral attack proceeding turns on dehors record evidence (to be determined de novo by the habeas court, Abela, supra), e.g., as to an IATC off-record defendant-counsel communication, no federal habeas procedural bar attaches to the claim).

In the Opinion's then referencing, second, at Doc. 75: 8759-60, on 16/17 procedural bar, the Ohio court of appeals decision on Cody's appeal of the 2014 IATC PCRP trial court judgment, which, affirming the trial court's judgment, merely invoked res judicata (IATC could have been raised in the direct appeal) as the ground for its state-law based procedural default. The Opinion errs in applying federal habeas bar because (a) Abela, supra, requires a de novo review of the decision, and the Opinion provides no review, de novo or otherwise; and (b) the prégânal proceeding turned on off-record from the trial evidence, supra, which excuses the federal bar (Hill, supra); and (c) the fact Cody requested counsel for the PCRP trial court action and none was provided excuses the federal bar (Martinez, supra; Hill, supra).

Third, and finally, the Opinion concludes federal procedural bar applies because the Ohio court of appeals, in its 2018 PCRP/motion for new trial decision, "denied those filings because they were

untimely."[30] Doc. 75: 8762. But, the Opinion concludes, thereupon, solely, " Thus the [district] court finds [Emphasis added] that Cody [is defaulted] [and that Maupin's first, second and third prongs providing an excuse for cause and prejudice do not apply]." The error of the Opinion is itself procedural ; it is not an Abela de novo review (in fact, it is not even a deferential review, or any kind of review at all) of the substance of the state court opinion as to the default, or as to any substantive merit to Cody's claims, i.e., the state court decision was not that the CIA and federal government issued documentary evidence (Cody limited his habeas argument to two documents in the state appellate court decision: the CIA written response to Cody's FOIA request, and a federal agency's (Office of Government Information Services ("OGIS"), the federal agency hearing Cody's administrative appeal from what Cody considered (the CIA FOIA response) to be an unsatisfactory result because the response refused to provide Cody with his requested, full CIA files; the OGIS document is that administrative agency's written opinion on the appeal, it could not issue, obviously, until the CIA had first provided its written FOIA response) Cody proferred was not relevant or outcome-determinative at trial, but that Cody was not "unavoidably prevented" from discovering and acquiring those documents within the relevant Ohio-state law based 120 day period. As pleaded by Cody in both his Traverse and Objections, a de novo review favoring Cody would have to address the merits of the reasons he gave the state court for the delay as constituting unavoidable prevention. Those reasons address Maupin's first prong cause and prejudice excuse of compliance with the state rule, i.e. unavoidable prevention (as pleaded by Cody to

30. Res judicata, based on either claim or issue preclusion, stemming from the direct appeal, the 2014 trial court PCRP, or the 2015 PCRP appellate decision, was not invoked as to the PCRP claims or the motion for new trial ("MNT") claims in this decision. Cody argued in his Objections, at Doc. 74-1, p. 27, and re-argues here, that it was error for the Opinion to invoke res judicata (and therefore any state-law based res judicata) based upon the 2014/2015 PCRP decisions, because this (same) appellate court, reviewing Cody's new off-record documentary and testimonial evidence of CIA employment for the first time as evidence, also, of IATC, and not finding it not outcome-determinative, sub silentio overruled the res judicata default of the two earlier actions based upon their "could have been raised in the direct appeal" argument, citing Y 1st v. Nunnemaker, 501 U.S. 797, 801-02 (1991) ("State procedural bars are not immortal; they may expire because of later actions by state courts.").

to the state and to the two habeas courts, Cody requested the FOIA response from the CIA after his arrest, as soon as he obtained the FOIA coordinator's address and an envelope pretrial, and again, immediately after he arrived in an Ohio prison (where and when the no contact order died); and he received no response from the CIA on either occasion ; and he received no response until 2017, when he made a re-request under a new administration, both in Washington, and at Langley CIA headquarters (his written request made from the Cuyahoga county jail was made before imposition of the no contact order); and that defense counsel refused to help him in the pre-trial request, or to make counsel's own request (IATC excusing the overlying reason , "avoidable delay" for the default - as well as the alleged default of all the other of Cody's 16/17 IATC claims (all PCRP actions) - a theory of certain types of IATC supporting excuse for a default of an IATC claim or, more importantly, on the MNT side of the house instantly, a default of untimeliness which is being used in a "per se" sense, based upon IATC used in the general sense of failure to pursue discovery)),[31] fully supported by Cody's habeas pleadings' argument and

31. IATC is not relevant per se in the Ohio motion for new trial ("MNT") section of Cody's action in either the Ohio trial or appellate court actions . Ohio MNT law to obtain new trial simply makes relevant the identification of relevant and outcome-determinative trial evidence the defendant was unavoidably prevented from discovering before or during the Statute's 120 day period, running until 120 days after jury verdict. The PCRPs, on the other hand, are about IATC.

citations.[32]

16. The procedural defaults for all the four PCRP actions the Opinion cites as determinative of the procedural default of claim 16/17 were also excused because the relevant evidence was off-record, supra, under federal habeas bar excuse as established by Hill, supra, at 842 F.3d at 936 (Objections, Doc. 74-1, p. 27) unmentioned by the Opinion.

17. The Opinion also errs at law, as its sole , and newly made, reasoning for rejecting one ground for habeas excuse of bar of "claim" 17, at Doc. 75:8762, stating: "Cody did not present this claim in his 26(B) Application [of IAAC excusing, under Maupin cause and prejudice, a federal procedural bar in a habeas case] and therefore, any such ineffective assistance of appellate counsel claim is procedurally defaulted." The Opinion appears to be arguing, on this issue, that, first, it agrees with Cody that IAAC for failure to make claim can serve as cause and prejudice. Second, the Opinion then limits its defintion of claim 17 strictly, i.e., as not being read in conjunction with a continuum of IATC actions also evidenced in claim 16. But it is to be so read, because counsel's actions in refusing investigation, discovery, pursuit and presentation did not occur as isolated events in the context of the larger IATC referenced in the App. R. 26(B) application, even if that application also focused its searchlight beam on some of those IATC events. The "claim" can thus fairly be said to have been noticed in the App. R. 26(B) application, and therefore it is at least debatable to conclude that IAAC as excuse is to be ruled out simply because it was not, as Doc. 8762, n.18 would have it.

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32. Cody cited four federal circuit court authorities, and the Supreme Court authority cited by one of the four ; Cody cited (with summaries of the relevance of their holdings on procedural default) these authorities in his Objections, Doc. 74-1, p. 30. The Opinion claimed, without explanation, that these were not "relevant authority" for the theory. Dietz v. Money , 391 F.3d 804, 807-808, 811 (6th Cir. 2004), of the four, is particularly on point (trial counsel's failure to file a timely appeal is cause to excuse the procedural bar of petitioner's habeas substantive claim that trial counsel was ineffective for failure to file a timely appeal, i.e. that an untimeliness procedural default could be excused where there was IATC for the untimely filing). Moreover, Cody's IAIC "theory" of cause to excuse procedural default constitutes nothing more then following Martinez v. Ryan's, 566 U.S. 1 (2012) ruling , since a section of this action and appellate court decision was an Ohio PCRP proceeding and appeal; since Ohio law requires a PCRP proceeding for IATC turning on dehors trial record evidence of IATC to be brought in an O.R.C. 2253.21 PCRP; and since the

Miscarriage of Justice Grounds

Summarized Issue:

VIII. Did the Opinion err, on law and the facts, in concluding that petitioner's miscarriage of justice (a.k.a. actual innocence) claim was denied for lack of merit?

Issues on Opinion's Analysis of Claim of Miscarriage of Justice (a.k.a. "Actual Innocence") (Doc. 75: 8763-8765):

In summary, as to matters at law, and, from time to time, as to matters of mixed questions of law and fact, the Opinion, at Doc. 75: 9763-64, makes statements and uses case quotations creating debatable propositions of what the law is, as the Opinion summarily applies its positions to Cody's proffers of new evidence. It is because of the Opinion's omissions of other case law statements and case law quotations from the Supreme Court and this Court about what miscarriage law clearly is, and how it is to be applied, which would be favorable, or at least more favorable, to the outcome of a determination instantly of the application of a ruling of the miscarriage standard having been met, and of the application of the omitted holdings on that standard and standards instantly, in order to open the gateway to a thorough review of Cody's constitutional claims regardless of any procedural default, that this debatability emerges as important. It is from the error of those omissions, as well as the omissions themselves, that debatable propositions of law from those sources spring, making the Opinion's unfavorable determination of failure of the miscarriage claim instantly. And, from outcome-determinative time to outcome-determinative time, the Opinion's factual conclusions of what Cody did or did not say in his miscarriage proffer, and of what Cody did or did not do in his miscarriage proffer and his explanation of it, are just plain, and clearly, erroneous.

Before stating projected issues for review of specific examples of these Opinion errors, some more generalized points of error at law of the Opinion

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32. [Cont'd from p. 52]

documentary evidence as well as the proffered testimonial evidence in the other PCRP actions the Opinion references, was clearly dehors trial record, as were defense counsel's statements to Cody he would not pursue further the CIA evidence.

should be noted:

The standard for a miscarriage review, including a credibility review of the new evidence, is that, after considering the new evidence, the habeas court concludes it would be more likely than not that "any" reasonable juror would have reasonable doubt of guilt, in order to effectuate a gateway to review of the petitioner's constitutional claims regardless of any procedural default of those claims, and with less stringent standards than the district court used in any of its so-called reviews of Cody's claims when and where it did, in fact, make such reviews. See, House v. Bell, 547 U.S. 518, 538-39 (2006). The standard for determination of the miscarriage issue is not, as erroneously implied by the Opinion instead of the "any juror" standard, supra, that the habeas court must determine that all 12 hypothetical jurrors must be convinced to an absolute certainty, upon consideration of the new evidence, that the defendant "actually" and "factually" did not commit the crime.

The any juror standard is that, for the gateway to open in light of the new evidence, the habeas court must find it "...more likely than not any reasonable juror would have reasonable doubt." House, at ***37-38, quoting Schlup. The Court makes this restatement of the "no reasonable juror" standard, it explicitly says, to clear up the double negative in the "no reasonable juror" iteration, the latter inherently leading to implications such as that applied by the Cody Opinion, that all 12 jurors, instead of any juror, would have to agree on a not guilty verdict by an absolute certainty, in accordance with the other tenets of the miscarriage standard.

Penney v. U.S., 870 F.3d 459, at **9-10 (6th Cir. 2017), omitted of mention by the Opinion, explains, further, House's referenced standard, focusing the miscarriage analysis on legal burden of proof and reasonable doubt about the legal elements of the crime. "Actual innocence" means "conviction] for a crime that the law does not deem criminal." Id. Smith v. Warden, 780 Fed. Appx. 208, 220 (6th Cir. 2019), also omitted of mention by the Opinion, makes that explanation even more explicit, stating that the "use of the term 'actual innocence' is actually a misnomer" since the miscarriage "... inquiry focuses on legal proof relating to reasonable doubt of the existence or not of each element

of the crime]...[not] factual innocence," such as, simply, whether the defendant was or was not at the scene of the crime, or whether the actus reas having been committed, whether the State has the right defendant or the "wrong guy." Id., at 221. This language goes clearly contra to the Opinion's interpretation of the quotations it cites, in creating, impliedly, for application to Cody's profferred new evidence in his "Traverse,"[33] a debatable or erroneous standard of "all the hypothetical jurors, to an absolute certainty, must be convinced of factual innocence."

Smith's "focusing on legal proof" explanation is not, moreover, a mere new iteration of an "insufficiency of the evidence" analysis; nor does it have anything to do with such a constitutional claim. "Insufficiency" has to do solely with an appellate court analyzing the presented State's evidence, by itself, to see whether it met a due process of law standard of sufficiency of proof beyond a reasonable doubt and, if not, reversing the conviction; defense evidence is not even considered. Smith's "legal proof focus" for miscarriage, instead, has the analysis made, not for the purpose of reversing any conviction, but, instead, for merely providing a gateway for further analysis of a separate (constitutional) claim or claims, going straight to the defense miscarriage proffer of new evidence, determining if it meets the "any juror" standard, certainly with respect to legal proof of elements beyond a reasonable doubt (with the State's pre-existing trial entered evidence to be considered), but, also certainly, without any "due process insufficiency standards" or rulings being applied to either sets of evidence of the two parties.

Cleveland v. Bradshaw, 693 F.3d 626 (6th Cir.2012), also explaining House, supra, also omitted of mention in the Opinion, makes clear that when the petitioner asserts only constitutional error, miscarriage serves to excuse any procedural default, and becomes a gateway to obtain habeas review of the claims applying "less stringent" standards for review of those claims than would apply without the showing of miscarriage. Id., at 631-633.

Also omitted of mention by the Opinion is House's clear statement that,

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33. This statement analyzes issues springing specifically from that application, for error, infra.

although Cody's proffer in his Traverse, Doc. 57, at pp. 31-48, is almost 100% eyewitness testimony, new evidence to be considered for a miscarriage claim analysis is not limited to the list contained in Schlup, and is to be considered regardless of evidentiary issues of admissibility. House, supra, 547 U.S. 518, 537-38 (2006). Thus, Cody's submitted CIA FOIA response, stating, in reply to Cody's request for all documents related to his CIA career, including, specifically, the CIA's Navy association operation,[34] stating the CIA refuses to confirm or deny a covert relationship of Cody with the CIA, along with the federal government administrative appeal agency's written decision on Cody's administrative appeal of the FOIA response analyzing the sections of federal statutes and executive orders cited by the CIA in its response as authorities for its exemptions from disclosure of Cody's requested material, as to what types of information those cited authorities covered, as well as Cody's statements of fact, in his Traverse (Doc. 57) proffer p. 20, as a former Agency desk officer reviewing requests of former officers made pursuant to the FOIA, that such a "Glomar" response as Cody received is never given where the requester in fact had no such covert relationship; as well as Cody's sworn statements as to defense counsel's refusal during pre-trial and trial to investigate or pursue CIA employment evidence leads (to which (the FOIA response and the administrative appeal agency written explanation of it) Cody limited (in his Objections, a limitation repeated here) his "newly discovered evidence" claim in his state-court motion for new trial 2018 proceeding; see Doc. 57, pp. 19-22; the R&R errs factually, at its pp. 50-51, in describing this evidence differently), becomes part of the miscarriage new evidence, in addition to the remainder of Cody's Traverse SS testimony at Doc. 57, pp. 31-48.

Analogous to the review of, and the decision on the facts in, House, supra, an appellate court cannot say, since there was no counter-evidence presented by the State that Cody was not CIA at all relevant times, or that he did

34. The CIA's (and the federal courts') position in FOIA cases is that the agency response provided is to a specific request for specific documents. Yagman v. Pompeo, 868 F. 3d 1075, 1081-82 (9th Cir. 2017); Public Triples. v. EPA, 314 F.Supp. 3d 68, 80 (D.D.C. 2018).

not have an exemplary career as a covert intelligence officer with operations as he details them in his proffer, from 1967 through April, 2012, which paid him sufficient monies in cash to make the political contributions the State said he did, as personal contributions, and still to save the amount - $981,500 - seized from his private storage in Portland, that the evidence Cody proffers would not cause real doubt, reasonable doubt, in the mind of any juror as to the intent element of the crimes as charged, or whether any "theft" occurred at all, or whether Cody's use of a cover identity - any cover identity, Bobby Thompson or not - was not for a "lawful purpose"; or that the lack of any direct State's evidence that Cody was not CIA following lawful orders, or of theft (e.g., a confession or admission or an eyewitness testifying she saw Cody take donor funds and place them so that he was treating them as his own) would do otherwise than prevent the jurors from placing "significant reliance" on a state case based simply on insinuation. See, House, 547 U.S. at 547-48. There is nothing in House to suggest, moreover, that the defendant's personal eyewitness testimony is to be deemed less than credible just because he is the accused in the case, or because the State presented circumstantial evidence of guilt not addressing, at all, the petitioner's new evidence, or less than credible because the district court summarily determined it to be. See, House, 547 U.S. at 553-54, followed, Whitfield v. Graham, 2016 U.S. Dist. LEXIS 120206, at *8 (S.D.N.Y.). When Cody's detailed argument on the applicability of miscarriage instantly, found at the Traverse, pp. 48-54, is also considered, with the above analysis, it becomes clear the Opinion's summary conclusion, at Doc. 75: 8765, that Cody did not provide a 'persuasive explanation' of that applicability, creates both Opinion positionings at law contra the authorities Cody used, and uses, which is

debatable[35], or wrong; and Opinion factual postures as to what Cody did or did not say

35. The uniqueness, for example, of the facts described in the traverse's profferred new evidence, fundamental to Cody's defense at a trial, in the history of reported Ohio-state-based criminal cases, brings the instant case squarely within the concept, dictum, certainly, of Schlup, as to the "rarity" of miscarriage cases. Miscarriage is, after all, otherwise undefined, as otherwise unspecified as to a "type" or "types" of circumstances or facts it applies to, but reflects an equitable concern about the defendant's guilt justifying the opening of a less rigorous analysis of his constitutional claims.

This Court may note that, pursuant to the State's evidence at trial, the activities alleged in the indictment, the actus reus of all these charges, took place in at least 40 states, justifying jurisdiction for those type of offenses to be tried both in all those states, and by federal prosecutors, and that the plausible, one reason for the failure to indict as to Navy association activities in any such jurisdiction other than the state of Ohio, including RICO-sourced charges for the illegal political contributions alleged as massive by the State in its presentation of its criminal case against "Bobby Thompson, and IRS - laundered charges for tax fraud alleged as massive by the State in its presentation of its criminal case against "Bobby Thompson," is presented in Cody's new evidence proffer, that, simply put, he was CIA at all relevant times; and that no federal indictment is, or was, forthcoming, and that federal discovery standards, presumably taken seriously by any U.S. attorney, would have required disclosure to the defendant of his entire CIA relationship history as exculpatory, and more than exculpatory, exonerating; and that no state prosecutor (since the state could, and did in Cody's case, claim no such disclosure obligation because it was not a party in "actual possession" of such evidence), anywhere, other than Ohio prosecutors, were willing, even with its critical questions evident, to risk a case against the defendant with the sorts of misconduct evidence Cody profferred possible, the pleading of that evidence being an alternative to that case. These circumstances certainly constitute a "rarity" among miscarriage cases at least equal to the rarity of prosecutions where the defendant convicted is mistakenly identified.

in the Traverse brief and Objections which are clearly in error.

As to these debatable propositions of law and clearly erroneous statements of "fact," more particularly:

18. The Opinion errs, in its end result of not applying miscarriage to all Cody's constitutional claims, at fact and law, in its constant use of the 'actual innocence' nomenclature, inasmuch as the term implies factual innocence, such as an alibi, is required to be shown, when, especially in the context of Cody's proffer by habeas affidavit (Doc. 57, pp. 19-22; 31-48), the substance of which is unmentioned, undiscussed and unanalyzed in the Opinion [although in referencing Cody's proffer in its Schlup context, neither the Opinion nor the R&R ever clearly and specifically refers to Cody's profferred evidence (when summary referencing does occur, infrequently, and incongruously in both documents side-by-side with statements Cody provided "no" evidence, as lacking credibility (see, Doc. 75: 8765)] and to which there was (nor was there any assertion by the Opinion or the R&R that there was) nothing in the evidence at trial which would, or could have, served as either refutation or rebuttal to Cody's profferred evidence of his CIA employment from 1967 through his arrest in 2012, that profferred evidence going persuasively, based upon the unrefuted, unrebutted specificity of the details of the profferred evidence on CIA and White House (for certain temporal periods), direction of Cody's operational activities from 1967 through and including the Navy association operations, and beyond, to the date of his arrest, despite those being details limited by page restrictions placed upon petitioner's habeas pleadings by the magistrate and district courts, but nevertheless overwhelming any summary or assumptive challenge to Cody's, or the evidence's credibility or reliability pursuant to Schlup or House, including specifically going persuasively, under Smith's test, supra, and Penney's test, supra, to:

(a) the issue of defeating the specific intent[36] required as an element of the offense

36. Cody's statements about the subject crimes (a) - (d), supra and infra, being "specific intent" crimes under Ohio law, are made with the meaning to be attached to that concept, as constitutionally required, by Supreme Court and federal precedent cited at Doc. 57, pp.48-54, which went unchallenged by the respondent, R&R and the Opinion.

by Ohio's theft statute as charged to "deprive" the donors to the Navy association of their property, their donations, by not fulfilling the purpose of those donations [T.Tr. 4395] "to help" U.S. Armed Forces members and veterans (see, infra, testimony of the only two donor witnesses to testify (for the State) as to their purposes in making their donations in response to the solicitations they received), based upon the CIA's federal law mandate to protect sources and methods of its intelligence operations, infra, and CIA and White House specific direction to (it being clearly erroneous to call this evidence as profferred as merely being evidence of the ignoring, by these agencies and persons, of an act of fundraising, or an act of making expenditures, or an act of theft of funds, or an act of the taking and moving of funds) Cody to take the unaccounted-for-at-trial funds donated to the Navy association [also for that very purpose, "to help veterans"] to make payments [37] to foreign officials and influence agents in Global War on Terror allied countries to secure the substitution of their frontline armed forces combat personnel for ours in the Iraqi and Afghan wars, keeping up, at the same time, the undeterred, undiminished, robust and relentless allied drive to victory against Islamist terror emanating from those two countries, of approximately $1 million per payment, such payments profferred by Cody as having been accomplished; as presented on the facts, and argued at law, by Cody (Doc. 57, pp. 48, 50, 51, 52, 53).

Cody's Traverse argument on the sufficiency of his proffer, as to the FOIA evidence under the Schlup/House standard, detailed how his proffer put forth classified details of what Cody did and did not do, as a Navy association officer, and the fact he was operating as a CIA officer during that time (see, on the totality of the related evidence on the FOIA response, Traverse, pp. 20-22; Wearry, Porter), and made watershed arguments, especially when it is considered Cody's credibility/reliability went unchallenged-by-the- state-counts-or-by- the-R&R, or Opinion.

These arguments were based upon Cody's explicitly detailed, extensive

[37] Political opponents of Bush [43] war policies in Iraq and Afghanistan would call these payments "bribes." Petitioner, instead, avoids this term, and uses, instead, the terminology used by his CIA superiors and the President of the United States in discussing, and issuing, directions for petitioner's participation in the making of these payments.

1967-2012 Agency employment career, including Cody's stints with the CIA's office of general counsel (made in Cody's 2018 motion for new trial/post-conviction relief petition action affidavit, and, again, at Traverse, p. 20), factually, stating that "Glomar FOIA responses" for an Agency employee's "own" covert and classified files as an officer, a refusal "to confirm or deny," have never been issued unless the file or files as requested existed. These factual statements were effectually conceded by the Magistrate court's statement that the documents showing the Navy association employment were denied to Cody "because such records are classified." R&R, p. 51. That's what the CIA did, and does, and was, and is, charged to do, honorably, to maintain secrets to protect the national security of the United States; and that's what Cody did, honorably, and as charged by his Agency, and his president, with regard to, and in, all Navy association operations and activities. The honorable purpose of the lies told by CIA covert officers is what destroys, 'actually,' the ability of the State to secure a conviction for a crime charged by it requiring specific mal-intent, as Cody's pertinent crimes all did, i.e. the ability to obtain a "conviction for a crime that the law does not deem criminal." That those records detailing Cody's activities on behalf of the Navy association (sometimes herein "USNVA"), and the United States Government (sometimes herein "USG"), "are classified" is exactly what the USG's Office of Government Information Services (sometimes herein "OGIS") (the administrative agency for an appeal of a CIA FOIA determination) said in its administrative appellate determination letter to Cody (also, in the R&R, at times ignored, and at other times stated as new or newly discovered), stating, further, the reasons for classification were that the subject matter (Cody's request for his covert files and what was covered in them, including, but not limited to, the Navy association operation) related to "military," "national defense," "national security" and national "intelligence" matters, matching, exactly, albeit as labels, what Cody says, in detail, was going on with regard to all the USNVA expenditures and "missing funds," the sine qua non predicate for insinuation of the State's theft and money laundering counts, at his Traverse, p. 34, sworn statement.

As a matter of clearly established federal law, miscarriage analysis provides that, first, where the petitioner makes his actual innocence claim with an assertion of constitutional error at trial,

the conviction may not be entitled to the same degree of respect as one that is the product of an error free trial. Schlup, 513 U.S. at 315-16, citing Herrera v. Collins, 506 U.S. at 419, 426 (O'Connor, J. concurring), and more importantly, because "Schlup makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to ... admissibility...." [Emphasis added]. House v. Bell, 547 U.S. at 537-38, citing Schlup, 513 U.S. at 327-28.

The State's entire case on theft and, the theft-dependent money laundering counts was predicated , solely, on a "missing funds," or end use of funds, and lack of records as to where funds went theory (testimony of Gus Palaibis, the State's forensic accountant (Doc. 43-13: 6222,7-6223,16, et al.), including his testimony he could not testify as to the end use of "missing" funds (his testimony going to both the mens rea and the actus reas of Ohio's theft statute, O.R.C. 2913.02(A), of "purpose to deprive"), i.e. deprivation of the donors' funds going to an unintended purpose (see, R&R and Opinion ignored Traverse SS, p. 35), the relevance of Cody's CIA/White House employment being that the classified "missing" expenditures, made in cash (regardless of what accounts they went through first prior to cash withdrawals) Cody described in his R&R/Opinion ignored Traverse SS (to secure , not an end to the destruction of Al Quaeda in Iraq and the Taliban, and their terror-based values, but the withdrawal of U.S. Forces from the Afghan and Iraqi theatres by their substitution with foreign, allied frontline, vetted forces who should have willingly been there in the first place) were clearly within the parameters of the USNVA authorized solicitations made, and the USNVA (sanitized to avoid direct statements of classified matter) statements of purposive activities registered with numerous (35) state and federal government agencies, including those of Ohio.

Incorporated into this inference[38] of theft and money laundering was a

38. There was no direct evidence of theft provided by the State at trial. Nobody saw Cody "steal" money from USNVA. Nobody saw Cody direct USNVA funds to some purpose overtly indicating deprivation of donor funds, or other than to a legitimate USNVA, or CIA, or White House approved purpose, or to spend any of such funds on himself, or for his personal inurement. Nor did anybody hear Cody make any such admission, or any otherwise inculpatory statement. There was no evidence he bought anything, ever, suggestive of greed or a desire for personal possessions, no real estate, no motor vehicles, no boats, no jewelry, no gambling, no prostitutes, no fancy clothing, no lavishness at all. There was no indicia of greed, and political contributions he made (although sometimes made with pressure by Republican officials) came out of his own pocket, his life savings of working for the Agency. The co-defendant (a guiltless, USNVA secretary) did not testify [because, if she had, she would have supported Cody's facts as described above]. There was no evidence introduced which denied Cody's miscarriage claim evidence of his CIA and White House intelligence operative employment, because Cody's evidence was not introduced at trial due to the denial of Cody's self-testimony and IAC. The State's entire case as to the actus reas of theft, and to the specific mal-intent for theft (two distinct issues) was circumstantial, as was the case for the same elements of the money laundering transactional movement of funds for an unlawful purpose (Traverse, pp. 48-54, with record citations). All of these matters , as a matter of miscarriage analysis, are ignored by the R&R and the Opinion.

[Cody says all this above not to assert an 'insufficiency' constitutional claim, for such was never made, but to simply delineate the State's evidence actually presented at trial, which House, supra, clearly permits for consideration as part of the miscarriage analysis.]

to be drawn conclusion that the $981,500 seized in Portland was part of those "missing funds", an inference refuted (as it only could have been, given the IATC the Traverse described) by Cody's testimony, his trial-desired testimony, in the Traverse SS, pp. 31-48, 19-22, detailing his employment assignments by the CIA, 1967-2012, for specific amounts of (largely) cash compensations and allowances over those years from which that amount was generated in savings. As to tampering with records, the specific intent requirement of the Ohio statute (R&R/Opinion ignored, Traverse, p. 48, with citations) is denied by Cody's intent to sign his name "Bobby Thompson" to the Ohio Attorney General's Office documents,designated by the State's evidence as the "records" in question, to further his CIA directed, and National Security Act of 1947, as amended (infra) sanctioned cover protection activities; likewise the defense of lawful purpose to Ohio's identity fraud statute (O.R.C. 2918.49(F)(2)(b))is established by Cody's trial-denied, R&R/Opinion ignored, Traverse SS testimony on, not just his CIA-directed personal use of identity cover going back to to 1974, but also with reference to his experience and expertise, from his CIA office of general counsel assignments and associations.

The specific mal-intent required for the Ohio crimes of theft and money laundering (Traverse, p. 48; R&R/Opinion ignored) is, moreover, and likewise, denied by Cody's USNVA activities, as directed, in furtherance of his CIA and White House national security and intelligence-related purposes described and established at his R&R/Opinion ignored Traverse SS pp. 31-48; and id. at 19-22. Ohio's Corrupt Activity crime can only be established on conviction for two or more of the incidences identified in the theft, money laundering or tampering with records counts, a legal point made by Cody in his habeas proceeding not disputed by the respondent, R&R or Opinion (Traverse, p. 53, n. 89, with citations).

Finally, to its implication raised as to miscarriage analysis value, of non-direct evidence, and, in denying miscarriage as to a procedural bar excuse to all claims, the R&R appended its conclusory remark that "...nowhere in his filings does Cody explain how [his] 'affiliations' with the CIA demonstrate actual innocence of the charges....," ignoring both the entirety of what Cody would have testified to on that very subject, Traverse SS pp. 31-48, and Cody's very specific argument, including numerous authorities on outcome-determinativeness of CIA "affiliations" to the specific intent requirements of many crimes, including economic crimes (Traverse, pp. 48-54), summarized above.

Ignoring Cody's sworn traverse statements, and ignoring Cody's traverse legal arguments on miscarriage application

either are gross oversights in the nature of factual error, or reflect a silent rejection of Penney's, and Smith v. Warden's, supra, clear holdings that, in this circuit at least, "legal innocence" and "factual innocence" for miscarriage purposes mean the same [redacted] thing, and that the rejection of that application to Cody's miscarriage claim by the Opinion is at [redacted] least debatable at law, or wrong; and/or clearly erroneous on the facts.

As clearly [redacted] specified in Cody's Traverse proffer, during all times covered by the indictment, Cody was directed to make all the end-use payments he made, or authorized, out of USNVA funds, and to do all the other financial-related activities of USNVA he did, or authorized, from which the State's evidence at trial was propounded as inferentially leading to the conclusions of theft and money laundering, and all other activities which that evidence was propounded as inferentially establishing records tampering and identity fraud, by his CIA superior officers, and,,as to certain of those activities, by [redacted] President George W. Bush, and his duly appointed designees, payments which did not involve theft, or any other crime, but which were, instead, designed to support, and which were totally supportive of, both the stated Navy association purposes, and the legitimate goals and strategy of the Office of President Bush, to help veterans. Specifically, Cody's habeas testimony, the only possible source for [redacted] an extreme-determinative clearly erroneous factual conclusion made in the R&R, that "...the CIA was [merely] aware of USNVA's expenditures," was that, instead, the CIA and the White House directed all the activities of the USNVA objected to in the indictment and the State's case at trial, including but not limited to its expenditures. See, Traverse testimony: pp. 42-45 ("Cody had been assigned...."); p.39 ("[T]he Agency used...."); pp. 33,39 (creation of USNVA "being formulated officially....;" aspects of USNVA activity "conceptualized...in meeting with [SecDef, later Vice-President] Dick Cheney"); p.34 (description of payments to foreign leaders; "PFRs [public fundraisers]... selected by the Agency..."; [describing payments to foreign leaders not made personally by Cody] "... personally confirmed to [Cody] as having been made ...by the President of the [redacted] United States, by the Special [redacted] Assistant to the President of the United States [Karl Rove], by [Cody's] NOC [non-official cover] handler, and by others reasonably known to [Cody] as officers of the CIA, on multiple occasions"); p. 47 ("Cody's CIA directed experiences ..." in covert assignments

almost identical to the USNVA activities [from 1971-1989 described]. See, also, Doc. 42-3:3038 et seq (Cody's 18 page 2018 MNT/PCRP affidavit): 3040 (Para 9): (Both my [non-official cover] and my [deep non-official cover] status, and ... orders [and] directions ... [redacted] to my CIA assignments, as well as the authority of the authenticator ... were authenticated [redacted] communicated and reported to me personally, continuously in an unbroken line of CIA NOC handlers stretching back to my service as a staff CIA ... operations officer .... in CYs 1974, 1975, and 1976 [naming first and last handler] ... continuing to [the last] [at or around] the time of my arrest in Portland ..., April 29, 2012; and also .... were authenticated, communicated and reported to me personally by publicly identifiable, high-level officers, ... officeholders and authorities of the United States Government having a national intelligence or national security function .... having made such.... orders [redacted] [and] directions ... in the regular practice of the activity of each such government office or entity"); 3045 (Para 22): ("The Defendant ... made detailed efforts, overseen by, and with the assistance of the CIA and other qualified U.S. government intelligence officers to make known [without releasing classified details] where USNVA expenditures went ..."; (Para 23): (Cody describes that not one cent of any Navy association receipts went, at any time, to the personal benefit or use of the Defendant, '[redacted] his pocket,' or 'into his piggy bank' ...; (Para 25): ("Those [redacted] purposes ... included .... covert intelligence related expenditures ... on behalf of the ... policies of the Office of the President ... designed [to be] beneficial to the interest of all active duty, and veteran members of the United States Armed Forces"); 3053 (Para 48): ("intelligence, defense and national security officials of the USG and the Bush[43] Administration personally informed [then U.S. Senator Mike DeWine, [redacted] in 2006] ... [of] the classified intelligence affiliation of the Navy ... Association ... with the CIA and Bush[43] White House [and] that large sums of money were flowing into USNVA as donations ... [that USNVA's] original concepts ... lay in ... Cody's classified intelligence activities for the CIA and for the Bush[redacted]93 administration[redacted]3's intelligence, national security, foreign policy and ... defense policy iniatives ... and with officials generating and [redacted] executing the same ... and [involved the] directions of those officials for covert [redacted] of, and by, USNVA ....") [Emphasis added, in each case].

These sworn statements made (immediately above), identified explicitly in Cody's[redacted] Traverse as a part of his [redacted] proffer, constituted a large part of the heart of his miscarriage new evidence establishing his actual, factual and legal innocence under the House, Penney and Smith v. [redacted] tests for miscarriage. They were either ignored entirely by the Opinion and the R&R, constituting clear factual error, or, in the R&R cited above, clearly erroneously mistated factually.

(b) the issue of justifying the movement of monies ("transactions") through a limited number of public record U.S. based accounts to defeat the [redacted] intent required as an element of the offense by Ohio's money laundering [redacted] statute as charged, of moving the money or monies, or doing anything else with it "knowing the property involved is the proceeds of ... unlawful activity" [T.Tr. 43-22: 8132, 15 - 8133, 8], for the same proffered and argued basis given, 18(a), supra (as argued by petitioner, Doc. 57, pp. 48, 52, 53);

(c) the issue of defeating the specific intent required as an element of the offense by Ohio's tampering with records statute as charged, "to defraud" or to knowingly facilitate fraud [O.R.C. 2913.42], based upon the details of Cody's proffer on the history of his employment by the CIA from and including the years 1967 [redacted] 2012[redacted] (it being clearly erroneous to call the work history Cody proffered, as the R&R did, as being merely "decades old");[redacted] and based upon CIA direction to Cody, and policies on, and authorizations of, with respect to the Agency's mandate under the National Security Act of 1947, as amended (see, n. 40, infra)[redacted] to protect the sources and methods of its intelligence operatives, the acquisition and use of the [redacted] possessed and used[redacted] false identifiers, including identifiers of living American citizens, justifying Cody, in not having that specific mal-intent of wrongdoing as required, signing his name "Bobby Thompson" to the Ohio government documents in issue in the tampering counts (as argued by Cody, Doc. 57, pp. 48, 52);

(d) the issue of establishing a "lawful purpose" for the acquisition, possession or use of the acquired, possessed or used identifier(s) of the "real" Bobby Thompson [O.R.C. 2913.49(F)(2)(a)] established as a defense by Ohio's identity fraud statute as charged, based upon the last part of the substantive proffer detailed, 18(c), hereabove, as argued by Cody, Doc. 57, pp. 48, 52. [redacted] 39.

(e) Cody's Traverse 88 proffer also described details of, and during, the temporal extent (1967-2012) of his CIA assignments. This testimony establishes a number of Schlup/House standard determinative points of fact, in addition to those made concerning the expenditures and activities of the Navy association, none of which were refuted, or even addressed, by the State's evidence at trial: (1) the personal and operational relationship of Cody with President Bush[41] (when he was Director of Central Intelligence ("DCI") in 1976), DCIs [redacted] William Colby and Bill Casey, and President George W. Bush, the son of the first President Bush; (2) Cody's extensive continuum of CIA cover employment on classified White House originated [redacted] CIA operations involving the raising of funds in the private sector to support presidential foreign, military and intelligence policies, from the time of the Nixon administration (1972) (veterans/military affairs policies and causes involving veterans' organizations), the Reagan administration (1981-1988) (overthrowal of Nicaragua's Sandinista regime, and the overthrowal of Soviet domination and Communism in eastern Europe involving religious charities); and the Bush[43] administration (Afghan and Iraqi war policies as they affected all veterans through [redacted] the Navy association); (4) Cody's attachment to and contacts with, over those years, the CIA office of general counsel, qualifying him to comment upon the legal posture of the CIA as communicated to, and observed by, him, as applied to Cody, CIA relationships with the FBI and all agencies of the Department of Defense, for those years; on all operations Cody was assigned to, interpretations and applications of the National Security Act of 1947, as amended, and the CIA Act (see, infra, n. 40), Executive Order 12333, CIA MOIA "Glomar" [redacted] responses, and, as applied to Cody and other non-official cover CIA operations officers, on policies

39. As stated at Doc. 57, p. 52, n. 88, and going undisputed by either respondent, the IRR or the opinion, a violation of Ohio's "Corrupt Activity" statute [O.R.C. 2923.31(E),(I)], as charged to petitioner in Count I of the indictment, requires a conviction on two or more incidents, in his case, in the theft, money laundering or tampering with records counts.

and procedures on the use of personal cover and the identities of others as used for personal [redacted] and operational cover.

In summary of this multi-faceted issue 18, the opinion [redacted] finds, does not challenge the credibility or anything in Cody's proffered new evidence. Given the factual detail Cody presents of a life in the CIA, including his participation in the Navy association mission, it is probabilistically [redacted] almost impossible to conclude that a reasonable juror hearing this evidence would be convinced:

(1) Cody had not been in the CIA during the times he said he was, and was not following orders of his CIA superiors, and Office of the President staff during the times he said he was, and that the expenditures of all unaccounted for funds of the Navy association were [redacted] made for, pursuant to those directions, purposes which did [redacted] deprive the donors of their intended use of their property, i.e., not made for legitimate purposes, albeit classified and covert [and within the scope of promised activities (as promised to public donors) for Navy association expenditures as established by the only witnesses to receive solicitations who testified at trial, State's witnesses Judith Roberts [redacted] and Dr. Patrick [redacted] Bray (see "Traverse," pp. 35 and 52) to "help veterans" and to help veterans transition back into civilian life], directed payments to foreign [redacted] leaders to influence them to have front line combat personnel from their countries substituted for ours in the Iraqi and Afghan combat theatres. In a process which, ultimately, but which was neither unlawful per se, nor asserted as unlawful [redacted] per se, commingled [redacted] funds for both cash-non-foreign-leader-payments (such as cash gifts or cash purchased gifts, to needy veterans) and for the normal and reasonable administrative expenses of running this "covert" veterans' organization) with cash-foreign-leader-payments, to do exactly what the CIA is supposed to do, keep its [redacted] classified [redacted] operations secret[40] from paying, unwitting, no-need-to-know eyes, foreign or domestic, as opposed to witting, need-to-know agents of the government, such as the IRS auditors who conducted the 2010 field audit of a USNVA subordinate. (In the Navy association's since 2003 physical,

40. See, n. 41, infra.

leased premises on Farragut [redacted] in Washington), and passed it, even though 75%-80% of all its expenditure receipts were missing;

(2) Thusly, Cody's profferred testimony being also that these sorts of financial transactional movements through banks and/or charity covers being common, reasonable and normal for NOC officers engaged in a [redacted] financial based operation, it is [redacted] probabilistically almost impossible to conclude that a reasonable juror hearing this evidence would be convinced Cody made these transactions "knowing that the property involved [was] the proceeds ... of unlawful activity," as charged by the trial court to the jury (T.Tr. 43-22: 8132, 15 - 8133, 8), beyond a reasonable doubt, as to the money laundering counts;

(3) And, thusly, it is probabilistically almost impossible to conclude that a reasonable juror hearing this evidence would [redacted] be convinced Cody signed his name "Bobby Thompson" on the OAG filed documents (which, pursuant [redacted] to the prosecutor's sole closing argument, constituted the sole factual basis of the specific-intent-required charges of tampering) other than with the intent to follow the lawful and proper use of a cover identity and name assigned legitimately by the CIA for those purposes, to maintain cover, such signings by NOC officers living under non-true-name cover commonly occurring as part of the normal covertness of their cover authorities, beyond a reasonable doubt, as to the tampering [redacted] counts;

(4) And, thusly, and likewise, it is probabilistically almost impossible to conclude that a reasonable juror hearing this evidence would be convinced Cody's possession and use of any identifier of the "real" Bobby Thompson was other than for the lawful purpose of protecting his cover, beyond a reasonable doubt, as to the remaining identity fraud count.

Cody's basis for his lawful vs, unlawful purposes, intent, and knowledge of the same statements is the mandate to the Director of the CIA and his subordinates to "protect" the sources and methods of covert intelligence, its operatives, and its operations found in the National Security Act of 1947, as amended, and the other [redacted] federal statututes dealing with the

authority and responsibilities of America's intelligence organizations.[41]

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41. For the federal mandate to protect intelligence sources and methods, see, the National Security Act of 1947, as amended (currently 50 U.S.C. §3024 (i)(1)), and its predecessor statutes, esp. 50 U.S.C. §403 (d)(3); and the CIA Act, as amended, 50 U.S.C. §3507. Although the 2005 amendments to the National Security Act of 1947 superimposed these mandates to the Director of National Intelligence, federal statutes made clear the responsibility on the newly established (in 2005) office of the Director of the Central Intelligence Agency, and his subordinates, to protect intelligence sources and methods, as applied to the CIA, remained intact as it existed in the previous legislative mandates. See, DiBacco v. U.S. Dept. of the Army, 983 F.Supp. 2d 44, at *61-62 (Dist. D.C., 2013). This protection authority is "very broad," unlimited beyond the fact the protection deals [redacted] Agency's mandate to conduct foreign intelligence," CIA v. Sims, 471 U.S. 159, 169 (1985), followed: ACLU v. DOJ, 681 F. 3d 61, 74 (2d Cir. 2012), Knight v. U.S.C. L.A., 872 F. 2d 660, 661 (5th Cir. 1989), Elgabrowny v. CIA, 2019 U.S. Dist. LEXIS 54807, at *37-38 (Dist. D.C. 2019), and flows from the state secrets privilege inherent in national sovereignty under international law, the latter explained in Totten v. U.S., 92 U.S. 105 (1876). See, also, the National Security Act of 1947 (Act [redacted] July 26, 1947, ch. 343, Title I, §102A(i)(1), as amended 50 U.S.C. [redacted] §3024 (i)(1)).

These authorities form the basis for the unanimous declarations of federal cases Cody cited in his Doc. 57 ("Traverse"), at pp. 49-53, that working for the CIA on an assigned, lawful mission, is outcome determinative of legal and actual innocence on any charge requiring specific mal-intent; or because, as one case opined, mistake of fact. In ignoring these cases, in summarily, weakly and vaguely calling Cody's facts, and argument based on them, and based on very relevant propositions supporting a miscarriage finding instantly, "no persuasive explanation" (Doc. 75: 8765), the Opinion creates an at least debatable proposition of law as to the [redacted] relevance of those authorities instantly; errs as a matter of fact in ignoring in large measure the details of the facts in Cody's proffer; and brushes under the table, in the process, those embarassing-only-to-some details of, and detailed history of, and related to, the covertly made-in-accordance-with-federal -law "bribes" to foreigners which lie as a large, if not the largest, part of the heart of Cody's innocence claim as it pertains to the theft and money laundering counts, and which were part of President Bush's strategic objective of destroying the Taliban in Afghanistan and Al Qaeda in Iraq by making these wars the multinational effort they should have been from the start, to the benefit of American soldiers, sailors, marines and air force personnel who were being asked to fight wars while others who had as much a stake in the outcome as we did shirked their responsibilities while using the bodies of our service men and women as their shields, all of this made, as only fate itself could have had it, even more relevant, and newsworthy, with the fall of Afghanistan occurring literally as this IFP motion is filed.

19. The Opinion errs, in both the [redacted] weakness of its argument, and in its wrong, or at least debatable at law, and in its clearly erroneous analysis of the facts, in its application of its (correctly) [redacted] quoted controlling authority of McQuiggin, at Doc. 75:8763, that the miscarriage "[redacted] gateway" should open ... when a petitioner presents evidence of innocence so strong that a court cannot have confidence of the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error,"[42] because, although the Opinion does not find, as a matter of law, constitutional error as alleged in petitioner's habeas documents, this Court should find that it is not satisfied that Cody's trial was free of it,[43] based upon Cody's habeas alleged constitutional claims (and because of the applicability of that standard because of miscarriage), a different standard than that used by the Opinion, on [redacted] appeal and, in that case, McQuiggin's quoted standard (or bar) is not even so high as the profferred evidence meeting a preponderance of the evidence ("more likely than not") test as to a [redacted] "lack of confidence" in the verdict, an analysis found at McQuiggin, 569 U.S. at 395, and an analysis made even more applicable by the legal fact, established by the record in Cody's case, the state appellate court, in Cody's direct appeal, [redacted] already had found Cody went to trial, and was convicted, in a trial loaded with State's evidence on Cody's alleged thefts of 11 identities (other than those of the real "Bobby Thompson"), on 11 counts for which the constitutional error of lack of subject matter jurisdiction did apply (referenced at Doc. 75:8713).

[redacted]

[redacted]

42. Neither the Opinion nor the R&R asserts that any of Cody's constitutional errors were non-harmless. Nor is there any specificial charge in either document that the profferred evidence was not "new," other than one side-reference in the R&R mentioned, infra, p. 76.

43. The "not satisfied" standard is firmly used to open the gateway, not as a final standard to rule on the constitutional claims the petitioner makes. The Opinion misses this point of law. Part of the problem is that McQuiggin's language both bifurcates the analysis, "reliable evidence," and ruling on the constitutional claim, into two separate events and concepts, at certain times, and, at other times, treats them as if a reviewing court [redacted] should be ruling a unitary analysis.

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20. To the extent the Opinion might arguably be said to have adopted the following specific R&R conclusions, it errs:

(a) factually, in concluding Cody did not provide the habeas court with his evidence (R&R, Doc. 65, p.49): Cody did so, explicitly labelling it as such, in his "traverse," Doc. 57, pp. 19-22 and 31-48, a traverse serving as his petition because the magistrate court struck his original petition, other than its bare-bones statement of claims found in an outline, from the record, supra; thus a court does not look elsewhere, as the R&R erroneously asserts, id., to find out what Cody's testimony would have been:

(b) a page later, Doc. 65, p. 50, the R&R relates that in the profferred evidence of Cody, Cody is saying the CIA only [redacted] "was aware" of the Navy association expenditures; factually, instead, the profferred evidence was that the CIA, and President George W. Bush personally, "directed" those expenditures (Doc. 57, pp. 42-45, 39, 33, 34, 47; and at Doc. 42-3: 3038 et seq. (Cody's 19 page 2018 MNT/PCRP affidavit, incorporated into his habeas profferred evidence at Doc. 57, p. 19 [redacted] (Doc. 42-3: 3040 ¶9, Doc. 42-3: 3045, ¶¶ 22,25, Doc. 42-3: 3053, ¶48)); and

(c) to the extent the Opinion might arguably be said to have adopted the R&R's conclusion that the miscarriage "outcome-determinativeness" test would not be met by Cody's profferred evidence because "it is not reliable evidence that Cody's actions operating the USNA were excused by virtue of his alleged CIA [redacted] affiliation" (R&R, Doc. 65, id.), it is unclear whether the conclusion is about the reliability of the testimony, or whether it is about Cody propounding at law some non-relevant determinative affirmative "excuse." As to reliability, Cody's testimony was reliable because: (1) of its detail, unrefuted and unrebutted by any [redacted] State's evidence at trial;

44. It is fairly clear the Opinion's analysis of Cody's miscarriage claim is a summary one, not making specific rulings on the R&R conclusions which follow, infra, and an analysis of error to be found in it for miscarriage purposes should be limited to the Opinion's specific, mixed-law-and-fact -issues, and summary conclusion that Cody's proffer and brief did not "reasonably explain" how from his profferred evidence it "would be more likely than not that no reasonable juror would have convicted him," limited to the newness of the evidence, and its not supporting a 'claim of actual innocence'" Opinion, Doc. 75: 8764-65.

(2) it was coming from a 66 year old man, previously unconvicted of any crime, whose society, and government, had provided an honored and respected education for him through the University of Virginia, majoring in government and foreign affairs, graduating magna cum laude, and Phi Beta Kappa, and the Harvard Law School, with course emphasis on transnational and international law, through an M.B.A. at a Manila graduate school of business funded by the Rockefeller and Ford Foundations and the CIA, a witness formerly a Captain with the United States Army Reserve, Military Intelligence branch, with 17 years of honorable reserve status service, and a CIA operations officer with many years of operational related training and experiences, certainly a work history, along with its compensation, relevant to the amount Cody could, and did, acquire from that source, as his life savings, and the (largely cash) method of that acquisition (as opposed to the State, as part of its burden of proof on the theft and money laundering charges, inferentially attempting to prove those charges beyond a reasonable doubt merely by presenting evidence of approximately $981,500 seized in cash from Cody's locker in Portland, Oregon); and from a witness with the remainder of Cody's curriculum vitae presented as part of the miscarriage proffer, Doc. 42-3, p.318, referenced at Doc. 65, p.50, which, "new" or not, Cody may use to establish reliability for miscarriage analysis purposes; and he, like any credentialed witness attempting to establish his credibility, and the relevance of the substance of his trial testimony in the context of those credentials, should and would be allowed to testify to at the outset of that testimony at trial.

As to Cody providing merely a non-relevant excuse in his miscarriage proffer, both habeas courts err factually and at law. Cody analyzed his own evidence, at Doc. 57, pp. 48-54, in the context of what miscarriage is, as to burden of proof as to the State under the different charges, under the miscarriage standards, and not as an assertion of some imaginary legal "excuse,"[45] that analysis being ignored without comment on it by both habeas courts.

45. Cody did, certainly, quote from, or cite to, id., 12 federal cases holding CIA (or U.S. government) employment of a person going to commission of acts otherwise criminal, if specific intent were required as an element of the crime, negated that element of the crime in an outcome -determinative on the facts way, as a matter of law. These citations and accompanying argument were also ignored by both habeas courts.

That leaves us, again, with credibility, but there are no facts asserted as to Cody's intent, or his credibility, other than inherent unbelievability. See, n. 44, supra. "Inherent unbelievability" of a defendant going into trial or new trial, simply because his testimony favored an outcome of a not guilty verdict (so-called "self-interest") or because of only the circumstantial and opinion-based testimony of agents of the state as to subjects not even covered in the defendant's relevant testimony, a testimony which was actual, factual and eyewitness, and when especially applied to a witness-defendant who would be testifying under a presumption of innocence, applied to reject reliability here would be offensive constitutionally. It is "not for appellate courts to say that a particular witness spoke the truth or fabricated a cock-and-bull story.... [T]he court has been unable to find a single case where a court has ruled [that inherent unbelievability without more as to lack of credibility as a matter of law] may be applied against [a] defense witness[ ]." U.S.v. Smith, 780 F. 2d 1102 (4th Cir. 1985), quoting U.S. v. Bailey, 444 U.S. 394, 414-15 (1980).

As to the "newness" of Cody's evidence, the two habeas courts erring at law if they were implying otherwise, it is "new" because the fact the evidence was not presented at Cody's trial makes it new for the purposes of the actual innocence deliberation. Souter v. Jones, 395 F.3d 577, 596, n. 9 (6th Cir. 2005), followed, Reed v. Sheldon, 2020 U.S. Dist. LEXIS 7658, at *7 (N.D. Ohio). If the Schlup court had wanted to make the requirement "newly discovered" evidence instead of "new" evidence, it would have done so.

It would be, further, a reductio ad absurdum in circularity, in legal argumentation to say that Cody's constitutional claims of ineffectiveness, and of denial of right to testify, for trial counsel refusing to call Cody to testify, and for not pursuing Cody's CIA employment based leads and defenses in either investigation or at trial, given Cody's passed-on-to-counsel knowledge of that employment (which Cody had to have in order to communicate it to counsel) barred as a matter of law Cody's miscarriage claim because the knowledge of the petitioner's claims by counsel (or Cody, as a necessary predicate of his communicating the employment fact to counsel) made the fact of the employment not "new" for miscarriage purposes, thus the application

of the less stringent miscarriage-based standards for court review of the constitutional claims, and even the claims themselves. Thusly the knowledge of the truth of the miscarriage proffer evidence would potentially defeat the constitutional claim, when the purpose of applying the miscarriage exception to procedural default cases is exactly the opposite, that the potential truth of the miscarriage proffer evidence, even if known by the declarant at time of trial, makes the less stringent review of the constitutional claim possible, not impossible. In House, supra, e.g., petitioner House knew he was not at the scene of the crime at the time of his first trial.

Henderson v. Sargent, 926 F.2d 706, at 713-14, addresses the very point. Miscarriage analysis there incorporated a favorable to the defendant outcome on a constitutional claim of ineffectiveness of trial counsel for failure to investigate and develop leads, analogous to Cody's claim trial counsel refused to investigate leads of Cody's CIA and White House employment related to the mens rea of all the crimes asserted, refusal to call Cody to testify, refusal to subpoena witnesses, and refusal to even make a closing statement, which were outcome-determinative to the petitioner's conviction, a miscarriage given petitioner's habeas proffer; amended by 939 F. 2d 586 (6th Cir. 1991). See, also, the conflation McQuiggin makes, supra, n.43.

On "newness," the R&R, pp. 49-50, for miscarriage analysis purposes, also erroneously, as a matter of law, conflates Schlup's "new" evidence requirement (of "new, reliable evidence" (R&R, p. 49) (as to Cody's propounded claim 16/17 evidence, found at Traverse, pp. 19-22 and pp. 21-48)) with the "newly discovered" (within 120 days of a jury verdict) concept of a state law procedural default, found in O.R. Crim. P. 33(B). Clear factual error is present in the R&R's first statement about Cody's propounded new evidence, sworn to by Cody as a matter of his habeas affidavit (evidence which, collectively includes Cody's statements in his state court 2018 MNT/PCRP proceeding affidavit with incorporated exhibits): "As an initial matter, Cody does not provide the habeas Court with his newly discovered (sic) evidence," (R&R, p. 49), when, both in the headings and in the cited sworn-to texts, Cody did, in great detail, exactly that (and error at law is present in citing to the miscarriage evidence requirement as "newly discovered" evidence

when it is "new" evidence instead). Then, however, the R&R (p.51) makes argument from its sole cited reference to Cody's traverse, pp. "38-61," which contain 11 of the 17 pages of Cody's sworn-to miscarraige "new evidence" (Traverse, pp. 31-48).

Denial of Evidentiary Hearing

Summarized Issue:

IX. Did the Opinion err, at law and on the facts, in denying petitioner's motion for a habeas evidentiary hearing?

Issues on Opinion's Denial of Petitioner's Motion for Habeas Evidentiary Hearing (Doc. 75: 8765):

21. The Opinion's summary denial of petitioner's motion for an evidentiary hearing on grounds he did not sufficiently demonstrate the need for an evidentiary hearing erred at law and on the facts because:

The bar of Pinholster, limiting review to matters in the habeas record, is utilized almost exclusively as the authority to deny motions for an evidentiary hearing. But that bar is not relevant to any issue concerning procedural default, Cullen v. Pinholster, 563 U.S. 170, 181-82, 185 (2011), because the bar extends only to state court adjudications on the merits.

Procedural default was used extensively by the Opinion to deny or dismiss a number of petition claims, supra. In many instances, however, that invoked procedural default turned upon, even as the Opinion analyzed the subject, whether trial counsel was ineffective in his action, actions, failure to act, or failures to act, and/or the cause of trial counsel's

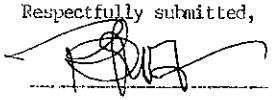
act, acts , failure or failures to act alleged by Cody to constitute IATC, i.e., whether the causation lay with counsel or the defendant, e.g., the procedural default of Cody's underlying Ground 4 claims as to trial counsel's involvement in denial of Cody's right to testify (Opinion, Doc. 75: 8746-48); and a procedural default of Claim 16/17 which turned on, in part, alleged failure to act by defense counsel as IATC.

Cody propounded the record was sufficient to determine these causation issues in his favor; the Opinion agreed it was sufficient, but determined each issue against the petitioner. But a strong and debatable case can be made the record does not contain all the available evidence relevant to this alleged theory of waiver of his right to testify by Cody. It is clear from Cody's habeas pleadings that he would speak, as to such a hearing , as to having spoken at the time, so as to clear himself of any intent to waive, or plan to waive, and to further explain his words of record as constituting non-waiver, and his failures to speak or act at the time as constituting non-waiver; while it should be clear that neither Cody nor any other petitioner in this situation could predict with exact accuracy what defense counsel's exact words would be at such a hearing, petitioner understands that he would be testifying under oath, and therefore would be presumed to accurately portray his actions or failures to act, not Cody's , as the root causation of this alleged, presumed waiver. In that case, outcome -determinative evidence of what counsel said to Cody in off-record conversations regarding not calling Cody to testify and his pursuit of evidence of Cody's CIA and White House employment, or did or did not do off-record on those subjects, and what Cody said to counsel in those conversations, and what Cody did or did not do, and his reasons therefor, and what Cody's and counsel's intents were at the time with respect to those issues, should be had, for a correct determination at law of those issues surrounding the "waiver" question, pursuant to Plummer v. Jackson, 491 Fed. Appx. 671 (6th Cir. 2013).

Statement of Issues Conclusion

While petitioner has a desire to raise the above issues on appeal, his respectfully made request to this Court reviewing his IFP motion and this statement is to find that the district court did make, or apply, outcome-determinative propositions of law in this habeas action which are at least debatable, or in error, in whole or in part, and, interwtwined with those applications issued outcome-determinative conclusions of fact which were clearly erroneous, and thereupon to issue a certificate of appealability delineating such outcome-determinative issues as this Court may deem appropriate for panel consideration after briefing on appeal.

Respectfully submitted,



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Appendix L

An Analysis of the 5th Circuit's Refusal to Adopt the Supreme Court's COA Standard in Capital Cases, 48 Am. J. Crim. L.

ARTICLE: A SHORTCUT TO DEATH: AN ANALYSIS OF THE FIFTH CIRCUIT'S REFUSAL TO ADOPT THE SUPREME COURT'S CERTIFICATE OF APPEALABILITY STANDARD IN CAPITAL CASES, 48 Am. J. Crim. L. 1

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Reporter
48 Am. J. Crim. L. 1 *

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* J.D. 2020, The University of Texas School of Law. Kevin would like to thank Josh Freiman and Jim Marcus for their input and guidance in the development of this piece, and Maddie Martel for patiently listening to rants about habeas law around the dinner table.

Introduction

When a person is sentenced to death in the United States, their case embarks on a long journey of appeals that will often take years, and in some cases decades. After a capital trial is complete, a defendant may appeal through their state court system and all the way up to the Supreme Court, before beginning a set of post-conviction habeas corpus proceedings at the state level, and finally, a set of post-conviction habeas corpus proceedings in federal courts. The process calls for meticulous reinvestigation of the case, the circumstances of the offense, and the defendant's background, in order to uncover any potential grounds for relief. **1**The Supreme Court has recognized that since the death penalty "differs from all other forms of criminal punishment, not in degree but in kind," **2**death sentences carry with them a heightened "need for reliability" **3**in order to be carried out.

In 1996, a Congress eager to carry out death sentences more quickly as part of the "tough on crime" movement **4**significantly shortened the federal habeas corpus process through the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). **5**The purpose of the law was, according to Justice Antonin Scalia, "not obscure," as it served to "eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal justice system, produced by various aspects of this Court's habeas corpus jurisprudence." **6**Justice Scalia's evaluation of the supposed problem of "interminable delays" is questionable at best. Between 1973 and 1995, nearly 70 percent of death penalty cases were overturned on appeal, with 40 percent of those reversals coming in federal habeas corpus proceedings, **7**suggesting that the problem was not delay but that state trial courts were not effectively safeguarding the constitutional rights of capital defendants. Nevertheless, Justice Scalia's (misleading) perception of the issue did accurately reflect the perceptions of those who passed AEDPA: the goal was quicker - or, as the law stated, more "effective" - death sentences. **8**

Despite its promise to speed up death sentences, Congress did not use AEDPA to test the limits of just how abbreviated post-conviction habeas corpus review may permissibly be under the Constitution. **9**While AEDPA certainly shortens the appeals process, it is not in itself a shortcut - if criminal defendants and their attorneys are able to follow the esoteric procedural mess imposed by the law, **10**federal courts will still review their claims in full, though with great deference to state court adjudications. **11**

However, the United States Court of Appeals for the Fifth Circuit has erroneously relied on AEDPA to take a true shortcut to the execution of death sentences, aggressively flouting Supreme Court rules to short-circuit the appeals process for those condemned to the ultimate punishment. The Fifth Circuit's shortcut has run through what is called a "Certificate of Appealability," **12**or "COA," a step in the habeas corpus process in which a petitioner must make "a substantial showing of the denial of a constitutional right" **13**in order to appeal a denial of habeas relief from a federal district court. It is merely a "threshold inquiry" **14**to ensure that the federal courts are only spending their time on plausibly meritorious petitions. Thus, the Supreme Court has held that a COA should issue as long as the merits of the petition could be debated by a reasonable jurist. **15**This is not a merits-review process, and in fact if a court treats it as such, that court has exceeded its jurisdiction. **16**Rather, it is a stepping stone in the federal habeas corpus process that ensures that a claim meets a threshold of plausibility before an appellate court hears it on the merits.

The Fifth Circuit has consistently used the COA process not to make this threshold inquiry but to decide the merits of the case - at times without even a full briefing on the merits - improperly shortening the federal appeals process beyond what even AEDPA allows. The Supreme Court has consistently reiterated to the Fifth Circuit that it is flouting the COA standard, to no avail. After four reversals on this one issue and another statement of concern from a group of three justices, the Fifth Circuit continues to short-circuit the federal appeals process at the COA stage, clearing the way for Texas, Louisiana, and Mississippi - particularly the former - to execute those sentenced to death without the full benefit of the great writ of habeas corpus. It is a dangerous shortcut to death that defies the heightened standards of reliability that the Supreme Court has demanded when states seek to execute their citizens.

This Article will first examine the restrictions on federal habeas corpus relief put into place by AEDPA and specifically examine the COA standard and how it has been implemented by the Court. Part two will examine the Supreme Court's reiteration to the Fifth Circuit that it is not following the correct COA standard and the Fifth Circuit's continued defiance after its last reversal in 2017. Part three will examine the harm suffered by petitioners sentenced to death when the Fifth Circuit takes a shortcut in the process prescribed by statute, and part four will examine how the Supreme Court can address an inferior court's decades-long "open defiance" of its rulings.

I. Background of the Constriction of Habeas Corpus and the Anti-Terrorism and Effective Death Penalty Act

Appendix L

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 17revising the statute governing federal courts' review of state criminal convictions in fifty years, 18and arguably the most consequential revision to federal review of state court convictions since just after the Civil War. 19While the federal habeas corpus statute, first passed in 1867, 20issues a broad command that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," 21this broad expansion of the so-called "great writ of liberty" was restrained by AEDPA's "twisted labyrinth of deliberately crafted legal obstacles" 22to the vindication of a prisoner's constitutional rights.

AEDPA's legal obstacles to relief for habeas corpus petitioners were designed "to address the perceived phenomenon of abuse[] of the writ" 23- that is, the perceived issue of people sentenced to death using habeas corpus to delay their execution - and to "accord extreme deference to state court determinations of federal law." 24Put simply, "AEDPA's purpose [is] to further the principles of comity, finality, and federalism." 25Most infamously, while federal courts could review state court decisions *de novo* prior to AEDPA, 26AEDPA requires that federal courts defer to state court legal determinations unless they are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 27The law requires similar deference to state court determinations of facts; 28limits situations in which federal courts can hold evidentiary hearings to develop new facts; 29bars second or successive petitions from the same petitioner, save for narrow exceptions; 30imposes a strict one-year statute of limitations for the filing of a federal habeas petition after state habeas proceedings have ended; 31and provides for perfunctory review of a district court's determination absent a threshold substantial showing of the denial of a constitutional right. 32These restrictions on the federal courts' ability to review state court convictions have resulted in a scenario where "except when a state has done something truly shocking in the course of convicting someone (and even then, only sometimes), habeas corpus no longer provides a meaningful avenue for protecting the constitutional rights of criminal defendants." 33Between 1973 and 1995, before AEDPA, 68 percent of death sentences were overturned, with 40 percent of those reversals coming in federal habeas proceedings. 34A study of federal habeas petitioners in death penalty cases between 2001 and 2006, after AEDPA, found reversals in just 12.4 percent of cases. 35

This Article will not examine the merits of AEDPA as policy, or the ways that the Supreme Court "has deliberately exacerbated the worst aspects of" the statute. 36Rather, this Article will explain how the Fifth Circuit has abused one of AEDPA's features - the Certificate of Appealability - to create a perfunctory review process of habeas corpus petitions that has aided the circuit in all-but barring habeas relief for state prisoners, most notably capital litigants, in Texas, Louisiana, and Mississippi. 37

A. Certificates of Appealability in AEDPA

AEDPA bars federal appellate courts from hearing appeals from federal district court denials of claims in habeas petitions unless a circuit judge issues a Certificate of Appealability ("COA"). 38A COA should issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 39While the COA was a new statutory restriction on federal appellate courts' ability to review district court denials of habeas relief, it was essentially a codification of the pre-AEDPA standard for appellate review. 40Under the pre-AEDPA standard, petitioners needed to obtain a COA-like "certificate of probable cause" ("CPC") in order to appeal denial of habeas relief by the district court. 41The Court announced in the 1983 case *Barefoot v. Estelle* that this standard "requires [the] petitioner to make a substantial showing of the denial of [a] federal right." 42In 2000, the Court reasoned in *Slack v. McDaniel* that since AEDPA copied this standard verbatim, except for substituting "constitutional" for "federal," the COA standard was a codification of the CPC standard from *Barefoot*. 43Therefore, the Court imported the standard that it had arrived at in *Barefoot*: in order to obtain a COA, 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." 44This standard applies to both procedural and substantive constitutional claims, meaning that if a petition is disposed of on procedural grounds by a district court, the petitioner must show that reasonable jurists could both debate the decision's procedural bar and that a substantial underlying constitutional claim debatably exists. 45

The COA standard announced in *Slack* is a "threshold inquiry." 46For this reason, the Court has "emphasized" that the COA inquiry "is not coextensive with a merits analysis." 47Indeed, the statute forbids using this threshold inquiry to "require full consideration of the factual or legal bases adduced in support of the claims." 48Accordingly, the Court has noted that "when a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." 49It is for this reason that "a COA does not require a showing that the appeal *will* succeed," and "that a COA will issue in some instances where there is no certainty of ultimate relief." 50

The Fifth Circuit is the one appellate court that has consistently failed to implement the *Slack* standard when performing its COA analysis. Too often, the court has used the COA stage not to make a "threshold inquiry" into whether a habeas petitioner should be entitled to an appeal, but to essentially do a merits analysis and dispose of cases before a true appeal is heard. The Supreme Court has rebuked the Fifth Circuit's refusal to implement the *Slack* standard five times in the past two decades, including in four reversals. The following section will break down the Fifth Circuit's refusal to follow the Court's direction.

II. The Fifth Circuit's Refusal to Adopt the COA Standard

The Fifth Circuit has developed a reputation for going "rogue" on contentious social issues, such as abortion 51and anti-police protests, 52ignoring Supreme Court precedent in favor of more conservative positions. This is no less true in federal habeas cases, particularly high-profile cases involving the death penalty, where the Fifth Circuit has ignored blatant "rubber- stamping" of prosecutors' arguments by state courts 53and facilitated with little scrutiny the government death machine. 54Said law professor David Dow, who regularly litigates death penalty cases in the circuit, "The Fifth Circuit does not understand that it is an inferior tribunal to the United States Supreme Court, and it acts lawlessly." 55Nowhere has the Fifth Circuit misapplied the law and "tr[ied the] Supreme Court's patience" more than on the issue of COAs. 56

A. The Fifth Circuit Has Routinely Defied the Supreme Court's COA Standard for the Past Twenty Years

Ever since the Supreme Court announced the proper standard for evaluating petitioners' requests for a COA in the 2000 case *Slack v McDaniel*, the Court has had to grant certiorari at least in part to "reiterate" 57to the Fifth Circuit that it has been applying the wrong standard on four different occasions, and a three-justice panel has indicated on another occasion that the circuit has a troubling habit of refusing to follow the correct standard. Those decisions, all of which fall between 2003 and 2017, follow below.

1. Miller-El v. Cockrell (2003)

The Court first rebuked the Fifth Circuit's refusal to follow the COA standard it announced in *Slack* in *Miller-El v. Cockrell* in 2003. Thomas Miller-El was convicted of capital murder and sentenced to death by a court in Dallas County, Texas, in 1986. **58**After voir dire, Miller-El, who is Black, moved for a new jury selection, arguing that African-Americans were illegally and systematically excluded from his jury. **59**The trial judge found no evidence of discrimination and allowed the trial to proceed. **60**During Miller-El's appeals, the Court decided *Batson v. Kentucky*, which created a framework for determining whether the State had unconstitutionally used race in exercising its peremptory strikes. **61**Under the framework, the petitioner must make a prima facie showing of discrimination, in which case the burden shifts back to the State to explain why its peremptory strikes were race-neutral. **62**

The Texas Court of Criminal Appeals ("CCA") remanded the case to the trial court to determine whether voir dire was conducted impermissibly under *Batson*. Miller-El demonstrated considerable evidence of purposeful discrimination. Ninety-one percent of eligible black jurors were removed by the prosecutors through peremptory strikes, while only 13 percent of non-black jurors were removed. **63**Black prospective jurors were also given a more graphic description of the death penalty than white prospective jurors, in order to make them more likely to indicate that they were not constitutionally eligible to sit on a capital jury. **64**Prosecutors also "shuffled" the venire when there were African-Americans at the front of the panel, in order to make it more likely that more white prospective jurors would be called for individual voir dire. **65**Perhaps most damning was evidence from former Dallas County District Attorney's Office officials that there was an office policy against allowing African-Americans on the jury. **66**Indeed, a former office manual stated: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." **67**

Despite this mountain of evidence, the trial court again found no discrimination, and the CCA affirmed. **68**Miller-El subsequently filed a federal habeas petition, but he was denied relief despite the district court having noted that he was "troubled by some of the evidence adduced in the state court proceedings." **69**Miller-El then filed for a COA with the Fifth Circuit, but his claim was denied. **70**The Fifth Circuit recited the COA standard that the Court had implemented in *Slack*, **71**but it essentially just decided the merits of the case, rather than determining whether the district court's decision regarding Miller-El's *Batson* claim - with his substantial evidence of potential racial discrimination - was debatable. **72**Given just how much evidence Miller-El had demonstrated, the Court reversed the Fifth Circuit, with the majority stating that "we have no difficulty concluding that a COA should have issued." **73**In reversing the Fifth Circuit, the Court "reiterated that a prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right." **74**Yet despite this reiteration of the COA standard, the Fifth Circuit continued to short-circuit the habeas appellate process created by AEDPA.

2. Banks v. Dretke (2004)

The year after it reversed the Fifth Circuit in *Miller-El v. Dretke*, the Supreme Court rebuked the appellate court for its improper analysis under the COA standard, this time in *Banks v. Dretke*. Delma Banks, Jr., was convicted of capital murder and sentenced to death in East Texas in 1980. **75**More than a decade after his death sentence, Banks discovered that the State had withheld important evidence that could have been used to impeach the State's two witnesses at his sentencing proceeding. **76**Banks alleged in a state habeas application that the State had withheld from him that one of the witnesses was a paid police informant, and that the other "had been intensively coached by prosecutors and law enforcement officers." **77**The State denied these allegations, and the CCA found in the State's favor in a one-page *per curium* order. **78**

Banks filed a federal habeas petition in 1996, arguing that he was denied due process of law under *Brady v. Maryland*. **79**The federal magistrate judge allowed for discovery regarding only one of the State's witnesses. **80**Subsequently, in 1999, Banks produced affidavits and other evidence indicating that the State "had wrongly withheld crucial exculpatory and impeaching evidence" from both of the State's witnesses. **81**The magistrate judge recommended relief from the sentence based on the discovery from 1996, but not relief from the conviction. **82**Banks moved to amend the report given the newly uncovered 1999 evidence, but the district court judge denied that motion and adopted the magistrate judge's report in full, concluding that Banks "had not properly pleaded a *Brady* claim" in 1996 predicated on the evidence that came about in 1999. **83**Banks sought a COA in the district court, claiming that the evidence from 1999 should have been treated as if it were raised in the pleadings, under Federal Rule of Civil Procedure 15(b). **84**In an unpublished *per curium* opinion, the Fifth Circuit also denied a COA on this claim *and* reversed the district court's grant of habeas relief from the death penalty on the initial *Brady* claim. **85**

On the eve of Banks's scheduled execution, the Supreme Court granted certiorari on the *Brady* claims, reversing the Fifth Circuit's judgment dismissing the initial *Brady* claim and reversing the denial of a COA on the Rule 15(b) claim. **86**In reversing the Fifth Circuit's COA denial, the Court struggled to decipher the appellate court's reasoning - noting that it "stated its position on this point somewhat obliquely" - but gathered that the Fifth Circuit "appears to have viewed Rule 15(b) as inapplicable in habeas proceedings." **87**The Court pointed out that it had "twice before referenced Rule 15(b)'s application in federal habeas proceedings" and that it had indeed "noted that Rule 15(b)'s use in habeas proceedings is 'noncontroversial.'" **88**Accordingly, the Court recited the COA standard that it had put forward in both *Slack* and *Miller-El* - that a petitioner must "demonstratee that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" - and held that "this case surely fits that description." **89**

3. Tennard v. Dretke (2004)

The Court overturned yet another one of the Fifth Circuit's COA denials in 2004, this time not only criticizing the appellate court's analysis of the COA framework but airing its frustration with the court's refusal to apply that standard at all. Robert Tennard was convicted of capital murder in Texas in 1986 and sentenced to death. **90**During the sentencing phase of Tennard's trial, his attorneys presented evidence that he had an IQ score of 67, which would suggest that he had "limited mental faculties." **91**In state post-conviction proceedings, Tennard argued, relying on the Court's 1989 decision *Penry v. Lynaugh*, **92**that the Texas sentencing statute did not adequately allow the jury to give effect to this mitigating evidence. **93**(In *Penry*, the Court had held that the same Texas statute did not adequately allow the jury to consider that petitioner's evidence of intellectual disability in its consideration of mitigating evidence.) **94**A split CCA denied the claim, holding that Tennard's low IQ score did not alone make him intellectually disabled, and thus that *Penry* is inapplicable. **95**

Tennard sought federal habeas relief, and the district court determined that the state court was correct in determining that the jury had "adequate means" under *Penry* to consider Tennard's low IQ score and give effect to it as mitigating evidence if it so chose. **96**Tennard subsequently applied for a COA and was denied relief by the Fifth Circuit. **97**The Court noted that the Fifth Circuit paid "lipservice to the principles guiding issuance of a COA" but that its "analysis proceeded along a distinctly different track." **98**Rather than address the debatability of Tennard's *Penry* claim, the appellate court addressed the *merits* on the *Penry* claim with "full briefing and oral argument." **99**Ironically, the Fifth Circuit's own merits analysis was incorrect, as well, as it applied a "relevance test" for mitigating evidence that "has no foundation in the decisions of [the Supreme] Court." **100**The majority ended its opinion with a "turn to the analysis the Fifth Circuit should have conducted," **101**and ultimately the Court held that "reasonable jurists could conclude that the low IQ evidence Tennard presented was relevant mitigating evidence", and that the CCA's "application of *Penry* to the facts of Tennard's case was unreasonable." **102**

4. Jordan v. Fisher (2015)

Despite these three-straight rebukes from the Supreme Court, the Fifth Circuit refused to implement the Court's command in *Slack*: that the COA analysis is not coextensive with a merits analysis. The Court did not overturn another one of the Fifth Circuit's COA decisions until 2017, but in dissenting from denial of certiorari in *Jordan v. Fisher* in 2015, three justices noted that the appellate court had, yet again, made a habit out of ignoring the *Slack* standard. **103**Richard Jordan was originally convicted of capital murder and sentenced to death in Jackson County, Mississippi, in 1976. **104**Jordan was actually sentenced to death on three separate occasions for the same crime, because his sentence kept getting overturned, and he kept getting re-tried by the same prosecutor, who at one point left the district attorney's office for private practice but still represented the State as a special prosecutor in this case at the behest of the victim's family. **105**After Jordan's death sentence was overturned for a third time, the prosecutor agreed to a plea agreement in which Jordan would be sentenced to life without the possibility of parole if he promised not to challenge his sentence. **106**However, this sentence was also illegal, because Mississippi law did not allow for sentences of life without parole unless the person was a "habitual offender," which Jordan was not. **107**In another case with "a plea agreement materially identical to Jordan's," the Mississippi Supreme Court held that the plea was void and that both parties were placed back in the positions "they occupied prior to entering into the agreement." **108**

Jordan subsequently asked for a resentencing to life with parole, but while his motion was pending, the Mississippi Legislature amended the criminal code to permit life without parole in cases like Jordan's. **109**The court agreed that Jordan's prior sentence was invalid and remanded the case for resentencing, where Jordan asked the special prosecutor once again for the same agreement. **110**While other capital defendants in the state received the same deal after their prior plea agreements were invalidated, the prosecutor decided to renege on the prior deal and seek the death penalty instead. **111**Jordan argued that this was improperly vindictive under the Due Process Clause, but the trial court disagreed, and Jordan was re-sentenced to death. **112**He appealed to the Mississippi Supreme Court but lost, over a dissent. **113**

Jordan subsequently filed a habeas petition in federal district court, where he lost, and he was denied a COA by both the district court and the Fifth Circuit. **114**In its denial, the Fifth Circuit addressed the merits of the case, holding that Jordan had "failed to prove actual vindictiveness" under its precedent. **115**The panel admitted that the *en banc* Ninth Circuit had granted relief in a very similar case, but under the COA standard, it ostensibly held that the claim was not debatable by jurists of reason. **116**One jurist of reason, Judge Dennis, dissented from the panel's denial of a COA, noting that the majority had improperly done a merits analysis at the COA stage. **117**

In dissenting from denial of certiorari, Justice Sonia Sotomayor, joined by Justices Ruth Bader Ginsburg and Elena Kagan, criticized the Fifth Circuit both for ignoring the COA standard and making a pattern out of doing so. Instead of limiting its analysis to the "threshold inquiry" demanded by *Slack*, *Miller-El*, and subsequent cases, "the Fifth Circuit engaged in precisely the analysis *Miller-El* and the COA statute forbid: conducting, across more than five full pages of the Federal Reporter, a detailed evaluation of the merits." **118**The dissent noted that a COA should have issued because not only *could* reasonable jurists differ on the merits of the opinion, many reasonable jurists - Judge Dennis, a judge on the Mississippi Supreme Court, and a majority of the *en banc* Ninth Circuit - *had differed*. **119**As the justices noted, "When a state appellate court is divided on the merits of [a] constitutional question, issuance of a certificate of appealability should ordinarily be routine." **120**The judges indicated that for this reason, they would have summarily reversed the Fifth Circuit's judgment against Jordan. **121**

However, it was not just Jordan's case that troubled the justices. Justice Sotomayor noted that the Fifth Circuit had demonstrated a "troubling" "pattern" of refusing to follow the COA standard created by Congress and explained repeatedly by the Court. **122**She identified a non-exhaustive list of five times between *Tennard*'s issuance in 2004 and this opinion in 2015 where "the Fifth Circuit has denied a COA after engaging in an extensive review of the merits of a habeas petitioner's claims" and two times where the appellate court had denied a COA over a dissenting opinion. **123**Ultimately, the full Court would not rebuke the Fifth Circuit's troubling pattern of misapplying the COA standard until two years later.

5. Buck v. Davis (2017)

The Court's most recent rebuke of the Fifth Circuit's refusal to apply the correct COA standard came in *Buck v. Davis* in 2017. Duane Buck was convicted of capital murder and sentenced to death in Harris County, Texas, in 1996. **124**Under the Texas death penalty statute, "the jury could impose a death sentence only [after] it found that Buck was likely to commit acts of violence in the future." **125**Buck argued that his attorney was unconstitutionally ineffective because he called a psychologist who testified "that Buck was statistically more likely to act violently because he is black." **126**However, because his attorneys never raised this claim in his state post-conviction proceedings, a federal district court judge who heard the claim determined that it was procedurally defaulted under AEDPA and not reviewable. **127**In 2014, after two Supreme Court decisions that made it easier for petitioners to overcome procedural defaults that were themselves the fault of ineffective attorneys, **128**Buck filed a motion under Federal Rule of Civil Procedure 60(b)(6) to reopen his case, arguing that these changes in the law and a number of other factors "constituted the "extraordinary circumstances' required to justify reopening the 2006 judgment under the Rule." **129**The district court denied the Rule 60(b) motion, and the Fifth Circuit subsequently denied a COA on the issue. **130**

After granting certiorari on the Rule 60(b) issue, the Supreme Court reversed, determining not only that the COA should have issued, but also that Buck was entitled to relief under Rule 60(b) and that his attorney was unconstitutionally ineffective. **131**This means that the denial of a claim that the Fifth Circuit ostensibly held was not debatable by jurists of reason was actually debatable, and in fact considered to be wrong, by five members of the Supreme Court.

The Court devoted much of its opinion to the fact that the Fifth Circuit had simply recited the COA standard but really had only done a merits analysis:

The court below phrased its determination in proper terms - that jurists of reason would not debate that Buck should be denied relief - but it reached that conclusion only after essentially deciding the case on the merits. As the court put it in the second sentence of its opinion: "Because [Buck] has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA." **132**

This analysis, the Court noted, is a "merits determination[] the panel should not have reached." **133**The question before the Fifth Circuit was not the ultimate merit of the Rule 60(b) argument but rather a "threshold inquiry into the underlying merit of the claim[]." **134**The Court "reiterated" to the Fifth Circuit, as it had before in *Miller-El*, that the COA standard it has imposed since *Slack* "flatly prohibits ... a departure from the procedure prescribed by § 2253." **135**

B. After Buck v. Davis: Open Defiance

Despite the reiteration by the Court over the course of nearly 20 years that it must follow the standard set forth in § 2253 and in *Slack*, the Fifth Circuit has continued to ignore Court's COA standard, testing the limits of how long "the system can tolerate open defiance by an inferior court." **136**

In the 2019 case *Gonzales v. Davis*, the court denied a COA on the issue of whether the petitioner's waiver of his state habeas proceedings was "voluntary and intelligent," even though two judges on the Texas CCA dissented from the court's determination that the waiver was adequate. **137**This despite the fact that "when a state appellate court is divided on the merits of [a] constitutional question, issuance of a certificate of appealability should ordinarily be routine." **138**In the 2018 case *Halprin v. Davis*, the court recited the COA standard but proceeded to do an extensive analysis of the claims under the case law in a way that mirrored a merits analysis. **139**The petitioner noted in his petition for a writ of certiorari that on one claim, the Fifth Circuit "invoked its own [circuit-created] restrictive gloss" to determine the merits of the claim, just as it had been told was incorrect in *Tennard*. **140**In the 2018 case *Hummel v. Davis*, the Fifth Circuit applied the wrong standard entirely to a COA request, denying a COA on an issue because "reasonable jurists cannot debate the reasonableness of the district court's conclusion." **141**The question at the COA stage is not whether the district court's decisions reasonableness could be debated, as decisions can be reasonable even though some might disagree with them, but whether the outcome on the merits is debatable. Finally, in the 2018 case *Freeney v. Davis*, the Fifth Circuit made the suspect claim that no reasonable jurist could debate that a petitioner's claims had actually been "adjudicated on the merits" in state court when the state court rubber-stamped the prosecution's proposed findings of fact and conclusions of law before the defense even had a chance to respond. **142**In doing so, the court did its own analysis of the applicability of a Supreme Court case on what constitutes an adjudication on the merits - a nuanced standard that requires an individualized analysis of each case **143**- in what was essentially a merits determination, not a COA analysis. **144**The Court did not grant a writ of certiorari in any of these cases.

In the interest of brevity, the preceding paragraph is merely a non-exhaustive list of cases in which the Fifth Circuit has defied the Supreme Court's COA standard since its re-reiteration in *Buck*. While these cases make it clear that the Fifth Circuit has at the very least failed to adopt the correct COA standard full-scale, the data indicates a persistent problem across the board.

Between 2008 and the end of 2019, the courts in the Fifth Circuit **145**heard 529 capital cases. One hundred nine of those cases - 20.6% of them - were disposed of with the denial of a COA. Only the Eighth Circuit, with its mere 133 capital cases in that timespan, came close denying COAs at such a rate. While the Fifth Circuit had the highest number of total capital cases, the Sixth, Ninth, and Eleventh Circuits each had more than 300 cases. They disposed of cases by COA denial in a mere 2.9% (Sixth Circuit), 1.9% (Ninth Circuit), and 11.1% (Eleventh Circuit) of their respective cases.

Table 2

Shockingly, the Fifth Circuit disposed of a *higher* percentage of cases overall through COA denial after *Buck v. Davis* than it did between 2008 and the end of 2019. In the nearly three years between the *Buck* decision and the end of 2019, the Fifth Circuit heard 107 death penalty cases and disposed of a whopping 30% of them by COA denial. The other three circuits with a significant number of capital cases have disposed of them by COA denial at far lower rates in that timespan: 6.3% (Sixth Circuit), 6.5% (Ninth Circuit), and 15.4% (Eleventh Circuit).

While *Buck* and the cases before it should have caused the Fifth Circuit to reevaluate its approach to COA requests, particularly when considering the denial rates of other circuits, the court has dug its feet in the sand, continuing to impose a harsh, unfounded standard and short-circuiting the federal habeas process to more quickly dispose of cases. Despite the Court's continued instructions to stop flouting the COA standard, the Fifth Circuit is fighting back with "open defiance."

III. The Problems with a Shortcut to Death

The Fifth Circuit has never stated why it does not believe it needs to follow the COA standard - after all, it cannot do that as an inferior court - but Texas's briefing in *Buck* explains what is likely the court's motivation: they do not think doing the merits analysis earlier in the process really matters. Texas noted that in *Buck* and in its general approach to COA adjudications, the Fifth Circuit "regularly [allows] comprehensive briefing from both sides and occasionally involves oral argument." **149**Therefore, the state argued, "the Fifth Circuit's practice thus provides substantial process to capital COA applicants." **150**In the context of *Buck*, in which the Court was trying to determine if the Fifth Circuit was improperly doing a merits analysis rather than a threshold inquiry, Chief Justice John Roberts pointed out that "this hurts rather than helps the State's case." **151**However, Justice Roberts's analysis of the problems with the Fifth Circuit's approach to COAs was limited to the fact that it refuses to follow the COA statute. Of course, it is problematic for courts to refuse to follow a statute, even if they do not agree that it makes a lot of sense. That alone was enough for the Court to reverse, as it should have been. However, the practical danger to those sentenced to death in the Fifth Circuit goes far beyond the fact that the circuit has not technically followed a statute. The truncated merits adjudication performed at the COA stage means that petitioners often have potentially meritorious claims rejected without full consideration by the federal courts.

At the heart of the issues with the Fifth Circuit's short-circuiting of the federal habeas process is that petitioners in the most significant cases in the criminal legal system are receiving an ad hoc review process. This can hardly be squared with the Constitution's demand that defendants in death penalty cases receive a process with heightened reliability. **152**For instance, while in *Buck* the Fifth Circuit did allow for extensive briefing and oral argument, that is not always the case. The Court is under no obligation to treat the COA stage briefing as a merits briefing - indeed, it is instructed not to do so - so by treating the COA stage as a quasi-merits stage, the Fifth Circuit can effectively give various petitioners varying degrees of process and adjudication. When the court does call for oral argument at the COA stage, petitioners and their attorneys are inherently forced to make a strange combined argument for relief on both the threshold inquiry and the merits, even though the burden for both is substantially different. Such an amorphous inquiry makes it nearly impossible to determine what kind of showing the petitioner must make.

Because the Fifth Circuit's review process is so ad hoc and its inquiry so amorphous, it can often become impossible to determine what kind of review a petitioner has actually received. For instance, as described by Justice Sandra Day O'Connor in *Tennard*, the Fifth Circuit will often pay "lipservice" to the COA standard, as if that is the standard it is applying, but then "proceed[] along a distinctly different track," with what appears to be a merits adjudication. **153**However, since the court will not specifically say that it is judging the merits of the petition, it is not clear that the court actually applied the correct case law, or what its "threshold" analysis really was. Sometimes, the issue on the merits is glaring enough that the Supreme Court will take the case and reverse. For instance, in Mr. Tennard's case, the Court granted certiorari and noted that the test the Fifth Circuit appeared to be applying had "no basis in our precedents." **154**In *Banks*, the Court also granted certiorari to reverse when the Fifth Circuit "somewhat obliquely" did a quasi-merits adjudication. **155**In these

cases, the Court reversed without interrogating what, if any, COA standard the Fifth Circuit was really applying. However, in other cases, the Fifth Circuit will apply standards that do not appear to satisfy either the COA or merits inquiries during COA proceedings and deny a COA. For example, in *Hummel*, the Fifth Circuit denied a COA because "reasonable jurists cannot debate the reasonableness of the district court's opinion" **156**- a standard that appears to have just been made up by the court, even though it presents a much stiffer obstacle to success than the true COA standard.

With so many different standards flying around - some explicit but wrong, as in *Hummel*, and some not specifically stated, as in *Tennard* and *Banks* - petitioners have no idea what, exactly they have to show at the COA stage in order to obtain relief in the Fifth Circuit. In practice, it appears the Fifth Circuit has just taken a convenient shortcut, deciding off-handedly at the COA stage, without adherence to any particular standard, whether it believes the petitioner really has much of a case, or whether it can be disposed of early on in the proceedings. This defies good judicial practice, as courts should follow the rules propagated by the legislature and the Supreme Court in order to ensure due process for all petitioners. However, more important is that this practice has led to some glaring injustices. The petitioners in *Miller-El* and *Buck* both won on the merits at the Supreme Court, despite the Fifth Circuit's apparent willingness to throw their cases away at the COA stage. After further litigation, Delma Banks **157**and Robert Tennard **158**had their sentences reduced to life in prison. All of these people are alive today because they were lucky to obtain a rare grant of certiorari from the Supreme Court. Under the Fifth Circuit's haphazard process, all would have been executed. While these litigants were spared, others have not been. For instance, John Hummel, whose COA was denied under the entirely wrong standard, is scheduled to be executed in June 2021. **159**The State has also sought an execution date for Michael Gonzales, whose COA was denied even though two judges on the CCA dissented from his denial of relief, which should have caused a COA to issue as almost a matter of course. **160**This is the consequence of a haphazard, amorphous process in which the Fifth Circuit refuses to apply the COA standard as instructed by AEDPA and the Supreme Court.

IV. A Call for Increased Supervision from the Supreme Court

It is clear by now that no matter how many times the Supreme Court recites the COA standard in reversing Fifth Circuit decisions, the Fifth Circuit is uninterested in following the Court's command. What is less clear is what can be done about it. Generally, it is not within the Supreme Court's duties to supervise a lower court - the high court is supposed to proffer rules and guidance, and the lower courts are supposed to follow that guidance. However, when necessary, the Court has recognized its obligation to "exercise [its] supervisory power" when a lower court "has so far departed from the accepted and usual course of judicial proceedings." **161**

In many ways, the Court has already been exercising its supervisory power over the Fifth Circuit by overturning the court on this one issue four times in less than 15 years, the last time choosing to not even give the circuit a chance to get the merits adjudication right. **162**However, given the gravity of the situation - that the Fifth Circuit's defiance has seemingly only *increased* since *Buck* and that the defiance is causing people to be executed - there is a strong argument that the Supreme Court must take an even more active supervisory role in enforcing the COA standard in Fifth Circuit cases.

Justices have already advocated for a stronger supervisory role when a lower court fails to follow the Supreme Court's rules **163**or demonstrates that it has "manifested a strong bias for or against a particular class of litigants." **164**Over the past two decades, the Fifth Circuit has demonstrated a strong bias against habeas petitioners in capital cases. Since 2000, 151 death row inmates in Texas have completed their federal habeas proceedings. **165**Only one has had their sentence overturned by the Fifth Circuit. **166**This means the Fifth Circuit will have granted relief in just more than half of one percent of Texas death penalty cases since 2000. Forty percent of capital cases nationwide were overturned on federal habeas review prior to AEDPA, **167**and 12.4 percent have been overturned since AEDPA. **168**The Fifth Circuit appears to be an extreme outlier in refusing to grant federal habeas relief. It is unconvincing that these disparities can be explained away as the Fifth Circuit supervising state courts that are simply excellent at guaranteeing the constitutional rights of litigants - on the contrary, Texas has been described as having "a runaway criminal justice system and a gatekeeper high court that [has done] nothing to control it," **169**and Louisiana's system has been described as "uniquely terrible." **170**Instead, the Fifth Circuit appears intent on refusing to give those sentenced to death within its jurisdiction their day in court, regardless of the constitutional deprivations the condemned endured at their trial.

This naked display of bias against capital defendants demands the increased supervision required in only the most extreme circumstances. The Court receives far more petitions for writs of certiorari than cases it can hear each year, but it does have other tools at its disposal. For example, the Court can flag COA denials from the Fifth Circuit and summarily reverse every time the lower court appears to adjudicate the merits of a claim, or make a quasi-merits adjudication, at the COA stage. This would take few resources for the Court but would force the Fifth Circuit to spend far more time on each case if it is to continue to use extensive briefing at the COA stage (in some cases) as an excuse for refusing to follow the COA standard. At that point, it would make far more sense from the standpoint of judicial economy for the circuit to simply make its merits adjudications at the correct stage. The Court could also issue a much firmer "benchslap" **171**than it did in *Buck*. Such a strategy appears to have worked in a recent series of Texas cases. For years, the Texas CCA used a standard for the determination of intellectual disability that did not comport with modern science, and thus, the standard was struck down by the Court in its 2017 case, *Moore v. Texas*. **172**The Court remanded the case to the CCA to determine whether the petitioner, Bobby Moore, was intellectually disabled under modern scientific standards. **173**However, the CCA ignored the Court while paying lipservice to its approved standard, much like the Fifth Circuit has done in COA denials, and still determined that the Moore was not intellectually disabled. **174**The Court took the case again, and without argument, reversed the CCA in a *per curium* opinion, and did its own factfinding - implicitly indicating that it could not trust the lower court to do so - to determine that Moore is intellectually disabled and ineligible to be executed. **175**Chief Justice Roberts, who dissented in the 2017 decision, concurred in the 2019 decision, noting that "on remand, the court repeated the same errors that this Court previously condemned - if not quite *in haec verba*, certainly in substance." **176**The original decision and subsequent benchslap appear to have had some effect. For a decade pre- *Moore*, the CCA failed to authorize any state habeas applications from petitioners who argued that they were intellectually disabled and were looking to come back into court following the conclusion of their original state habeas proceedings - a procedural maze the court used to essentially allow execution of people with valid claims of intellectual disability, whose executions should have been barred by the Eighth Amendment. **177**Since the 2017 decision, and particularly since the 2019 decision, the CCA has been much more willing to entertain intellectual disability claims. **178**It is unclear whether such a strategy would work with the Fifth Circuit, but given that the court's COA jurisprudence has been similarly defiant, if not even more flagrantly so, such review by the Supreme Court would be warranted.

Regardless of how the Supreme Court goes about it, it is imperative that the Court use its supervisory role in some way to curb the Fifth Circuit's flagrant defiance of the Court's COA jurisprudence. The circuit's refusal to recognize its role as an inferior tribunal - and its eagerness to flout that role in denying relief to capital defendants - undermines the United States' judicial system, and given the consequences in capital cases, the court's defiance is all-the-more grave and in need of correction. Only the Supreme Court has the power to curb the Fifth Circuit's abuse of its judicial role.

Conclusion

The past three decades have not been kind to capital defendants hoping to vindicate the constitutional rights that they were deprived of at trial. While the federal courts previously played an important role in safeguarding those rights, AEDPA created a major roadblock for petitioners to obtain a new trial as a remedy for those constitutional deprivations. However, AEDPA was not meant to be a complete bar on relief - rather, it was meant to allow greater deference to state courts in their determinations of the merits of petitioners' constitutional claims and to end delays in the execution of those who had been sentenced to death.

In its implementation of AEDPA, the Fifth Circuit has gone far beyond what the statute requires, creating a near-blanket ban on relief for capital federal habeas petitioners in Texas, Louisiana, and Mississippi. In doing so, it has misapplied one of AEDPA's features - the certificate of appealability - and used it to effectively short-circuit the appeals process. Despite four reversals between 2003 and 2017 on this very issue and another warning from a group of three justices, the Fifth Circuit continues to defy the Court's clear instructions about the COA inquiry. This has resulted in petitioners being denied relief on an amorphous, ever-changing standard in the most serious of cases. The Court has already intervened, continuously, with no success. Without even further supervision from the Court, the Fifth Circuit will likely continue to defy the AEDPA and the Court's commands, denying virtually every capital defendant who comes through its chambers a fair chance for relief, in its effort to create a shortcut to death.

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Appendix M

Statutory Provisions / Rules of Court

M-1: 28 U.S.C. § 2253

M-2: Ohio Appellate Rule 26(B) ("App. R. 26(B)")

M-3: 28 U.S.C. § 2254 (d)

M-3(A): 28 U.S.C. § 2254 (e)

M-4: Ohio Revised Code § 2953.21 et seq.

Constitutional Provisions

M-5: United States Constitution, Amendment VI

M-6: United States Constitution, Amendment X

M-7: United States Constitution, Amendment XIV

Appendix M-1

28 U.S.C. § 2253

Statutory Provision

28 U.S.C. §2253 Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review on appeal by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Appendix M-2

Ohio Rule of Appellate Procedure 26(B) with Staff Notes

Rule of Court

Ohio App. Rule 26

Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.

(A)Application for reconsideration and en banc consideration.

(1)Reconsideration.

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A).

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2)En banc consideration.

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App.R. 30(A). A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App.R. 26(A)(2)(c) and, if so vacated, shall be reentered.

(c) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B)Application for reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

History

Amended, eff 7-1-75; 7-1-93; 7-1-94; 7-1-97; 7-1-10; 7-1-11; 7-1-12.

Commentary

Staff Notes

7-1-12 AMENDMENT

The amendment to App.R. 26(A)(2)(c) removes language added in 2011 that required a court of appeals to vacate a panel decision in the event of a sua sponte decision to consider a case en banc. That language was added to ensure that a party's time to appeal to the Supreme Court would not begin to run while en banc consideration was pending. But the language is no longer necessary in light of a 2011 amendment to S.Ct.Prac.R. 2.2.

7-1-10 AMENDMENT

App.R. 26(A) has now been subdivided into two provisions: App.R. 26(A)(1) governs applications for reconsideration (former App.R. 26(A)), while App.R. 26(A)(2) is a new provision governing en banc consideration. The amendment to former App.R. 26(A) (now App.R. 26(A)(1)) contemplates a future amendment to the Supreme Court Practice Rules that will extend the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration in the court of appeals. It also ensures a responding party's full ten-day response period, even if that party does not receive the application on the day it is filed. Because the ten-day response period now begins to run from the date of service, a party served by mail now has an extra three days to file an opposition. See App.R. 14(C). Finally, the amendment permits the moving party a reply in support of the application within seven days of service of the opposition; this clarification avoids any ambiguity about the right to file a reply in support of a motion under App.R. 15(A).

The addition of App.R. 26(A)(2) is designed to address the Supreme Court's decision in *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672 and, in particular, the holding that "if the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." Id., paragraph two of the syllabus. The new provision establishes a

standard for parties to seek en banc consideration under the same procedures that govern applications for reconsideration under App.R. 26(A)(1), except that a party may also seek consideration en banc within ten days of a judgment or order ruling on an application for reconsideration if that ruling itself creates an intra-district conflict that did not appear from the panel's original decision. The new provision also allows courts of appeals to establish their own procedures to the extent consistent with the statewide rule.

Former App. R 26(C), which required courts of appeals to decide applications for reconsideration within 45 days, has been eliminated in anticipation of an amendment to the Supreme Court Rules of Practice that will toll the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration or en banc consideration in the court of appeals.

7-1-97 AMENDMENT

RULE 26(A) APPLICATION FOR RECONSIDERATION.

The Supreme Court Rules of Practice were amended effective June 1, 1994, to provide that an appeal from a court of appeals is perfected by filing a notice of appeal in the Supreme Court; Rule II, Section 2(A)(1). The previous rule had required that the notice be filed in the court of appeals. The 1997 amendment to App.R. 26(A) was to conform this rule with the Supreme Court Rules of Practice.

RULE 26(B) APPLICATION FOR REOPENING.

The amendment changed the rule's reference from "referee" to "magistrate" in division (B)(8) in order to harmonize the rule with the terminology adopted in the 1995 amendments to Civ.R. 53. The amendment is technical only and no substantive change is intended.

7-1-94 AMENDMENT

RULE 26(C).

The 1994 amendment added division (C), which addresses those situations where the Supreme Court and the court of appeals have concurrent jurisdiction. See Proposed S.Ct. Prac. R. II, § 2(D) (O.S.B.A. Rpt., 12/21/92). Judicial economy is promoted when the court of appeals resolves applications for reconsideration before the Supreme Court begins its review of the case, thereby avoiding duplicative effort by the Supreme Court. Division (C) will apply, however, in all cases regardless of whether an attempt has been made to invoke the Supreme Court's jurisdiction to review the case.

7-1-93 AMENDMENT

RULE 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING.

The 1993 amendment was in response to the Supreme Court's opinion in State v. Murnahan (1992), 63 Ohio St.3d 60, 66 n. 6. In Murnahan, the Court held that claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals, syl. 1, and requested that a rule be drafted to govern such applications. Id. at 66 n. 6.

App.R. 26 previously permitted applications for reconsideration to be filed within ten days of the journalization or announcement of the appellate decision. The Court noted in Murnahan that although reconsideration under Rule 26 appeared to be restricted to issues already presented to the appellate court, the Court "construe[d] claims of ineffective assistance of appellate counsel to be tantamount to constitutional claims that should have been presented on appeal, and but for their omission the outcome of the case would be otherwise." Id. at 65 n. 3. Because "claims of ineffective assistance of appellate counsel may be left undiscovered due to the inadequacy of appellate counsel or the inability of the defendant to identify such errors within the time allotted for reconsideration," the Court stated that it may be necessary for defendants to request delayed reconsideration. Id. at 65-66. The amendment thus provides for reconsideration in criminal cases beyond the previous limitation of time. The rule permits delayed reconsideration only of the direct appeal and does not apply to appeals related to post-conviction proceedings pursuant to R.C. 2953.21. The amendment permits applications to be filed more than ninety days after the appellate judgment's journalization if good cause is shown. See App.R. 14(B).

The term "ineffective assistance of counsel" is intended to comprise the two elements set forth in Strickland v. Washington (1984), 466 U.S. 668, that is, deficiency in the representation and prejudice resulting from such deficiency. The term "deficient" representation is intended to refer to the first prong of the Strickland standard, and is not intended to introduce a different type or quantum of proof than that already developed in the Strickland line of cases. See, e.g., State v. Bradley (1989), 42 Ohio St.3d 136.

The amended rule presents a two-stage procedure. The first stage involves a threshold showing for obtaining permission to file new appellate briefs. See Murnahan, 63 Ohio St.3d at 66 (stating that defendant must "put forth a colorable claim of ineffective assistance of appellate counsel"). The second stage involves filing appellate briefs and supporting materials with the assistance of new counsel, in order to establish that prejudicial errors were made

in the trial court and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to the court of appeals. Thus, in order to have the prior appellate judgment altered, in the second stage the applicant must establish not only the merits of the appeal but also that the Murnahan standard has been met. See also State v. Bradley (1989), 42 Ohio St.3d 136 (under which the applicant must prove that there exists a reasonable probability that without counsel's deficiencies the result of the trial would have been different). Ordinary principles of res judicata are applicable unless "the circumstances render the application of res judicata unjust." Murnahan, 63 Ohio St.3d at 66.

"Arguments" as used in division (B)(2)(c) may include citations to legal authority or to the record.

If the applicant claims that the record is incomplete or unavailable, the applicant may submit an affidavit setting forth that claim and the matters that the applicant believes that the record contains or should contain. Division (B)(2)(e) permits but does not require submission of supplemental affidavits and portions of the record with the application.

Although counsel for the appellant must take action to have the record transmitted to the court of appeals after reopening is granted, pursuant to the usual procedure on appeal, the court of appeals may request from the clerk of the trial court any portion of the record that it wishes to review in its consideration of the application.

Where matters outside the record are raised that must be resolved in order to reach a determination of the relevant issues, and where the usual rules regarding preservation of issues for appeal are not applicable, the court of appeals may order that a hearing be conducted to determine these factual questions.

Finally, the "appropriate judgment" under division (B)(9) may include a remand to the trial court, a modification of a judgment, or entering the judgment that the court of appeals concludes should have been entered by the trial court.

Appendix M-3

28 U.S.C. § 2254 (d)

Statotory Provision

28 U.S.C § 2254(d)

(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; 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.

Appendix M-3 (A)

28 U.S.C. § 2254 (e)

Statutory Provision

28 U.S.C. § 2254 (e)

(e)
(1) 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.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
(A) the claim relies on—
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Appendix M-4

Ohio Revised Code § 2953.21 et seq.

Statutory Provision

ORC Ann. 2953.21 et seq.

Current through File 85 (HB 184) of the 134th (2021-2022) General Assembly; acts signed as of March 14, 2022.

§ 2953.21 Petition for postconviction relief.

(A)

(1)

(a) A person in any of the following categories may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief:

(i) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States;

(ii) Any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict;

(iii) Any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that 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 person's case as described in division (D) of section 2953.74 of the Revised Code provided results that 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;

(iv) Any person who has been convicted of aggravated murder and sentenced to death for the offense and who claims that the person had a serious mental illness at the time of the commission of the offense and that as a result the court should render void the sentence of death, with the filing of the petition constituting the waiver described in division (A)(3)(b) of this section.

(b) A petitioner under division (A)(1)(a) of this section may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(c) As used in division (A)(1)(a) of this section:

(i) Actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available

admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(ii) "Serious mental illness" has the same meaning as in section 2929.025 of the Revised Code.

(d) As used in divisions (A)(1)(a) and (c) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to July 6, 2010.

(e) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1) (e), (A)(1) (f), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:

(i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

(ii) For any witness with respect to whom division (A)(1) (e)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

(f) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1) (e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.

(g) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1) (e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or

undue burden or expense, including but not limited to the orders described in divisions (A)(1) (h)(i) to (viii) of this section. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

(h) If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order under division (A)(1) (g) of this section and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery as described in division (A)(1) (e) of this section. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case shall a court require a petitioner who is indigent to pay expenses under those provisions.

Before any person moves for an order under division (A)(1) (g) of this section, that person shall make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order under division (A)(1) (g) of this section shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

The orders that may be made under division (A)(1) (g) of this section include, but are not limited to, any of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the court;

(vi) That a deposition after being sealed be opened only by order of the court;

(vii) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(viii) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(i) Any postconviction discovery authorized under division (A)(1) (e) of this section shall be completed not later than eighteen months after the start of the discovery proceedings unless, for good cause shown, the court extends that period for completing the discovery.

(j) Nothing in division (A)(1) (e) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.

(k) Division (A)(1) of this section does not apply to any person who has been convicted of a criminal offense and sentenced to death and who has unsuccessfully raised the same claims in a petition for postconviction relief.

(2)

(a) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1)(a)(i), (ii), or (iii) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(b) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1)(a)(iv) of this section shall be filed not later than three hundred sixty-five days after the effective date of this amendment.

(3)

(a) In a petition filed under division (A)(1)(a)(i), (ii), or (iii) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(b) A person sentenced to death who files a petition under division (A)(1)(a)(iv) of this section may ask the court to render void the sentence of death and to order the resentencing of the person under division (A) of section 2929.06 of the Revised Code. If a person sentenced to death files such a petition and asks the court to render void the sentence of death and to order the resentencing of the person under division (A) of section 2929.06 of the Revised Code, the act of filing the petition constitutes a waiver of any right to be sentenced under the law that existed at the time the offense was committed and constitutes consent to be sentenced to life imprisonment without parole under division (A) of section 2929.06 of the Revised Code.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A)(1)(a)(i), (ii), or (iii) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(6) 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 petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on the length of, a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to

death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.

(B) The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1) (e) of this section is filed shall docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1) (e) of this section is filed immediately shall forward a copy of the petition and a copy of the request if filed by the petitioner to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately shall forward a copy of the request to the petitioner or the petitioner's counsel.

(C) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1) (e) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.

(D) The court shall consider a petition that is timely filed within the period specified in division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

(E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Division (A)(6) of this section applies with respect to the prosecuting attorney's response. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

With respect to a petition filed under division (A)(1)(a)(iv) of this section, the procedures and rules regarding introduction of evidence and burden of proof at the pretrial hearing that are set forth in divisions (C), (D), and (F) of section 2929.025 of the Revised Code apply in considering the petition. With respect to such a petition, the grounds for granting relief are that the person has been diagnosed

with one or more of the conditions set forth in division (A)(1)(a) of section 2929.025 of the Revised Code and that, at the time of the aggravated murder that was the basis of the sentence of death, the condition or conditions significantly impaired the person's capacity in a manner described in division (A)(1)(b) of that section.

(G) A petitioner who files a petition under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(2) If division (G)(1) of this section does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(3) The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) or (2) of this section.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, except as otherwise described in this division, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the court finds grounds for relief in the case of a petitioner who filed a petition under division (A)(1)(a)(iv) of this section, the court shall render void the sentence of death and order the resentencing of the offender under division (A) of section 2929.06 of the Revised Code. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(I) Upon the filing of a petition pursuant to division (A)(1)(a)(i), (ii), (iii), or (iv) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(J)

(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or

reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the

Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

ORC Ann. 2953.22

Current through File 85 (HB 184) of the 134th (2021-2022) General Assembly; acts signed as of March 14, 2022.

§ 2953.22 Hearing.

If a hearing is granted pursuant to section 2953.21 of the Revised Code, the petitioner shall be permitted to attend the hearing. Testimony of the prisoner or other witnesses may be offered by deposition.

If the petitioner is in a state correctional institution, he may be returned for the hearing upon the warrant of the court of common pleas of the county where the hearing is to be held. The approval of the

governor on the warrant shall not be required. The warrant shall be directed to the sheriff of the county in which the hearing is to be held. When a copy of the warrant is presented to the warden or other head of a state correctional institution, he shall deliver the convict to the sheriff, who shall convey him to the county. For removing and returning the convict, the sheriff shall receive the fees allowed for conveying convicts to the correctional institution.

ORC Ann. 2953.23

Current through File 85 (HB 184) of the 134th (2021-2022) General Assembly; acts signed as of March 14, 2022.

§ 2953.23 Time for filing petition; appeals.

(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) (c) 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) (d) 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 attorney may file a response or briefs that exceed the limit specified for the answer or briefs.

Appendix M-5

United States Constitution, Amendment VI

United States Constitution Amendment VI

Amendment VI Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix M-6

United States Constitution, Amendment X

United States Constitution Amendment X

Amendment X Powers reserved to states or people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appendix M-7

United States Constitution, Amendment XIV

United States Constitution Amendment XIV

Amendment XIV, Section 1

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix N

Cody v. Sheldon U.S. District Court numbered habeas record docket sheets for trial court State v. Cody Cuyahoga county common pleas No. CR-12-565050 A showing 3/19/2013 No Contact Order and petitioner's 7/26/2013 trial court motion objecting to trial court's No Contact Order's bar to the opportunity to access prospective counsel because he wanted to retain outside counsel of choice:

"7/26/2013 D1 Mo Defendant's Continuing Objection of Record to Opportunity to Retain Outside Counsel/ Related Motion"

				DEFENDANT'S MOTION FILED 2/4/2013 ORAL ARUGMENT REQUESTED TO CHANGE CAPTION IS DENIED. 04/15/2013 CPROB 04/15/2013 12:09:09
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/12/2013 FOR ORAL ARGUMENT FOR RELEIF FROM PRE JUDICIAL JOINDER ON COUNTS 13 THROUGH 24 IS DENIED. 04/15/2013 CPROB 04/15/2013 12:05:57
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/4/2013 TO ALLOW DEFENDANT TO PRESENT OPENING STATEMENT AT CLOSE OF STATES CASE IS DENIED. 04/15/2013 CPROB 04/15/2013 12:04:54
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/4/2013 FOR PROCESSING UNDER PAPER FILING SYSTEM IS DENIED. 04/15/2013 CPROB 04/15/2013 12:02:11
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/12/2013 TO DISMISS UNFAIR PREJUDICE MOTION FOR GAG ORDER AND ORAL ARGUMENT REQUESTED TO LIFT GAG ORDER IS DENIED. 04/15/2013 CPROB 04/15/2013 11:54:04
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED ON 2/6/2013 TO WITHDRAW SPECIFIC EX-PARTE MOTIONS FOR COMPUTER EXPERT, LITIGATION EXPERT, FORENSIC ACCOUNTANT AND INVESTIGATOR IS GRANTED. 04/15/2013 CPROB 04/15/2013 11:48:15
04/15/2013	04/15/2013	N/A	CS	COURT REPORTER FEE
04/11/2013	04/12/2013	N/A	JE	CRIMINAL DEPOSITION OF RONNIE D. BRITTAN HELD 04/11/2013 CPROB 04/11/2013 16:41:33
04/09/2013	04/09/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO DISMISS/SUPPRESSRE: COUNT 24 VOID FOR VAGUENESS/I INSUFFICIENT NOTICE OF OFFENSE/ LACK OF CUSTODIAL CONTROL OF EVIDENCE.
04/09/2013	04/09/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION CONCOMITANT TO APPOINTMENT AS COUNSEL, FILED. PRO-SE
04/08/2013	04/09/2013	P	MO	STATE OF OHIO SUPPLEMENTAL WITNESS LIST, FILED.
04/08/2013	04/08/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO DISMISSS FOR TAMPERING WITH EVIDENCE, FILED.
04/05/2013	04/05/2013	D1	SH	MAHONING COUNTY SHERIFF DEPT SERVICE FEE $14.00 SS 885558
04/05/2013	04/05/2013	D1	SH	MAHONING COUNTY SHERIFF DEPT SERVICE FEE $14.00 SS 887850
04/05/2013	04/05/2013	D1	SH	ATHENS COUNTY SHERIFF DEPT SERVICE FEE $14.00 SS 887849
04/05/2013	04/05/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION FOR FORMER DEFENSE COUNSEL TO TURN OVER WORK PRODUCT AND TO DISMISS ADVISORY COUNSEL, FILED.
04/05/2013	04/05/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA MOTION TO DISMISS COUNTS 1-11: INCOMPREHENSIBILITY OF CONFLICTING MENS REA REQUIREMENTS- RECKLESSNESS, FILED.
04/05/2013	04/05/2013	P	MO	STATE OF OHIO NOTICE OF DEPOSITION, FILED.
04/04/2013	04/04/2013	P	MO	STATE OF OHIO REPLY TO MOTION RE: LIMINATION OF THEFT, MONEY LAUNDERING COUNTS TO OHIO MONEY, FILED.
04/04/2013	04/04/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTIONT O COMPEL SUBPOENAS DUCES TECUM RE: ACS, CPS, CSI, FILED.
04/04/2013	04/04/2013	P	MO	STATE OF OHIO MEMROANDUM CONTRA MOTION TO SUPPRESS IN LIMINE / DISMISS EVIDENCE/ CASE RE: VIOLATION OF ATTORNEY-CLIENT PRIVILEGE, FILED.
04/01/2013	04/01/2013	D1	MO	DEFENSE SUPPLEMENTAL OPPOSITION TO STATE OF OHIO MOTION IN LIMINE DEFENSE CLAIM OF UNLAWFUL PURPOSE, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/29/2013	03/29/2013	D1	MO	

				DEFENSE RESPONSE IN OPPOSITION TO STATE OF OHIO MOTION IN LIMINE,FILED. PRO-SE CUYAHOGA COUNTY JAIL (HEARING REQUESTE)
03/28/2013	03/28/2013	D1	MO	DEFENSE RESPONSE TO SECOND STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S EX PARTE MOTION TO SHOW CAUSE, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/28/2013	03/28/2013	D1	MO	DEFENSE REPLY TO STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO COMPEL DISCOVERY: EXTRADITION HEARING TRANSCRIPT, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/28/2013	03/28/2013	D1	MO	DEFENSE REPLY TO STATE OF OHIO MEMANDRUM CONTRA MOTION FOR FURTHER DISCOVERY AND TO COMPEL PRODUCTION OF BANK RECORDS, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/28/2013	03/28/2013	D1	MO	DEFENSE MOTION TO DISMISS COUNTS 1-11: INCOMPREHENISIBILITY OF CONFLICTING MENS REA REQUIREMENTS - "RECKLESSNESS", FILED. PRO-SE CUYAHOGA COUNTY JAIL ORAL ARGUMENT REQUESTED
03/28/2013	03/28/2013	D1	MO	DEFENSE MOTION TO DISMISS: DENIAL OF BASIC AND INTEGRAL RIGHTS, TOOLS AND SERVICES IN PREPARATION FOR TRIAL AND AT TRIAL, FILED. (PRO-SE)
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO COMPEL DISCOVERY: EXTRADITION HEARING TRANSCRIPTS.
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE O OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO MERGE COUNTS 3-9 AND COUNTS 10-11.
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S EX PARTE MOTION TO SHOW CAUSE.
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA MOTION FOR FURTHER DISCOVERY AND TO COMPEL PRODUCTION OF BANK RECORDS.
03/25/2013	03/25/2013	D1	MO	DEFENCE REPLY TO STATE'S RESPONSE MEMO TO DEFENSE DEMAND FOR MISSING BANK RECORDS, ETC. FILED 2/20/2013, FILED PRO-SE CUYAHOGA COUNTY JAIL
03/25/2013	03/25/2013	D1	MO	DEFENSE REPLY TO STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION FOR FURTHER DISCOVERY, FILED PRO-SE CUYAHOGA COUNTY JAIL
03/22/2013	03/22/2013	N/A	JE	NUNC PRO TUNC ENTRY AS OF AND FOR 02/27/2013. PRETRIAL SET FOR 04/11/2013 AT 01:30 PM. STATE'S MOTION TO CONDUCT CRIMINAL DEPOSITION ON RONNIE BRITTIN IS GRANTED. 03/22/2013 CPROB 03/22/2013 10:01:05
03/21/2013	03/21/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION FOR FURTHER DISCOVERY: COUNT 1 AND FOR EXPANDED BILL OF PARTICULARS, FILED.
03/21/2013	03/21/2013	P	MO	STATE OF OHIO MOTION IN LIMINE: DEFENSE CLAIM OF LAWFUL PURPOSE, FILED.
03/20/2013	03/20/2013	D1	MO	DEMAND AND MOTION FOR DISCOVERY, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/19/2013	03/19/2013	D1	MO	DEFENSE REPLY TO STATE'S MEMO CONTRA DEFENDANT'S MEDICAL TREATMENT, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/19/2013	03/19/2013	D1	MO	DEFENSE MOTION IN LIMINE TO SUPPRESS ALL PERSONAL IDENTIFYING INFORMATION OF MEMBERS , OR LACK THEREOF, AS EVIDENCE AT TRIAL, FILED. PRO-SE CUYAHOGA COUNTY JAIL (ORAL ARGUMENT REQUESTED)
03/19/2013	03/19/2013	N/A	JE	DEFENDANT IS RESTRICTED TO HAVE NO CONTACT BY PHONE, MAIL OR SOCIAL VISITS 03/19/2013 CPROB 03/19/2013 08:16:38

Appendix N

CUYAHOGA COUNTY
COURT OF COMMON PLE

CR12565050-A 80440720

STATE OF OHIO,
PLAINTIFF

V.

BOBBY THOMPSON,
DEFENDANT

RECEIVED FOR FILING
JUL 26 2013
CUYAHOGA COUNTY
CLERK OF COURTS
By Deputy

DEFENDANT'S CONTINUING OBJECTION OF RECORD TO OPPORTUNITY TO RETAIN OUTSIDE COUNSEL / RELATED MOTION

POSTED

DEFENDANT HAS BEEN BLOCKED BY JE OF THIS COURT 3.19.2013, AND BY THE DENIAL OF, OR NON-RULING UPON, OTHER DEFENSE MOTIONS, FROM (A) ANY FACILITY, SUCH AS A CLEVELAND PAPER, OR INTERNET, YELLOW PAGES TO RESEARCH CONTACT INFORMATION FOR PRIVATE PRACTICE CLEVELAND ATTORNEYS, AND (B) FROM MAKING ANY TELEPHONE CALLS WHATSOEVER OTHER THAN PAID-FOR-IN-ADVANCE PHONE CARD CALLS AND THEN ONLY TO MR. PATITUCE [1]; AND (C) MAIL, SOCIAL OR PHYSICAL CONTACT WITH ANY PERSON OTHER THAN MR. PATITUCE FOR THE PURPOSE OF HAVING SUCH PERSON CONTACT AN ATTORNEY CONCERNING PRIVATE RETENTION FOR THE DEFENDANT.

INDEED THE DEFENDANT WAS PLACED INTO "DISCIPLINARY PUNISHMENT" ON TOP OF HIS ISOLATION STATUS FOR 5 DAYS FOR PASSING A NOTE TO A FELLOW INMATE TO REQUEST THE INMATE TELL HIS ATTORNEY THE DEFENDANT WISHED TO DISCUSS HIS PRIVATE RETENTION FOR THE DEFENDANT.

THE DEFENDANT OBJECTS OF RECORD TO THIS CONTINUING PROCESS OF DENIAL ONWARD FROM AT LEAST 3.19.2013 AS A VIOLATION OF HIS RIGHT TO RETAINED COUNSEL OF CHOICE PROVIDED BY THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1 SEC. 10 OF THE OHIO CONSTITUTION; AND MOVES TO LIFT SUCH BARS EFFECTIVELY FORTHWITH AND/OR TO DISMISS THIS CASE WITH PREJUDICE.

RESPECTFULLY SUBMITTED,

BOBBY C. THOMPSON
COUNSEL PRO SE

P.O. BOX 5600
CLEVELAND OH 44101

CLERK OF COURT: PLEASE FILE AND COPY AS PERMITTED / REQUIRED,

1. GENERAL POPULATION CCCC INMATES, WHICH STATUS DEFENDANT HAS BEEN DENIED PURSUANT TO THE 3.19.2013 JE, ARE PERMITTED UNLIMITED COLLECT TELEPHONE CALLS TO ANY PERSON, CCCC "INMATE HANDBOOK," (REV. JAN. 2012), "INMATE USE OF TELEPHONE, P. 17.

Appendix N-1

Contra to Caplin and Gonzalez-Lopez, supra, the primary dispositive error the R&R makes, at pp. 44-45, is premising its analysis, without authority, on the assumption that a defendant, sua sponte "declared" by a trial court financially qualified for appointed counsel, does not retain a right (while, in Cody's case, after pro se appointment) to obtain, or even to attempt to obtain, private counsel. Any purported waiver of right to access outside counsel, purportedly made prior to the time Cody was experiencing, in the spring of 2013, pro se representation difficulties, was, moreover, revocable. U.S. v. [redacted] Proctor, 166 F. 3d 396, 405 (1st Cir. 1999); Ontiveros, supra; Merefield, supra.

Claim 16/17 Objection #1

The R&R, pp. 46-54, upon a required, substantive de novo review of Claim 16/17 (erroneously, at law, never made),[1] failed to recommend the petition's granting of Claim 16/17 (which is found at Doc. 42: 1669, but limited as stated, Traverse, p. 1) and which is, contra to the R&R's varied descriptions of it, supra, IATC for failure, pre-trial, to pursue, discover and develop evidence continuing, consecutively into counsel's abandonment at trial, of Cody's

1. Because the R&R's procedural bar was erroneously applied (R&R, pp. 52, 54; see, infra, pp. 34-38, 39-30), there was no real substantive review of the meritorious 16/17 claim upon which habeas relief should have been recommended. Moreover, non de-novo review of state court procedural default reasoning, which the R&R applied to both "claims" 16 and 17 (or, merely made conclusory statements about the procedural bar analysis meeting de novo standards) was erroneous because procedural bar analysis must always be de novo (Abela, supra, 380 F. 2d at 922; Alexander, supra, 311 Fed Appx 875); and because the instant issues addressed involved mixed questions of fact and law; and because Schlup "new" evidence (see, infra, pp. 28-29) is involved. See Traverse, pp. 5-6, with cited cases.

defenses factually based upon Cody's employment by the Central Intelligence Agency and the office of President George W. Bush as arising out of, pertinent to the Claim, Cody's 2018-19 state court motion for new trial/PCRP ("MNT/PCRP") proceedings, a claim made therein of evidence of those employments, detailed at Traverse, pp. 17-29, 30-54. In so failing, the R&R's analysis used the same types of "building blocks" referenced in Claim 4, Objection #1 supra. The errors in that analysis have the following specifications:

(1) The R&R errs factually and at law in misconstruing Claim 16/17 into two distinct claims,[1] presenting reasoning for dismissing each considered separately (pp. 46-53). These separations invited the erroneous recommendations, contra the intertwining argued and factually detailed (Traverse, pp. 22-25), as the continuum of counsel's actions failing to investigate and develop evidence on the pertinent CIA/White House employment-based defenses → his failures to affirmatively present or argue those defenses at trial, or to argue at all (abandonment of those defenses at trial, including refusing to call Cody to testify at trial), as intertwining IAC doctrine holds can, and should, be considered, because IAC actions are to be cumulated, and are to be considered under a totality of the circumstances. See, Strickland, 466 U.S. at 690 (1984); Dugas v. Coplan, 428 F.3d 317, 332 (1st Cir. 2005); Morales v. Mitchell, 507 F.3d 916, 936 (6th Cir. 2007); Goodman v. Bertrand, 467 F.3d 1022, 1023-31 (7th Cir. 2006).

1. The R&R, pp. 53-54, also misstates Cody's argument on IATC in "Claim 17" as being based on McCoy. R&R, pp. 52-53, p. 52 n. 15. Cody used McCoy, in the Traverse made to serve as his petition, only in McCoy's reference to prior U.S. Supreme Court authority on the requirement that the defendant, not the defense counsel, is the master of his defense, and in McCoy's factual context - as pointed out by three justices - that Mr. McCoy was being allowed to be that master by the majority decision, making it irrelevant whether his factual theory of his own case was incredible or "bizarre." None of Cody's pertinent argument in the traverse had anything to do with the retroactivity of McCoy, death-penalty cases, or admissions of guilt by defense counsel.

Specifications: Habeas Procedural Bar of "Claim 16" Portion of Claim 16/17 (R&R pp. 47-49)

(1) The R&R, p. 47 errs, on a mixed matter of fact and law, in its first reasoning for a procedural bar,[1] reaching, erroneously, the conclusion Cody cannot argue IATC[2] as excuse, based, in part, on the R&R's assertion the "claim 16" portion of Claim 16/17 did not "arise out of" the 2018 MNT/PCRP proceedings, but, instead, arose out of a 2015 state court PCRP decision[3], which means, therefore, we must turn to the latter proceeding to analyze procedural default of, or substantive issues pertaining to, "claim 16."

As the R&R takes cognizance of the "arising out of" concept instantly control, procedurally, a number of other consequential issues which are, or might be, dispositive of "claim 16," the R&R, p. 47 clearly errs, as a factual matter, by arguing that Cody did not exhaust, for fair notice, his IATC "claim 16" in the 2018 MNT/PCRP proceedings. (Respondent's Ex. 87) dealt with identical subject matter, divided initially into two trial court ("t.c.") actions arising under two separate state statutes; the appellate court combined the actions. First Heading itself, counsel determined himself as having no responsibility for discovering any evidence of Cody's CIA/White House affiliation at any time." Traverse, p. 25, citing Doc. 42-3: 3051 (Cody's MNT/PCRP affidavit, ¶ 44). The R&R also ignores, on this point, the explicit assignments to the appellate court of counsel's IATC for failing to investigate and develop this evidence, in Cody's opening merit brief, Doc. 42-3: 3318-19, #'s (5) and (10), and Cody's Ohio Supreme Court filing the Traverse cites, p. 4, n. 9. In the MNT/PCRP t.c. proceedings, Cody alleged, as part of

Cody's combined appeals opening brief argued, in the

1. One aspect of this reasoning deals with waiver by Cody of argument. Cody did not contradict himself in arguing, on Claim 16/17, counsel's ineffectiveness in not investigating, developing and attempting to acquire, and use, evidentiary item after item of Cody's CIA-based defenses, and, simultaneously, that counsel was unavoidably prevented from providing one piece of that evidence, the 2017 CIA letter. See, infra, p. 26. (Cody's unavoidable prevention argument relates to an "actual compliance" Maupin nullification of the "untimeliness-based-on-avoidable-prevention" state law procedural default; see, infra, p. 30).

2. Cody does not allege IAAC as an excuse for a procedural bar to "claim 16."

3. In the MNT appellate court decision no procedural default is invoked, other than "untimeliness-based-on-avoidable prevention," which only was applied by the state court to the "claim 17" portion of Claim 16/17 present in that proceeding. Both "claims" were present in the proceeding, text, infra, this page.

the claim, trial counsel took no responsibility to attempt to acquire any CIA documentary evidence of Cody's affiliation or to pursue a "CIA agent" [State's brief wording] defense at trial. T.C. Motion for Leave to File a Motion for New Trial (Doc. 42-3: 3032-33); T.C. In-Limine Motion for New Trial (not included in Cody's copy of record; Cody's habeas motion for record inclusion denied) (same) motion language also contained at Doc. [redacted] 42-3: 3032-33, Doc. 42-3: 3147-48, and Doc. 42-3: 3163; 2018 T.C. PCRP (Doc 42-3: 3147-48; Doc. 42-3: 3163). The operability of the 2018 MNT PCRP decision to "claim 16" is argued further, p. 27.

(2) Supplementally, the R&R's reasoning also fails because counsel's ineffectiveness in "claim 16," as argued by Cody, dealt with counsel's failure to investigate Cody's CIA/White House background, separate and apart from his failure to produce the CIA's FOIA letter, a request for which by counsel would have been futile for the reasons Cody factually presented in his MNT affidavit (Traverse, p. 24); the fact such an FOIA request by counsel to the CIA would have been futile, thus making that evidence not "newly discoverable" under state law, however, does not mean that counsel did not ignore his responsibilities in not making such a request, nor that he was otherwise ineffective in failing to even attempt to make any other investigatory effort related to Cody's CIA/White House affiliation defense evidence, including failing to even produce Cody's own testimony at trial. More important, however, to the failure of the R&R's reasoning related to its procedural bar conclusion, is that counsel's ineffectiveness in failing to obtain the CIA FOIA response (and Cody's, and the OGIS explanation of it)[2] (whether Cody argued it or not), identified as such in the MNT appellate court's conclusory decision that the evidence was discoverable (relevant to Ohio's MNT statute, but not to Schlup's "new" test; and an off-record "fact" not available for consideration in the 2015 state court PCRP proceeding); a "fact"

2. By definition, those explanations of the response could not chronologically have been made until the CIA response letter was issued; and counsel did not know what, if any, or how, the CIA response to an FOIA request would be, until he attempted it. It is the MNT appellate court, not Cody, who charges counsel with the deficiency of failing to produce the CIA FOIA response.

shedding new light and perspective on Cody's allegations of counsel's other failures to investigate Cody's CIA/White House employment defenses all the above making inoperable the findings of the 2015 PCRP court cited by the R&R, p.48. Moreover, the 2018 state court (the same court) never invokes res judicata related to either the App.R.26(B) or its 2015 PCRP decision as a procedural default to the 2018 MNT/PCRP claims or action (or as any other form of controlling precedence)[1] making the use of res judicata as a habeas bar invalid under Hill's (supra), at 842 F.3d, at ***30,31, "clearly and plainly stated" proscription; and making the new CIA response and Cody's and the U.S. Office of Government Information Services ("OGIS")'s analysis of it, and the 2018 decision on "discoverability" itself, the root of the "stem" of the "claim 16" IATC allegations upon which the "...[H]abeas court may... consider [the substantive] claim of federal constitutional error stemming from the denial of [the] motion for new trial." [Emphasis added]. Bolan v. LaRose, 2014 U.S. Dist. LEXIS 140565 at *19 (N.D.Ohio), adopted, 2014 U.S. Dist. LEXIS 139684. The R&R's reference, p.48, to no IATC procedural bar excuse applying to Cody's "claim 16" as raised in his 2018 state MNT court case, by reason, this time, of the R&R (not state-court decision) raised res judicata bar relating backward to Cody's App.R.26(B) case, would, on the other hand, push "claim 16" back into the App.R.26(B) case, whereupon this Court should make a de novo, supra, independent and careful review of what would be an underlying "claim 16" there, pursuant to the clearly merits discussion of the claim there. See, App.R.26(B) decision, Doc. #2-3, 2949-58. Such a review, however, needs to consider all the "miscarriage" evidence testified to in Cody's traverse sworn statement ("SS"), pp.19-22; 31-48.

(3) Even if the 2015 PCRP decision were the "operable" one (in reality, an R&R conclusion of a res judicata bar to "claim 16" in the state court 2018 MNT case based on the 2015 PCRP case) for decision-making on "claim 16" no such habeas bar of procedural default would apply to the claim in the 2015 PCRP decision because counsel's failure to investigate or pursue any affirmative evidence of Cody's CIA/White House employment defenses (see R&R, p.47, n.13) was evidenced by counsel's IATC activities off-record evidenced, in part, by discussions with Cody, also off-record. See Hill, supra, 842 F.3d at *936; Hutton v. Mitchell, 839 F.3d 486, at *504 (6th Cir., 2016).

The 2018 state court decision, by its own terms considered evidence shedding new light on Cody's CIA/White House employment-based defenses not introduced at trial

1. "State procedural bars are not immortal; they may expire because of later actions by state courts." Ylst v. Nunnemaker, 501 U.S. 797, 801-02 (1991).

(the 2019 CIA response to Cody's FOIA request, and the Cody/DOJ's explanations of it (including Cody's MNT affidavit), as invoking National Security Act of 1947-authorized state secrets privilege to deny Cody his CIA files relating to his covert career, including the Navy association operation) which emphatically inform the requirement of habeas intertwining of that evidence, in fact, on both procedural default of Cody's state law post-conviction cases, and a merits analysis of miscarriage as a stand-alone claim. Schlup, 513 U.S. at 327; Herrera v. Collins, 506 U.S. 390, 400, 404-05 (1993); McQuiggan v. Perkins, 569 U.S. 383 (2013).

Miscarriage of Justice Objection #1 (R&R, pp. 49-52):

In making its analysis reaching its report on miscarriage of justice the R&R ignores argument, and the transcripts 55 found at both pp. 19-22 and 31-48 (including but not limited to the nature of "actual innocence" being "legal innocence" under Penney v. U.S., 870 F.3d 459, at **9-10 (6th Cir. 2016) and Smith v. Warden, 780 Fed Appx. 208, 221 (6th Cir. 2019); the "one juror" standard for outcome-determinativeness of miscarriage (English v. Romanowski, 602 F.3d 730, 731 (6th Cir. 2011); the standard for consideration of "new" evidence found at House v. Bell, 547 U.S. at 537-38; the relationship between a procedural default and an independently applied substantive miscarriage analysis under Schlup; the nature of the "new reliable" Schlup standard (See, in part, Reed v. Shelden, 2020 U.S. Dist. LEXIS 7658, at *7 (N.D. Ohio) (miscarriage evidence presented in the habeas proceeding is "new" under Schlup if it was not presented at trial)); fails to focus on the MNT proceeding evidence described above, this page, 1st four lines, as the only habeas-relevant Schlup "new" evidence present in that state court proceeding for miscarriage analysis purposes; ignores the private fundraising by Cody, as a covert operative in support of CIA operations, not just as "decades old" activities, but as establishing the history of such programs (Nixon administration (1972 veterans group fundraising in support of military/veterans affairs policies); Reagan administration (1980's, religious charity fundraising in support of overthrowal of Nicaraguan Sandinista regime and Communist regimes in Eastern Europe); George W. Bush administration (2001-2009, Navy association fundraising in support of substituting foreign military forces for ours in the Afghan and Iraqi theatres of operations in the Global War on Terror)); ignores Cody's specific testimony on the direction (the R&R mistakenly labelling it "acquiescence") by identified CIA and White House officers to Cody to make the Navy Association expenditures and to take the other administrative and operational acts he did under the lawful authority of the President, and the CIA established in the SS; ignores the relevance and outcome-determinativeness (transcripts, pp. 48-54) of the SS new evidence, including but not limited to the distinction between no acts/no rews of theft (and therefore no money laundering) because all money raised was spent, in all cases, on activities

and purposes which did not "deprive" the donor (as required by O.R.C. § 2913.02(A)) of the property or purposes in making the donation, as caused by Cody operating under CIA and White House direction; ignores as a separate and distinct mens rea issue (from any actus reus issue), no specific mal-intent (including ignoring the standard for proof of intent, on weight of circumstantial evidence) under State v. Collins, 2013-Ohio-488, at ¶P16 (8th Dist.) and Dal v. Grimes, 332 F. 2d 1014, 1017 (6th Cir. 1964); ignores the willing of the specific mal-intent to the tampering counts by Cody signing his name "Bobby Thompson" to OAG charitable regulatory office records, and the remaining identity fraud county requirements of that intent for an unlawful purpose; ignores the required statutory tying required of an Ohio Corrupt Activity verdict to convictions on Cody's other "crimes" above (Traverse, p. 53, n. 89); ignores or minimalizes (in its erroneous (factually) "decades old" CIA employment comment) the length (1967-2012) of Cody's SS detailed covert activities establishing (1) relevant to the State's burden of proof at any new trial, as Cody's CIA compensation, his cash life-savings of the money seized in Portland, $981,500, and greater sums legitimately available personally to Cody, during the years 2001-2010, and (2) Cody's access cachet in his personal and operational contacts with both presidents Bush, over all, the R&R ignores the substantive content of the Traverse SS, pp. 31-48, as if it had never been proffered. In these procedures described, the R&R arrives at dispositional error in each case, of law, of fact, or upon mixed questions of fact and law, in recommending non-applicability of miscarriage. Cody's miscarriage claims also applies as a habeas bar excuse, on all other claims the R&R, at pp. 59-63, summarily reports contra.

Procedural Bar of "Claim 17" (R&R, pp. 52-54)

The R&R concludes habeas procedural bar of "claim 17" erroneously because (1) it does not apply the requirement of de novo review to the "untimeliness" procedural default annunciated by the MNT appellate court, required by Abela v. Martin, 380 F. 3d 915, 922 (6th Cir. 2004), followed Alexander v. Smith, 311 Fed. Appx. 875 (6th Cir 2009); (2) it ignores the Traverse, pp. 26-30, argument for excuse of actual compliance; (3) it ignores the inherent finding by the MNT state appellate court, of IATC deficiency for failure to produce the 2012 CIA FOIA response (and the fact-based explanation of it) earlier, serving as habeas procedural bar excuse, separate from any excuse argument made by Cody[1]; (4) it ignores (p. 53, without citation(s)), on

1. As argued in the traverse, counsel was "unavoidably prevented" from producing the 2012 FOIA response. However, this failure to produce does not affect, or excuse, his refusal to investigate, develop or produce any other affirmative CIA/White House employment defenses evidenced (Traverse, p. 24), including Cody's own testimony. Claim 16/17, as referenced in the state MNT action, informed the state court about. That latter IATC, as Cody argued, excuses the procedural default of Claim 16/17 in the MNT action, as does, separately, actual compliance.

IATC, Maupin's "independence of the constitutional claim" prong as part of its "plainly applicable" requirement for state-law procedural default to be the basis of the habeas bar, nulling the state court's basis of "untimeliness" for its default because that reason is intertwined with counsel's failure to produce the CIA response and following explanatory evidence, an IATC federal law question, see, Lee v. Kemna, 534 U.S. 362, 375 (2002) and, supporting further, holding a nexus between counsel ineffectiveness and the claim does not bar that ineffectiveness from serving as the excuse, Restrepo v. Kelly, 178 F.3d 634, 641, 642-43 (2d Cir. 1999), citing Murray v. Carrier; Cook v. Lynaugh, 821 F.2d 1072, 1078-79 (5th Cir. 1987); Dietz v. Money, 391 F.3d 804, 811 (6th Cir. 2004); Sanders v. Cotton, 398 F.3d 572, 580 (7th Cir. 2005); (5) the R&R erroneously asserts, p.53, without citation, that Maupin-based excuse be "newly discovered;" (6) the R&R erroneously contends, pp.52-53, the "adequacy" prong excuse of Maupin, Stone, Beard and Walker (as applied to a discretionarily definitional aspect of an Ohio statute or, by extension, to a rule of court)[1] with Maupin's "plainly applicable" excuse (see, Traverse, p.26 (ii)), and "no enforcement" nulling excuse (Traverse, p.25 (i)), producing the implied erroneous conclusion the MNT appellate court did not, simply, for its procedural default decision substitute the words "no unavoidable prevention" for the word "untimeliness" without explaining what the unavoidable prevention was[2] (which did not, additionally, make the decision a "summary ruling" on the merits that absenced nulling Harrington's applicability (cf. R&R, p.37); and (7) it ignores, in reporting that a de novo review of the MNT court default decision is barred by law, firmly established habeas law in this Circuit, that AEDPA's "presumption of correctness" does not apply to a state court conclusion, however reached, on an IATC claim. Higgins v. Renico, 470 F.3d 624, 630 (6th Cir. 2006).

Conclusion

Your petitioner, John Cody, pro se, timely, and pursuant to F.R.Civ.P. 72(b)(2)-(3) and F.R.Civ.P. 6(e), respectfully objects to the Report & Recommendation dated 3.24.2020, and respectfully requests de novo review thereof.

1. These "adequacy" holdings cited may negate Traverse, p.26 argument contra the discretionarily definitional aspect of O.R.Crim.P. 32(B), but do not affect the still applicable Maupin "plainly applicable", "independent" excuse to the MNT court's default decision.

2. Required as part of no deference review by Abela, supra, and Higgins, infra.

Respectfully submitted,
John Cody
Petitioner, pro se

John Cody A651040
O.D.R.C. Mansfield
P.O. Box 788
Mansfield OH 44901-0788
Petitioner, pro se

Certificate of Service

I certify, under penalty of perjury, that I sent, U.S.P.S., postage prepaid, 1st class, the original of the foregoing, for requested filing and docketing, to the Clerk of the U.S. District Court, 801 W. Superior Ave., Cleveland OH 44113, by depositing the same in the O.D.R.C. Mansfield's internal prisoners' outgoing mail system on the 6th day of August, 2020.

John Cody A645040
O.D.R.C. Mansfield
P.O. Box 788
Mansfield OH 44901

Petitioner, pro se

Appendix K

Petitioner's United States Court of Appeals Invited (USCA Form 4) In Forma Pauperis Affidavit Statement of "Issues Which [Petitioner] Wishes to Raise on Appeal" appended merely to evidence petitioner's substantial showing of debatability under 28 U.S.C. § 2253 (c)(2).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: July 29, 2021

Mr. John Cody
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901

Re: Case No. 21-3462, *John Cody v. Tim McConahay*
Originating Case No. 1:18-cv-01787

Dear Mr. Cody,

We received your financial documentation from the district court, however, in order for your motion for pauper status to be considered, the enclosed form must be completed and returned to this office by **August 30, 2021**.

Sincerely yours,

s/Maria T. Welker
Case Manager
Direct Dial No. 513-564-7025

cc: Ms. Stephanie Lynn Watson

Enclosure (Form 4)

Appendix K

Appendix K

FORM 4. AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

United States Court of Appeals
for the Sixth Circuit

John Cody,
Petitioner]
]

v.] Case No: 21-3462 (mw)

Tim McConahay, Warden
Respondent]
]

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. §§ 1746; 18 U.S.C. §§ 1621.)

This affidavit is only for the temporal scope and jurisdictional aspect of this proceeding only. The affidavit and the answers in it do not apply, nor are they intended to apply, to any proceeding in the Ohio state courts, nor do they constitute any statement of petitioner relative to his qualification for appointed counsel, or his ability to obtain private counsel, in any other proceeding. Nor are these answers an assumption of petitioner about his rights or intent, financial condition - related or not, for the retention of private counsel in the trial court proceedings in the state court.

Signature: [signature] Date: August 10, 2021

John Cody
Petitioner, pro se

The [illegible] petitioner relies to file an appeal in forma pauperis is contained in this Affidavit. Attachment A is incorporated herein at pg. 80. The information in regards to petitioner's finances can be found there.

Affidavit

Attachment A

Issues Which Petitioner Wishes to Raise on Appeal

(Revised from Previous Filings, Which Petitioner Requests Be Ignored)

Petitioner's objective in drafting these issues is to raise only issues which are, or were, dispositive or outcome-determinative, to the granting or denial of certain grounds/claims the habeas petitioner raised, issues involving dispositive errors of fact, of law, or on mixed questions of fact and law, which occurred explicitly or implicitly, in the judgment opinion. Having said that, however, sometimes those errors deal with matters of procedure; and sometimes they deal with substantive matters; and, sometimes they deal with both. Sometimes a dispositional procedural error was dispositive because it was a predicate to a denial of a full or further substantive review which should, or would, have produced an outcome favorable to petitioner's substantive habeas position and argument requesting new trial as the appropriate remedy or, in certain cases, an evidentiary hearing. Sometimes a preliminary substantive error, as a matter of substance, was dispositive because it became a linchpin, or *sine qua non*, substantive predicate for, and therefore became a part of, a subsequent substantive ruling.

Issues petitioner requests this Court consider pertaining to these dispositional errors are organized here in presentation to bring certain of the, because of the issues' similarities or cohesiveness, together for a more comprehensive understanding, even though the same may be addressed, or referenced, at different, or even disparate, segments of the judgment opinion of the district court.

These issues are:

Cody v. Sheldon, 2021 U.S. Dist. LEXIS 73493 (herein "Opinion"), U.S.D.C. No. 1:18CV1787 (Herein record citation "Doc. 75")(Decided April 16, 2021)

SUMMARIZED ISSUES

Ground 4 Issues:

I. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of ineffective assistance of direct appeal counsel ("IAAC")(the overlying claim), for failure to raise the claim of denial of the petitioner's "pure" right to testify at trial (the underlying claim), was to be denied on the merits?

(Issue discussed, with error and prejudice explained, infra, pp. 11-28 , Issues 1-3)

II. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of ineffective assistance of direct appeal counsel ("IAAC")(the overlying claim), for failure to raise the claim of ineffective assistance of trial counsel("IATC")(the underlying claim), for not calling the petitioner to testify at trial, was to be denied on the merits?

(Issue discussed, with error and prejudice explained, infra, pp. 11-28 , Issues 1-3)

III. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim) for failure to raise the claim of IATC because of counsel's belief and and statement that he could not call petitioner because petitioner was temporarily mentally and physically incapable of assisting counsel during examination and cross-examination (the underlying claim), was to be denied on the merits?

(Issue discussed, with error and prejudice explained, infra, pp. 11-28 , Issues 1-3)

IV. Did the Opinion err, on law and the facts, in concluding that the underlying claims in Ground 4 Issues I, II, and III above, were procedurally defaulted?

(Issue discussed, with error and prejudice explained, infra, pp. 28-35 , Issues 4- 7)

Ground 6 Issues:

V. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 habeas claim of IAAC for failure to raise the claim of denial of petitioner's right to access prospective counsel of choice for retention (the underlying claim) was without merit?

(Issue discussed, with error and prejudice explained, infra, pp. 35-45 , Issues 8 - 13)

VI. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 underlying habeas claim of denial of petitioner's right to access prospective counsel of choice for retention was procedurally barred?

(Issue discussed, with error and prejudice explained, infra, p. 45 , Issue 14)

Ground 16/17 Issues:

VII. Did the Opinion err, at law, in concluding that petitioner's Ground 16/17 (or, as referenced in the Opinion's nomenclature, Grounds 16 and 17) were procedurally defaulted?

(Issue discussed, with error and prejudice explained, infra, pp. 45-52 , Issues 15-17)

Miscarriage of Justice Issues:

VIII. Did the Opinion err, on law and the facts, in concluding that petitioner's miscarriage of justice (a.k.a. actual innocence) claim was denied for lack of merit?

(Issue discussed, with error and prejudice explained, infra, pp. 53-77 , Issues 18- 20)

Denial of Motion for Evidentiary Hearing Issue:

IX. Did the Opinion err, at law and on the facts, in denying petitioner's motion for a habeas evidentiary hearing?

(Issue discussed, with error and prejudice explained, infra, pp. 78-79 , Issue 21)

...

For portions of the Magistrate's Report ("R&R") carried over into the Opinion, the Opinion correctly does not invoke any lack of specificity in petitioner's Objections for failure to object to such positions. Where such carryover took place, and petitioner has taken issue herein with the carried over position, the district court was fairly noticed in Cody's Objection's of the gist of his issue herein.

...

Expanded issue discussion is designed to establish that positions of law taken by the Opinion were atleast debatable, or wrong; and that findings of fact made by the Opinion were clearly erroneous.

Ground 4:

Summarized Issue:

I. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim), for failure to raise the claim of denial of the petitioner's "pure" right to testify at trial(the underlying claim), was to be denied on the merits?

II. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim), for failure to raise the claim of IATC (the underlying claim) for not calling the petitioner to testify at trial, was to be denied on the merits?

III. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 4 habeas claim of IAAC (the overlying claim) for failure to raise the claim of IATC because of counsel's belief and statement that he could not call petitioner to testify because petitioner was temporarily mentally and physically incapable of assisting counsel during examination and cross-examination (the underlying claim), was to be denied on the merits?

Expanded Issues Pertaining to Ground 4:

Ineffectve Assistance of Appellate Counsel for Failure to Raise Denial of Right to Testify; and Ineffective Assistance of Trial Counsel with Respect to His Refusal to Call Cody to Testify (Opinion Analysis at Doc. 75:8731-8748):

First Set of Issues:

The first set of issues, with Opinion analysis beginning at Doc. 75:8738, concern Cody's claims (raised first by Cody in his state court App. R. 26(B) application, decided in, and reported at, State v. Cody, 2017 Ohio 1543, 2017 WL 1507211 (Ohio App. 8th Dist.)), of IAAC for failing to raise (first overlying claim)

(see Doc. 75:8732-8742) denial of the "pure" right to testify (the first underlying claim)(see Doc. 75:8746-8749); and for failing to raise (second overlying claim) (see Doc. 75: 8732-8742) ineffective assistance of trial counsel, upon prompting by the trial court, for using a constitutionally impermissible reason [trial counsel alleging Cody's physical and mental incapacities in assisting trial counsel on direct and cross-examination at trial] for trial counsel's refusal to call Cody to testify (the second underlying claim,[1] which, in turn, has two parts: trial counsel's ineffectiveness and the standards for ineffectiveness in general; and, second, an alleged violation of Drope v. Missouri for counsel making Cody's mental and physical incapability to assist counsel his reason for proceeding through trial to conviction with a defendant unable to assist counsel) (see Doc. 75:8742-8748), the overlying claim correctly assumed by the Opinion to be, based upon the legal posture of the case, a conclusion to be reached by the Opinion's basing its findings and holdings on the IAAC claims on nothing but the Opinion's analysis of the lack of merit

[1]: This claim in the first instance can be said to be two separate claims, as first separated by the Magistrate Court's Report ("R&R"). divided by actor culpability (trial court vs. trial defense counsel). See, the Opinion's interpretation of what Cody propounded on this subject at Doc. 75:8744-45,

to the underlying constitutional claims (see Doc. 75:8739, 8745; and 8746[2]), if either underlying claim was meritorious (i.e., if as we will see, Cody did not waive his right to testify), a cause to excuse the procedural default of appellate counsel not raising either claim in Cody's direct appeal. Thus Cody challenges Opinion error on this first set of issues in a context of an Opinion which sets up the framework, that, if petitioner is

[2] The Opinion ties together both appellate counsel ineffectiveness claims to the merits, as to all the underlying claims, of the Opinion's mixed question of law and fact "waiver" defense to the latter claims, denying, in the process, based upon that merits determination, the failure of cause and prejudice, as to the fundamental constitutional rights which are the subject of Cody's constitutional claims, to excuse procedural default based upon appellate failure to raise. Petitioner realizes it is possible, under precedent, to find lack of appellate ineffectiveness while at the same time finding failure to raise a meritorious claim, but neither the Opinion nor the R&R raises that possibility in this case.

found to be correct on appeal on the merits of non-waiver of his right to testify, he prevails on those merits and , at the same time, prevails

on cause and prejudice' to excuse any procedural default (see Doc. 75:8746)

' In the larger context of defense counsel's refusal in which Cody raises his denial, and because the denial affected the framework in which the trial proceeded, as well as the right protected in Cody's personal case, there is a fundamental legal principle being violated here, that a defendant, pursuant to his 6th Amendment autonomy at trial, must be allowed to make his own choices about the proper way to protect his own liberty, and this violation may have signalled fundamental unfairness. McCoy v. Louisiana, 138 S.Ct. 1500, 1511-12 (2018). The larger context of defense cousel's refusal to call Cody to testify relates to his larger refusal, as alleged throughout Cody's numerous post-conviction collateral proceedings on or related to IATC, to pursue, develop or present evidence relating to Cody's CIA employment as defenses to his charges.

This McCoy based point was argued by Cody in his Objections, Doc. 74-1: at originally numbered page 24, n.1 as referenced in the Opinion , in a slight misinterpretation, that the kind of error this denial was, was not to be treated under the harmless error standard. McCoy's description of what rights qualified for structural error were and were not, was not new law (McCoy, id., citing to numerous Supreme Court opinions prior to 2012 in support of the finding, including Arizona v. Fulminante , 499 U.S. 279, 310 (1991)); and that restrictions on this finding, based upon non-retroactivity, did not apply.

Neither the R&R nor the Opinion challenges, on Ground 4 based upon right to testify, that a violation of Cody's right to testify in the context of the claim as made, and his trial, would be structural error; neither raises a harmless error standard. Counsel not calling Cody was not addressed as it being prejudicial or not prejudicial, by either habeas court. However, if in counsel's actions in not calling Cody, if Cody did not knowingly and intelligently waive his right to testify, its IATC is established per se, it was prejudicial per se at law.

Where, without the "new" evidence petitioner presented to the habeas court, the jury that convicted the petitioner had no reason to question the inferences the state drew from its circumstantial case, and trial counsel was ineffective because he failed to investigate and develop leads of, or related to, that new evidence, the standard for miscarriage has been met. Henderson v. Sargent, 926 F.2d 706, 713-14 (8th Cir. 1991), citing Murray v. Carrier, 477 U.S. 478, 498 (1986), Dugger v. Adams, 489 U.S. 401, n.6 (1989). "Failure to pursue the defendant's only realistic defense constitutes ineffectiveness." Henderson , 926 F.2d at **18, concur, Richey v. Mitchell, 395 F.3d 660, at **55 (6th Cir. 2005)(counsel's failure to raise, explicitly, defense based upon lack of specific intent, constituted ineffectiveness; "In making that determination, a court should keep in mind that counsel's function... is to make the adversarial testing process work in the particular case.")

If Cody did, on the other hand, have to show outcome-determinativeness on this issue, of his proferred testimony, he did so in the proffer, in his Traverse, Doc. 57, at originally numbered pages 19-22 and 31-48; and in his description of the evidence's outcome determinativeness in Doc. 57, at originally numbered pp. 48-54, and in his Objections, Doc. 74-1, at originally numbered pp. 28-29, and this matter of what the that proferred evidence would or would not achieve at a new trial, including what the Opinion had to opine about it by summarily adopting the R&R's analysis, is analyzed, supra, for Opinion error, in the Issues section on miscarriage of justice.

of appellate counsel's failure to raise any and all of the underlying right to testify claims, and on any procedural default of the underlying claims (and all their "parts") themselves.

First Set of Issues, on the Standards for Review of Ground 4: Preliminary Issue Dealing with Habeas Standard for Analysis, As to Whether the Opinion Erred in Denying DeNovo Review of the State Court Decision as to Cody's Claim of IAAC for Failure to Raise the "Pure" Denial of Cody's Right to Testify:

1. The Opinion errs factually (starting at 2021 U.S. Dist. LEXIS 73493, at *40) in concluding the App. R. 26(B) decision adjudicated Cody's claim of ineffectiveness of appellate counsel for failure to raise (first overlying claim, supra) the "pure" denial of Cody's right to testify ("first" underlying claim, supra) on the merits (and in performing, therefore, a fully deferential habeas review of this claim) because the sole "analysis" in that App. R. 26(B) decision of that claim, occurring at the decision's P13, constituted "little analysis", a decision issued in scanty fashion, which omits, so important in this day and age, any discussion of fact within its real or as-alleged context, and which, simultaneously, merely moves forward an assumed narrative, and therefore the district court's habeas review of that claim was to be careful and independent of the state court decision, showing only modified deference to it, and further, because, after the Opinion calls, id., at *40, the state court's analysis "somewhat brief:"

(a) P13 was so "brief" on the IAAC for failure to raise and on the underlying claim of denial of "pure" right to testify, it failed to reference the word "waive" or "waiver" by Cody of the right , the habeas Opinion's sole defense for defeating both underlying

claims on the merits and, therefore, the IAAC claims overlying them; and cannot be said to fall into the Opinion's (at Doc. 75:8735) factually inaccurate categorization of P13 as a "careful discussion;" and because

(b) the Opinion cites Williams v. Curtin, 613 Fed. Appx. 461, n.1 (6th Cir. 2015)(unpublished) as its sole authority for the Opinion's ruling on fully deferential review, that "modified AEDPA deference" [the Davie v. Mitchell, 547 F.3d 297, 315 (6th Cir. 2008) doctrine of independent and careful habeas review where there was "little analysis" of an underlying constitutional claim] lacks "continuing vitality," with one of a three judge Curtin panel dissenting on that point, when an unpublished decision in this circuit "is not binding precedent" (Honigman v. Comerica Bank, 128 F.3d 945, 948 (6th Cir. 1997) and "...has no precedential force" (U.S. v. Ables, 167 F.3d 1021, 1031 (6th Cir.), cert. denied, 527 U.S. 1027 (1999)); and the Davie doctrine is still being followed in district court habeas reviews in this circuit (Rice v. Bottoms, 2015 U.S. Dist. LEXIS 18829, at HN 5 (E.D. Ky.)).

Ground 4 Second Set of Issues:

Ground 4 Issues on Opinion's Substantive Analysis of Claim of IAAC for failure to Raise Denial of Cody's "Pure" Right to Testify Claim, and Failure to Raise IATC for Refusing to Call Cody (Doc. 75:8736-8746):

2. On both these overlying claims of IAAC, the Opinion, id., in reviewing with

full deference what the habeas district court erroneously and unreasonably concludes is a state court analysis (albeit "somewhat brief), one on the IAAC on failure to raise the denial of "pure" right to testify ("first" underlying claim, supra)[4], erroneously interjects, as dispositive to the Opinion's rulings on both IAAC claims, and all underlying claims, its own, solely dispositive on "waiver" grounds, erroneous determination of fact, and debatable or wrong at federal law, that "Cody had declined to testify due to counsel's concerns regarding Cody's physical and mental capabilit[ies], " or that counsel had told the trial court that (Opinion,

4. Opinion, Doc. 75: 8742 concurs with Cody that the state appellate court "did not specifically address Cody's separate [overlying] claim that appellate counsel was ineffective for failing to argue that defense counsel [prompted by the trial court] was ineffective for failing to call Cody to testify at trial [or, Cody points out here, on Cody's "second" underlying claim, supra)]."

Doc. 75: 8739, 8745)[5] because

5. As part of this issue for consideration on appealability, this Court should note the Opinion's change of wording on these two pages of, factually, what the record shows as to Cody's alleged waiver:

"... defense counsel assured the trial court ... Cody had declined to testify, due to counsel's concerns regarding Cody's physical and mental capability to withstand cross-examination"(Doc. 75: 8739) vs. " ... the state court recessed to allow Cody and defense counsel the opportunity to speak [about Cody testifying];[*] ... defense counsel subsequently advised the trial court that Cody would not testify [Counsel's exact words were, " ... I do believe he will not be taking the stand .... I certainly believe that he would not be able to survive the prospects [of cross-examination]."Doc. 75:8738-39]; and "... Cody did not object or otherwise engage in any behavior that would alert the trial court that he disagreed." Doc. 75:8745.

[*] The Opinion erroneously factually implies here, and elsewhere, that the "40 minute" recess was spent by Cody and counsel conferring. If that had taken place, we could infer there was strong "give and take" between counsel and client on whether Cody should or would testify. In fact, what took place during the recess is undocumented. What did in fact occur was a good 30 minutes of walking Cody through a byzantine maze of medieval dungeon-like alleys, passageways and subterranean chambers by jail guards who had not even been in the courtroom, back to Cody's solitary psychiatric cell, placing him in the cell, where he proceeded to agitate and yell for his reading glasses (of which the guards knew nothing) so he could read documents during his testimony, and then, without his glasses, escorting him back through the same subterranean maze, to the courtroom, for what was, at best, in the adjoining holding cell, a 3 minute meeting with defense counsel, in which counsel visually assessed Cody's physical appearance, announced to Cody he was resting; counsel left the room; Cody was led back into the courtroom by a courtroom deputy sheriff, and on-record proceedings commenced. See, also, Cody's argument on denial of his motion for a habeas evidentiary hearing, [redacted] infra.

(a) Cody did not waive his "pure" right to testify, at all, because he did not expressly state that he did not wish to testify, and because his actions, and words relating to the colloquy, considering all the circumstances, did not, under precedent, unequivocally rise to the level of implied waiver, it being factually unreasonable to conclude, as Doc. 75: 8741, n. 13 does, that Cody's counsel's two-times during the colloquy - made alerts of Cody's desire and intent to

testify[6], and Cody personally answering the trial court's premised question,

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6. Prior to the colloquy defense counsel also definitively "alerted" the court twice more Cody would testify, as argued expressly by Cody in his Traverse (Doc. 57) serving by order of the magistrate court as his petition's sole explanation of fact, and argument, at Doc.57, originally numbered p. 8, et. seq., when counsel promised the jury and court Cody would testify (Doc. 43-21: 892, 9-13) and when the trial court noted on record that Cody's counsel had noticed the court off-record Cody wished to testify (Tr. 43-21:8037, 16-17). Cody's thereupon made argument in the promise to the jury by counsel being part of counsel's larger IATC in alerting the Court and in refusing to call Cody (Doc. 57, pp. 11 & n. 30, 12, 24 & n. 60);Objections (Doc. 74-1),originally numbered pp. 8-10; this argument on how many alerts were given was based upon, in support, in this circuit, Plummer v. Jackson, 491 Fed. Appx. 671 (6th Cir. 2013), and not a separate habeas 'claim', making it erroneous for the Opinion, at Doc. 75:8746, n. 15, to claim this argument should be procedurally defaulted (i.e. ignored) because "... it does not appear that Cody asserted this particular claim in the instant habeas petition , when the magistrate court orders (Doc. 18: 1381, 1383; Order [non-document] 9/12/2019) barred any explanation of fact, or argument, from that petition, "and that Cody did not raise it [as a claim] in his App. R. 26(B) application," when Cody, again, in a page-limited by order document, did raise it, by stating "... Defendant repeatedly through counsel expressed his desire and intent to testify, " [Emphasis added] (Doc. 42-3: 2830) and , again in his App. R.26(B) Ohio Supreme Court appeal memorandum (Doc. 42-3:2989) by stating that "Defense counsel told the trial court Cody ... would testify," and referencing, in both documents, "[ ]" Shaun v. Haskis ... et al" as authorities.
The Opinion's point on non-raising in Cody's App. R. 26(B) application is irrelevant, in any event, as Cody [further] explicitly raised the facts of the Plummer violation in his Opening Merit Brief on his "PCR[?]" appeal (Doc. 42-3, at 3345, fn. 39; stating " ... Patituce [told] the jury (opening statement) Cody would testify" as part of a larger explanation of counsel's IATC, and state appellate courts did not invoke res judicata in rejecting anything, be it argument, explanation or claim, about this statement (referenced at Opinion, Doc. 75: 8719-20).

if you would like to testify, time would be given to repair yourself, that he would like that time, including having his glasses returned, for that purpose, and that he would like to consult with counsel about testifying, did not merit the conclusion, at least, of an equivocal response on wish to testify; nor did it merit the conclusion that Cody " ... did [not] equivocally respond to the trial court questions as to whether he wanted to testify;" and because

(b) Defense counsel never [before or after the recess] told the court Cody told him Cody would not be testifying, or did not wish to testify, or that Cody gave counsel any reason whatsoever for not testifying, or not wishing to testify, and the Opinion's statement , 2021 U.S. Dist. LEXIS 73493, at *49, that "... defense counsel assured the trial court ... that Cody had declined to testify" [for any reason], citing Doc. 43-21:8037-45, is clearly erroneous on the facts; instead, what defense counsel did, at this point in the colloquy, where the trial court refuses to address Cody, and addresses counsel instead[7], was to change his sentence structure and mode, from when he was making his statements

7. The language of the trial court is shown at Doc. 75:8738. It shows the court concluding Cody's previous personally made answer was unclear, and that, thereupon, the court refuses to address Cody again, and directs its questions and points to defense counsel, reflecting the result of a trial court rejecting previously twice-made-by-counsel alerts, but now accepting, as finally determinative, counsel's retraction of the previously made alerts.

to the court of Cody's alerts, from, "[M]y client indicates he wishes to answer to his Complaint" [Emphasis added], and "[H]e is reiterating to me the same. He wishes to answer to all the charges" [Emphasis added] (Opinion, Doc. 75: 8736-37), to, now, in refusing to call Cody to testify, "I do believe he will not be taking the stand," and "I certainly believe [he cannot assist me]" [Emphasis added] (Doc. 75:8738-39), referencing his, and the trial court's, unfounded belief that temporary incapacity authorizes counsel to default a defendant's trial; and because

(c) Precedent does not hold that the defendant's assent is presumed "when a tactical decision is made by an attorney that a defendant should not testify," (cf. Doc. 75:8745), when counsel's decision is explicitly expressed as being based upon a constitutionally impermissible outcome, instantly, Drope v. Missouri's (infra) proscription against trying, or convicting, a defendant with physical or mental deficiencies, infirmities, conditions or impediments; and because

(d) there is no record evidence Cody affirmatively or expressly "agreed" with the fullness of defense counsel's own stated reason, upon trial court prompting, for justifying counsel's refusal to call Cody, and to thusly default trial; and because

(e) the record shows Cody did not contest(as part of the underlying claim of IATC, upon prompting by the trial court, using a constitutionally impermissible reason for justifying counsel's refusal to call Cody) that Cody was,at the time, suffering from some temporary mental and physical injuries (as counsel did speak to) (caused by petition-detailed cruel and inhuman treatment and conditions

inflicted by jail authorities, and defense counsel's cooperation with the State's position that Cody was "never" CIA," in failing to pursue Cody's CIA employment to negate the intentional deprivation of donor funds as an element of that charge (i.e. , that spending the unaccounted for donations to the Navy association for the (state secret) purposes to make payments to 76+ foreign leaders to secure the substitution of their front-line troops for ours in Iraq and Afghanistan, so fewer Americans came home in body bags, was as much to do with "helping veterans" as providing them with care kits, or arts and crafts to make, or more) and the elememts of the other offenses of which Cody was charged)) (and, only to that extent, in a few minutes long, off record, communication with defense counsel, did Cody "agree" with counsel, but only on the point injuries did exist), but that, rather than default trial, they were to be alleviated by a continuance, permitting Cody, thereupon to testify, and (as argued in Cody's traverse/petition and Objections), Drope v. Missouri, 420 U.S. 162, 178-83, constitutionally forbade trial leading to conviction (this aspect of the Opinion on this subject being error at law; this point of law being ignored by both the state appellate courts and the Opinion; and because

(f) the district court erroneously assumed, 2021 U.S. Dist. LEXIS 73493, at *49, as a debatable question of federal law,claiming it was following a state court decision (petitioner's App. R. 26 (B) decision) which, if made, would have been contrary to federal law, holding petitioner had an (unfulfilled, in Cody's case) obligation to address the trial court affirmatively, stating the exact words, "I wish to testify ," in order to establish the "alert" required by precedent in the 6th Circuit, when that is not what precedent requires; and because

(g) the clear, substantive gist of the underlying claim of IATC (which is itself the underlying claim of the overlying IAAC claim), the Drope issue, is that

it is irrelevant to disposition of the claim whether Cody was mentally infirm or not[8] (due both to his attempted suicide, and, a justice center guard

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8. The Opinion's further argument on this issue, found at Doc. 75: 8740, also seems irrelevant. First, Cody did not argue IAAC because the trial court was aware Cody had head injuries; Cody certainly argued the trial court was aware of the head injuries; defense counsel had just told the court of such. Undecipherable to petitioner as to the purpose of the argument being made, the Opinion then relates the trial court saying Cody has no mental health issues that needed to be dealt with at this time' [made at the same time Cody has been placed in a jail psychiatric cell, in a strait-jacket while celled, under jail staff prescribed cylexa, an anti-depressant/psychotic], and then, moments later, addressing only defense counsel, prompts him by stating, "And you indicated [in an obvious reference to an immediately preceding off-record conference] his physical and mental abilities...referring...if you wil, being cross-examined...?" [Tr. 4322:7-11], leading to counsel explaining his reasons , thusly, for not calling Cody, reasons the trial court accepts, without addressing Cody. If Cody had no mental incapacities, the trial court should not have accepted that as the sole reasoning offered by counsel, either as to refusal to call, or as to Cody's alleged acceptance of that reasoning, for a knowing and intelligent "waiver" to apply, NOT constituting a structural violation of the fair trial principle that defendant and society are entitle to "trial at which the truth will [not] be undermined" (Liegakos v. Cooke, 106 F. 3d 1381, 1387 (7th Cir, 1997), explaining Nix v. Whiteside, 475 U.S. 157, 167 (1986), citing Strickland, and Cronic, 466 U.S. 648 at 657, n.21 (as argued at Objections, Doc. 74-1, p. 9). If Cody were suffering from the kind of incapacity counsel said he was suffering from, on the other hand, then, contary to the Opinion's argument Cody's reliance on Ward v. Stemes, 2003 U.S. App LEXIS 13688 (7th Cir. 2003) is misplaced (Doc. 75:8741, n. 13), as to the issue of required alerts, if it is determined that Cody had an obligation to speak out over counsel at this point, it should be excused for the simple reason counsel gave.

slamming his head against the trial courtroom holding tank cell concrete wall, the first hand evidence of which is for an event, again,which occurred off-record, as did what Cody told defense counsel about those injuries at the time they occurred (prior to the "40 minute recess" this segment of Issues has been talking about, supra), which was that he (Cody) was temporarily disoriented by the residual effects of those injuries, but wanted to testify, and had to testify, given the situation counsel had placed him in at trial at that point, by failing to develop evidence relevant to Cody's acquisition of his cash savings from his CIA employment of over 40 years, and CIA and White House direction for made and unaccounted for (in the State's case) expenditures of the Navy association for national security purposes "helping" Armed Forces personnel and veterans (see, Doc. 43-21:7995, referenced at Objections, Doc. 74-1, p.6, n. 1, for defense counsel telling the trial court about the results of this separate and before-the-one-during-the-recess off-record attorney-client conferring event); or, even if Cody agreed with counsel telling Cody mental inability to assist counsel on examination and cross-examination (and re-cross-examination) legally justified counsel not calling Cody and defaulting trial (not even to mention counsel's failure to present any closing argument), because counsel's statement was in defect to and of a fundamental right Drope v. Missouri establishes, the right of a defendant who cannot assist counsel effectively with and at trial because of a physical or mental issue cannot be tried or convicted during the existence of that incapacity. Counsel's statements on this issue, expressly prompted, and then approved, by the trial court, are of record, lie at the heart of the IATC alleged here. Thus, if as the Opinion finds, as it did at Doc. 57: 8739, "...that Cody had declined to testify [i.e., Cody waived his right] due to counsel's concerns regarding Cody's physical and mental capability...," [10] Cody's "waiver", whether express or implied, still is disqualified, under well-established precedent, by its lack of its being knowingly or intelligently made, because counsel used a legally fallacious argument to secure both the "waiver" and an outcome (non-testimony and defaulted trial) which violated a defendant's fundamental

10. Such a finding should have been dispositive in Cody's favor to the merits of his Ground 4 IATC underlying claim, and, since the Opinion cites, solely, the lack of such substantive merit for its defeat of the overlying IAAC claim (appellate counsel need not make an unmeritorious claim; see Doc. 75: 8742, 8745-46), the Ground 4 IAAC/IATC claim should have been decided in petitioner's favor.

constitutonal right, and which was therefore constitutionally prohibited. The dropping of any discussion of the Drope -based basis for this IATC, by and in the Opinion, where, in the district court's arguments, lack of merit to the Ground's IATC underlying claim is the only reason given for substantive denial of the overlying IAAC claim, causes an ignoring of this gist, advancing the cause of appellate briefing before this Court on this at least debatable issue, and claim.

3. The district court erroneously assumed, 2021 U.S. Dist. LEXIS 73493, at *49, as a debatable, or wrong determination of federal law, and a clearly erroneously determined fact, claiming it was following a state court decision (petitioner's App. R. 26(B) decision) which, if made, would have been likewise erroneous, that, after defense counsel alerted the trial court at least twice of record that Cody wished to testify, and thereafter Cody personally, of record, answered the trial court that he wished to redress his dishevelled appearance, caused by jail deputies, because he "would like to testify" (Opinion, id., at *45-46: Trial Court: "...if you would like to testify, I'm happy to give you some time [to repair your appearance]." Cody: " I would like to put myself in physical appearance state....[sic]"), Cody had to, at that point or thereafter, utter the explicit words, "I wish to testify," of record, because trial court right to testify colloquy law requires nothing more than the defendant "somehow alerted" the trial court he desired to testify (Holt v. U.S., 2021 U.S. App. LEXIS 159, at *6-7 (6th Cir., decided January 5, 2021); [redacted] does NOT require the defendant to put repetitive alerts to the trial court at the time of a colloquy, nor does it permit the trial court to repetitively badger the defendant with, in Cody's case, on top of these previous "asked and answereds", yet another parsing inquiry having the effect of creating ambiguity as to the defendant's "intentions" with respect to testifying (Opinion, id., at *46), in violation, by analogy or not, of the Supreme Court rule that once a constitutional right of this importance has been invoked, the state cannot employ techniques to elicit information designed to create ambiguity about the assertion of the right (see, e.g. Mich. v. Jackson, 89 L.Ed. 2d 63, 475 U.S. 625, 640 (1986)), as opposed to simply directing defense counsel to call the defendant to take the stand in accordance with the defendant's express wishes, and alerts, to ascertain whether the defendant does so, or refuses to do so (cf., "...

10(a). "Somehow (adv.). In a way not specified...." Webster's II New Riverside Dictionary (Rev. 1966). An alert made by counsel clearly is not disqualified; and no case justifying implicit or ambiguous waiver by the defendant's actions had this element present instantly of explicit statement(s), right before the defendant's time to testify, of defendant's counsel that the defendant wished to testify.

after the recess, Cody [had to] alert[ ] the trial court [again]... he wanted to testify." (Doc. 75: 8745)).

Ground 4 Summarized Issue IV

Did the Opinion err, on law and the facts, in concluding that the underlying claims in Ground 4 Issues I,II and III above, were procedurally defaulted?

Ground 4 Expanded Issues on the Opinion's "Analysis of Underlying Claims" of Denial of "Pure" Right to Testify and Ineffective Assistance of Trial Counsel for Refusing to Call Petitioner to Testify (Doc. 75: 8746-8748):

The Opinion errs in a number of ways in ruling that there was a "procedural default" based upon the non-presentation of these claims in the direct appeal, and in ruling that there was a failure of that default's excuse by reason of cause and prejudice:

4. First , the Opinion incongruously holds [Doc. 75:8741-47] Cody was procedurally defaulted on the IAAC/IATC claim because of the Davie App. R. 26(B) doctrine defaulting for failure to preserve the underlying claim because it was not raised in the direct appeal, when, four pages earlier the Opinion [Doc. 75: 8742], from the record, correctly "... agrees with Cody that ... the state appellate court ... did not separately address Cody's separate claim that appellate counsel was ineffective for failing to argue that defense counsel was ineffective for failing to call Cody to testify at trial," [Emphasis in original], correctly citing Barton v. Warden , 786 F. 3d 450, 460 (6th Cir. 2015) (per curiam) for the holding that, in a habeas proceeding turning upon, and stemming from, an Ohio App. R. 26(B) case, when the appellate court did not address an underlying constitutional claim (here, IATC), the habeas court presumes a state court appellate full merits review which justifies bypassing the Davie default reason, and decides the underlying claim de novo, applying 28 U.S.C. §2254(d), per se, as dispositive. (See, also, Carter v. Mitchell, 693 F. 3d 555 (6th Cir. 2012), citing Maples v. Stegall, 340 F. 3d 433, citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)). The Opinion then engages in what it calls a de novo review (Doc. 75: 8745-46), substantively denying the claim, a denial which was substantively in error, as was the review itself procedurally in error, both subjects discussed infra.

5. The Opinion incorrectly states Cody argued that the filing of the App. R. 26(B) application "preserved" the claim (when, in fact, Cody's habeas pleadings

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11. Five pages previous, the Opinion says, calling Cody's argument disagreeing with the R&R, a "suggestion," stating the district court "need not decide the issue."

stated no such thing, petitioner realizing that the filing of an App. R. 26(B) application, per se, can never "preserve" per se the underlying claims, in the absence of raising them on direct appeal or in some other, appropriate, state court post-conviction collateral proceeding, because the two actions (direct appeal, App. R. 26(B)) cover distinct subjects for analysis) when, instead, Cody's argument was that habeas review of the underlying claims outside the context of IAAC for failure to raise was possible and, in context it is clear it is only to that extent Cody uses the term "preserved" and argument concerning "preservation" in his Objections; the Opinion, on the other hand, uses the term to mean that the petitioner is claiming per se preservation established by the filing, per se, of the App. R. 26(B) application. That possible review, Cody argued, was to be based on any of the following reasons, upon which the Opinion erred, at law or on the facts, because:

(a) the Opinion clearly errs in stating, at Doc. 75:8748, n. 17, that Cody, in his Objections (Doc. 74-1), did not argue on "cause or prejudice" on these issues other than IAAC for failure to raise and, on the IAAC claim for citing an impermissible reason, pursuant to Drope (unrecognized erroneously by the Opinion as the "underlying claim" to the underlying claim of IATC), for not calling Cody and defaulting his trial, evidence outside the trial record (Doc. 75:8747), when

(1) Cody argued, at Doc. 74-1, p. 2, that "little analysis" on the underlying claim of denial of "pure" right to testify required a Davie- authorized "careful and independent review" on the the underlying claim independent of analysis on the overlying IAAC claim[12] - not performed by the Opinion (see, supra, on IAAC claims);

(2) Cody argued, id., that if there were no review by the state courts of the underlying claim of actions impermissible under Drope rationalizing defaulting Cody's trial by the Opinion, Doc. 75:8742, as to the claim underlying IAAC that, as stated by the court, defense counsel was ineffective for failing to call Cody to testify, then a merits review by the state court is presumed (under Barton v. Warden, 786 F.3d 450, 460 (6th Cir. 2015) (per curiam)), and a habeas de novo review, independent of the analysis on the overlying IAAC claim - needs to be made - the Opinion erroneously, on

12. "... to see if the decision on the underlying claim is an unreasonable application of federal law" [Emphasis added], Davie, supra, at 315.

this issue, making what it calls, at Doc. 75:8745, a "de novo" review, but only within the context of "appellate counsel [not being] ineffective.... [id] [T]he Court finds ...appellate counsel was not ineffective .... (Doc. 75:8746);[13]

(3)Cody argued, at Doc. 74-1, p.3, as to the R&R citing Davie's rule to block review of the claim of the underlying IATC, that "any state court-based res judicata procedural default[14] is excused by IATC," and then cited, as evidence of the same, at Doc. 74-1, pp. 8-9, IATC for telling the jury Cody would testify

13. "To reach [habeas] substantive merits review of the underlying issue separately [from the IAAC claim]...." Davie v. Mitchell, 547 F.3d 297, 312 at HN 12 (6th Cir. 2009) [Emphasis added].

14. In the context of all his habeas pleadings, it is clear Cody concludes that Davie's analytical distinction under state law between the subjects of a direct appeal and an App. R. 26(B) application proceeding has to do with the latter's underlying constitutional claims already having been decided in the direct appeal under the 'could have been raised but wasn't' type of preclusion of res judicata state law procedural bar, and that it is fair to classify the bar Davie announced as such.

and then not producing him;[15] and counsel's violation of the Drope mandate itself, as such IATC.

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15. This event as either an evidentiary statement from the record shedding light on the ground as stated, or, as to the claim as explicitly fairly noticed to the state courts throughout all Cody's post-conviction collateral proceedings related to IATC, meeting the requirement of "specificity" for fair notice, of a claim of IATC, not in general, but for 'failure to investigate, develop, pursue and present evidence of Cody's CIA/White House employment relevant to the defense as to the charges', or, to be cumulated with counsel's other alleged ineffective acts or failures to act, need not be stated explicitly as a separate habeas 'claim', and the Opinion errs in assuming otherwise, at Doc. 75: 8746, n. 1.

The Opinion errs there also, as to exhaustion as to this item, the promise to the jury unfulfilled, under Osber and Plummer, by stating Cody did not mention counsel's promise in his App. R. 26(B) application. In the application, Cody stated , at Doc. 42-3:2830, that he "repeatedly through counsel, expressed his desire and intent to testify." Moreover, contra to what the Opinion implies, id., Cody was not limited to this application for exhaustion (fair notice) purposes: he could have referenced the claim anywhere in the post-conviction collateral action process (Carter v. Mitchell, 693 F.3d 555, 566), and, in his PCRP's appellate brief (repeated in his memorandum in support of jurisdiction brief to the Ohio supreme court (Doc. 42-3: 3345, n. 3) Cody specifically references counsel promising the jury Cody would testify, and then not calling Cody.

6. In denying Cody's claim of bar excuse for the de novo and independent-of-the-IAAC claim review of the underlying IATC claim (in both its parts), the Opinion erroneously, first, states that Cody provided only one vaguely worded example (the major relevant example, in fact, under Plummer, Cody points out, since the Opinion/R&R's sole substantive reason for denying all the underlying right to testify claims was the lack of merit of the claims based upon Cody's waiver of the right) of evidence outside the trial record, i.e. off-record discussions between Cody and counsel as to their respective intents [16] with regard to "the client's express desire to testify" (Doc. 75:8747); and second, erroneously states that if Cody raised the IATC claim in his first post-conviction petition ("PCRP") the claim would have been [habeas] procedurally defaulted because the state courts denied the claim on res judicata grounds, when

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16. This was not Cody's only relevant example of such off-record discussions. In the same Objections section, Doc. 74-1, p. 8, n. 2, Cody also mentioned counsel's statements, or lack thereof, on mental deficiency as a cause for non-testimony, and his statements about failure to investigate CIA-related evidence on Cody's defenses and, in general, statements "of intents of defendant and counsel as to Cody testifying." Cody also vigorously referenced, as occurring off-record during the "40 minute recess", as relevant to his non-waiver, the refusal by guards to return his reading glasses to him so he could read the documentary evidence, and the refusal by guards of the ability to repair himself (Doc. 57, p. 8; and Doc. 74-1, p. 4).

In specifically identifying off-record defendant-counsel communications referenced specifically in the record (e.g. the 40 minute session) Cody is specifically identifying such communications as providing statements of counsel and defendant going to Cody's and counsel's plans and intentions regarding testimony, or waiver. See, also, Doc. 75: 8747; and the Issues section, infra, on denial of Cody's motion for a habeas evidentiary hearing.

(a) the habeas petitioner may "preserve" an underlying App. R. 26(B) constitutional claim by bringing it somewhere else in the exhaustion process (Carter v. Mitchell, 693 F. 3d 555, 566 (6th Cir. 2012); and the existence of relevant off-record evidence in an Ohio PCRP case, such as there were in the PCRP actions brought by Cody, eliminates the federal habeas bar even if the state court invoked state-rule-based res judicata (Hill v. Mitchell, 842 F. 3d 910, 936 (6th Cir. 2016); Hutton v. Mitchell, 839 F. 3d 486, 504 (6th Cir. 2016);
(b) the PCRP decision referenced and invoked by the Opinion did not invoke res judicata to defeat the underlying claim of denial of right to testify, but only the overlying claim of IATC (Doc. 42-2, Ex. 65); and
(c) de novo review of the state court's procedural default analysis is required (Abela, infra, at 922), instead of the Opinion merely finding, as it did, at Doc. 75:8746-47, that the state court "imposed the procedural default." The Opinion erroneously ignored Cody's argument (made at Doc. 57, p.2, and again in his Objections (Doc. 74-1, p. 1), stating that it was not made (Doc. 75: 8748, n. 17)), that Davie's established App. R. 26(B) state procedural bar is not exempt from non-application for a violation of Abela v. Martin, 380 F. 3d 915, 924 (6th Cir. 2004)'s rule that the appellate court must, clearly and expressly, announce the default as applying to independent review of the underlying claim as a reason for the judgment, if the federal habeas bar is to apply. See, in support of Abela's applicability, Smith v. Warden, 780 Fed. Appx. 208, 223-25 (6th Cir. 2019) (App. R. 26 (B) appellate court must specifically invoke the procedural default [which Cody's court did not do] or Maupin's second prong of [non] "enforcement" applies, denying the habeas court jurisdiction to invoke this habeas bar).

7. The Opinion erred by reiterating, summarily, by error on law and fact, that Cody waived his right to testify, and that the non-meritoriousness of Cody's right to testify underlying claims, for that reason (as discussed in the Opinion's section on the IAAC, supra), was the sole reason for the Opinion not approving the IAAC claims as meritorious, and erring by ruling erroneously at law, that therefore IAAC may not serve as the Opinion's sole allowable excuse for the Davie-established state law procedural bar.

...

Neither the Opinion nor the R&R invokes, as to their respective analyses on and in their Ground 4 sections, that a prejudice prong of "cause and prejudice" is necessary of consideration, as to Cody's testimonial evidence, if there were to be a meritorious case of "cause" made as to either IAAC or IATC.

...

Ground 6: IAAC for Failure to Raise Denial of Right to Access Counsel of Choice (Opinion Analysis at Doc. 75: 8748-8758):

Summarized Issue:

V. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 habeas claim of IAAC (the overlying claim) for failure to raise the claim of denial of petitioner's right to access prospective counsel of choice for retention (the underlying claim) was without merit?

Expanded Issues pertaining to Ground 6:

IAAC Portion of Ground 6 (Overlying Claim). (Opinion Analysis at Doc. 75: 8749-57):

8. As a preliminary matter, the Opinion factually misstates Cody's explanation of the claim in his Traverse with the mis-consequence of limiting what is and is not relevant to it: Cody did not, in the Traverse serving as his claim explanation, Doc. 57: 8391-8395, as the Opinion misalleges at Doc. 75: 8749: "... limit[s] his argument [on the underlying claim] solely to that portion of Ground Six that alleges that the trial court's 'no contact' order denied him his right to access counsel of his choice." Instead, what Cody said on this subject, exactly, at Doc. 57, p.1, was "Ground 6 (Doc. 42: 1666-67), limited as follows: ... the trial court's no contact order [JE 3.19.2013] ... and other court and jail imposed conditions of pretrial confinement while he was in pro se status ... blocked his fundamental right to access counsel of choice ...." [Emphasis added].

9. As a preliminary matter , the Opinion (Doc. 75: 8750) errs in implying petitioner may not have put the state courts on fair notice because, specifically on the factual allegations cited, id., made by petitioner (as opposed to his

statement of claim proper (see Doc. 57, p. 1) that the error complained of "blocked his fundamental right to access counsel of choice..."), petitioner did not specifically state or reiterate prohibition of contact with outside prospective counsel of choice, when, in fact, Cody's language cited in the Opinion at 8750 mentions Cody trying to get to see "...counsel...about potential representation" and states "[H]e was permitted no contact with any other human being (except for the jail guards) ... and other than advisory counsel Patituce..." [Emphasis added], the words "any other human being" by definition incorporating prospective outside counsel other than advisory counsel; and Cody pleaded, with mention also omitted in the Opinion, explicitly in his application to re-open his direct appeal (his only filed pleading permitted in his App. R. 26(B) case), at Doc. 42-3: 2807, "[T]he trial court's 3.19.2013 order caused violations of the Defendant's fundamental rights (involving structural error) to access counsel of choice, " citing Sullivan v. Louisiana.

10. As a preliminary matter, on standard of review for the claim, the Opinion erred in not making a de novo review of the underlying constitutional claim as dispositive of the ultimate issue, and appropriate remedy that Cody should have been ordered a new trial, because he was denied his right to access prospective counsel of choice, or as dispositive of that issue as penultimate to the further conclusion, that the merit of the denial (the underlying claim) argument was determinative, that appellate counsel was ineffective for not making the claim.[17] The Opinion errs in inappropriately applying (in what we will call the "fleeting reference" rule issue) in Johnson v. Williams, 568 U.S. 289 (2013),[18] an application in which the Opinion, in any event,

17. This "flowing" conclusion, on prospective merits of any of Cody's particular underlying claims meaning likewise ineffectiveness for failure to raise, is not challenged in the Opinion.

18. The "fleeting reference" charge against Cody's application is not specifically made in the R&R, the magistrate court seemingly implying, instead, in what was a real fleeting reference, that the App. R. 26(B) application's claim may have been "too insubstantial" or "covered by another claim by implication." These are dropped, as charges, in the Opinion. See, Doc. 75: 8753.

misinterprets Johnson's holding on the admittedly tricky subject of degrees of specificity in petitioner's claims necessary for different purposes, and degrees of specificity in review of claims in state appellate court opinions necessary for different purposes, as the framework for reaching its "no de novo review" conclusion. Instead of the Opinion's erroneous interpretation and application, Johnson's is a rule that a state court may disregard (in its opinion) "a fleeting reference to a provision of the Federal Constitution ... as sufficient to raise a separate federal claim " [Emphasis added] (Johnson, 568 U.S. at 298-299), the presumption disregarding avoidance of de novo review of the claim being required[19] because the claim was "not adjudicated on the

19. The Opinion discusses what are, in a Johnson/Richter-based analysis, two separate presumptions. The first one is that one presumes a state court decision to be on the merits, and the habeas court thereupon applies deferential review. But when it is not, de novo review is applied. Johnson, supra, at 302. So that presumption, to achieve de novo review, places the burden of that rebuttal on the petitioner, with Cody instantly, saying that rebuttal is met by the wording of the App. R.26 (B) decision, and the Opinion agreeing with Cody, stating "... the Court agrees with Cody that the state court did not directly address his specific claim as it relates to the alleged denial of right of access to counsel of choice...." (Doc. 75: 8752). The district court then opines (and not from the R&R's opinion), as its sole basis for its decision on deferential review, that the state court had an excuse under AEDPA, established by Johnson, for not addressing the merits, and that was that Cody only raised the claim in the state court proceeding in a "fleeting" reference, as that term and concept are used in Johnson. Thus, Cody must raise a cognizable issue here, for his requested briefing on this "second rebuttal", as to the "fleeting reference" issue to be issued, in the Notice of Appeal, that the Opinion erred, under Johnson's analysis of what such a "fleeting" reference was, and is.

merits "[20].

Instead of the Opinion's erroneous interpretation and application:
(a) Johnson does not change the widely established rule that cognizable constitutional claims in state court proceedings are to be "fact based," i.e. simply an identification of the facts and the constitutional violation (Poindexter v. Mitchell, 454 F. 3d 564, 567 (6th Cir. 2006); Onifer v. Tyszkiewicz, 255 F. 313, 315 (6th Cir. 2001); Johnson is distinguishable from the facts in Cody instantly because:
(b) Cody's referent passages are distinguishable from the objectionable Johnson passages because Cody's passages do not have the Johnson-complained about objections of (1) only a vague and uncertain reference to a federal constitutional right constituting insufficient notice of the right addressed, (2) an insubstantial right or claim; or (3) treating the alleged violation of the federal right as *interchangeable* with a violation of a state-law right;
(c) Cody's referent passages are distinguishable from the Johnson's petitioner's state court pleadings (petitioner's state court of appeal direct appeal brief stated: "' Juror No. 6 was a holdout juror for acquittal: Williams was denied her Sixth Amendment right by dismissing him; the 'Sixth Amendment right to a jury trial' could be offended by 'the dismissal and replacement of ...jurors' under Cal. Penal Code section 1089.'" See, Williams v. Cavazos, 646 F.3d 626, n. 8 (9th Cir. 2011), quoting Pet'r Cal. Ct. App. Br. 41-42, 14-15 & n. 12) because there is no confusion in the state courts being created by Cody between a state law based ground and the federal constitutional ground which lies at the heart of the Johnson-objected to "fleeting reference to a provision of the Federal Constitution" [Emphasis added]; and

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20. See, Opinion, Doc. 75: Cody argues "...the state appellate court ignored the particular claim at issue.... [T]he Court agrees with Cody that the State court did not directly address his claim as it relates to the alleged denial of right of access to counsel of his choice...." The claim was not addressed at all, invoking de novo review under Johnson's presumption unless the claim can be said to have been stated as a "fleeting" or "passing" reference.

(d) unlike the full briefing permitted to petitioner Williams in the California appellate courts, Cody was only permitted the "first stage" of the Ohio App. R. 26(B) proceeding, the "application to reopen," in which the applicant is permitted to present "one or more assignments of error or arguments" [Emphasis added] (App. R. 26(B)(2)(c)),"which may [but need not] include citations to applicable authorities and references to the record" (App. R. 26(B)(2)(d)), and in which all the applicant need do is "put forth a colorable claim" of IAAC, to be followed, only if the application is granted, by the full "appellate briefs" [provided by, and in, Johnson]. Rules Staff Note , 7-1-93, App. R. 26(B) Application for Re-Opening.

Clearly, Cody did not violate the fleeting reference rule because Cody pleaded before the state courts, in quantitatively what amounted to a more than a "fleeting" or "passing" reference Johnson found, in its context, objectionable: first, at Doc. 42-3:2807 (omitted of reference by the Opinion), that a violation of his fundamental right involving structural error to access counsel of choice occurred, and , second, as quoted by the Opinion, Doc. 57:8750, in ¶¶1, 2 and 4, (1) that the trial court issued its no contact order, and that enforcement of it meant no permission to contact "any other human being, no telephone calls, and no access to writing materials , other than paper and pens"; (2) that Cody was thrown into solitary confinement thereupon; (3) that he was apprehended by jail guards for writing on a piece of scrap paper he found, for the purpose of contacting outside counsel and smuggling the note to another inmate in a nearby cell who was getting out, in violation of the quoted order, and placed in further "disciplinary" solitary confinement (See, the App. R. 26 (B) application itself, Doc. 42-3: 2827, ¶ 3. The word "disciplinary" is dropped, as to what Cody pleaded, from the Opinion's presentation at Doc. 75: 8750). Likewise omitted of mention by the Opinion, as to what Cody stated to the App. R. 26(B) state court, is Cody's statement complaining, as part of the claim, that the denial of his trial court "6.12.2013, 7.17.2013, 7.18. and "7.26.2013" motions that the "no contact restrictions be lifted, for the explicit reasons cited in the Application proper, Assignment IV," which included the denial of desired access to prospective retained outside counsel

to secure representation (Doc. 42-3: 2828). On these omissions, see, also, n.24, infra.

Cody's count is that he used 128 words to plead these things in this document, both factually, and referencing the constitutional reference at law without conflating it with a state law violation, a count which does not include the fact the state court of appeals ordered the full record to be provided, including Cody's filed and pro se permitted, but denied, motions to the trial court complaining about the prohibition of his right to access prospective private counsel (as referenced by Cody to the habeas courts at his Doc. 57, p. 16).

Opinion's Substantive Analysis of IAAC Portion of Ground 6, by Denying the Merits of the Underlying Claim, and therefore the Merits of the Overlying Claim (Opinion at Doc. 75: 8754-57):

The Opinion's sole reason for denying the IAAC portion of the Ground 6 claim is that appellate counsel was not ineffective for failure to raise the underlying claim because the right to access prospective private counsel Cody asserted does not exist, or because, if it does exist, "under the circumstances" that "Cody never indicated that he wanted to attempt to retain private counsel or that he was prevented from doing so, by virtue of the 'no contact order.'" (Doc. 75:8756-57).[21] In other words, the IAAC decision in the Opinion turns upon the Opinion's deferential substantive analysis, found at Doc. 75: 8754-57, of the merits of the underlying claim.

11. The Opinion's primary analytical error, at law, is that it would create new law, containing a new proposition, that a defendant "declared" indigent, by a trial court in which he never alleged or demonstrated that he was indigent, has no right to contact or access outside counsel to inquire if and how he can obtain

21. The Opinion does not adopt the R&R's opinion on these issues, offering, instead, its own new and newly worded conceptualizations about what the underlying claim is about, and why it lacks merit. In Cody's instant section's "issues," therefore, petitioner addresses these newly presented, salient points and argument.

representation,[22] without precedent, on the subject of a defendant's constitutional right to access prospective retained counsel (the denial of which , the Opinion does not contest, would be structural error), and then alleges, again without precedent, that Cody's actions/failure to act violated this new proposition because he never told the trial court he was not

22. The Opinion does not challenge one of Cody's fundamental premises, although the R&R did, that under Gonzalez-Lopez, infra, it is the right to access prospective counsel of choice, not the right to choose particular counsel per se, which is at issue instantly. But, even though the Opinion may "get" this statement of law, it does not "get" that the defendant cannot determine the exact compensatory "things" prospective counsel might want for retention, until the "access" has taken place.

indigent[23] or that he wished to attempt to retain

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23. Although it is not relevant under Caplin, infra, or Gonzalez-Lopez, infra, whether Cody was indigent, or that Cody did not tell the trial court that he was not indigent (Cody , contra to the Opinion's factually erroneous (and irrelevant because of the underlying issue) statement that he did not direct the trial court's attention to a purported "non-indigent" status (Doc. 75: 8756), argued in his Traverse, Doc. 57, p. 16, and in his Objections, Doc. 74-1, pp. 20-21, that, by the time he was counsel pro se (and subject to the no contact order), had he been permitted to contact them, friends, relatives, and public supporters could, and would have, provided funds sufficient to at least negotiate with prospective counsel about money fees, if that is what they wanted; on this "lack of direction" point, the Opinion also ignores Cody's extensive Objections discourse, Doc. 74-1, pp. 15-18, that he refused to sign the trial-court provided "waiver of counsel" form, because he wanted to attempt to obtain retained counsel, at the only Faretta-valid hearing held on the issue of self-representation); the Opinion errs, on the facts and at law, by ignoring that Cody never told the trial court, of record, that he was indigent, and never claimed, of trial court record, that he was indigent, at any point in the trial court proceedings (including the only relevant points in time while he was appointed to represent himself). Instead, he was "declared" indigent even before his personal appearance began, in May, 2012 (Doc. 42-1, Ex. 5) in a case filed under an indictment twice removed from the one Cody was tried on.

> "Due process does not permit a judge to decide ... whether a defendant is unable to afford counsel without [a] hearing...." Bradley v. Henry, 510 F. 3d 1093, at HN 4 (9th Cir. 2007). "Decide first [for the court, to appoint counsel; for the defendant, on pro se status, or to accept appointed counsel], defend later, is not an axiom of constitutional law. To deny assistance of [retained] counsel on account of the impecuniousness of the defendant requires a hearing to explore the case." Id., at HN 6, citing Caplin &Drysdale v. U.S., 491 U.S. 617, 624 (1989), Wheat v. U.S. , 486 U.S. 153, 159 and Powell v. Alabama, 287 U.S. 45, 53 (1932) (Clifton, J., concurring, 510 F. 3d, at **14-17).

As the Opinion evidences, at Doc. 75:8754-55, in its factual review of the many relevant trial court proceedings, Cody never tells the trial court he is indigent, the Opinion citing, as its' sole example, in support of its claim, its not explicitly stated, but implied, proposition that Cody did tell the trial court (or any court during the trial or pre-trial time) that he was indigent, id., one off-Pinholster-record-statement (Doc. 1-14 (stricken from the record by Magistrate Court order Doc. 18) Cody made, not to the trial court, but to the 8th district court of appeals in a separate original civil action, not that he was indigent, but that "I have been found indigent in [the criminal] case;" the facts (the stricken document from the court of appeals action the Opinion relies on) then clearly showing, the opposite of what the Opinion asserts as fact (id., at 8754), that Cody declined to attach, and did not attach, as opposed to the Opinion saying he did attach, any "affidavit of indigency" to the pleading (and, even if such an affidavit had been attached, it would have been relevant only to the waiver of filing fees and costs for the particular court of appeals civil action).

counsel;[24] in other words, as to the Opinion's frequently, clearly and erroneously made statements of fact, from which the Opinion attempts to establish vitiating waiver by Cody, again, without any specific precedent in waiver law that Cody's actions constituted such waiver.

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24. Even though it is irrelevant to any requirement of existing precedent, the Opinion clearly errs factually on the latter part of that statement. In his Traverse acting by court order as his explanation of, and argument on, his petition, at Doc. 57, p.16, at ¶ 8, and again in his Objections, Doc. 74-1, p. 18, Cody explicitly told the habeas courts that at the time jail guards, enforcing the no contact order, punished him for attempting to have a jail inmate smuggle a note to prospective counsel to inquire of them their requested compensation for representation, with a view to retaining the same, he moved the trial court, pro se, to vacate the no contact order to allow him to access prospective retained counsel, citing that court's journal entries 5/31/2013, 6/21/2013 and 7/26/2013 , made with summarized titles of the respective motions filed by Cody on those dates, and entries made part of the habeas record by Respondent, at Doc. 42-4: 3555 ("Motion to Vacate [No Contact] Order," "Defense ...Other Motions," and, citing the trial court's journal entry 7/26/2013 (appearing at Doc. 42-4:3554), "Defendant's Continuing Objections of Record to Retain Outside Counsel" [Emphasis added]; these are more than mere "passing mention" of Cody's planning to retain counsel on his own; and that his magistrate court motion (Doc. 52) to include the content of these trial court motions as part of the habeas court record had been denied (Order [non-document], 9.12.2019), which denial was separately affirmed by the district court in its preliminary decision (Doc. 64), and that Cody was objecting to that decision as well in his Objections (Doc. 74-1, p.18), and Cody notices his request for appeal here, also, from the 9.12.2019 magistrate's order and Doc. 64's affirmation of it. Likewise to the above, the Opinion omits to mention that Cody also explicitly complained in the App. R. 26(B) application about the denial of his trial court "6.12.2013, 7.17.2013, 7.18.2013" and "7.26.2013" motions, that the no contact "restrictions be lifted for the for explicit reasons cited in the Application proper, Assignment IV," which included the denial of desired access to prospective outside retained counsel to secure representation (Doc. 42-3: 2828).

12. Leaving aside the factual errors the Opinion makes pursuant to its misstatements and missassumptions about what clearly established federal law requires, the legal issue is contained in, and the law presented by, simply, Caplin's clearly stated holding, Caplin & Drysdale v. U.S., 491 U.S. 618, at 624-25, even though argued vigorously by Cody, ignored by both the R&R and the Opinion, that an indigent defendant does have the right to acquire an attorney "... who is willing to represent the defendant even though he is without funds," with that right extended to "access" of such a lawyer, by Gonzalez-Lopez, infra.

The Opinion's sole attempt to imply these holdings are not clearly established federal law invokes one off-point quotation from Gonzalez-Lopez, infra, and another off-point quotation from Daniels v. Lafler, 501 F. 3d 735 (6th Cir, 2007) (Doc. 75:8756). The Gonzalez-Lopez, 548 U.S. at 151, quote is on the facts of, and applied solely to, a context of Gonzalez separate from the instant issue, [25] not a defendant attempting, but forbidden to, access outside counsel for prospective representation, but, instead, one who has appointed counsel, and wants another one, by name, appointed instead, at state expense (the words the Court uses clearly indicate it is talking about having "counsel of choice," not "access" to the prospective outside counsel of choice at issue instantly; likewise, no defendant in Cody's approved pro se status, which is the point in time Cody is seeking to access outside counsel, can be said, by definition, "to require appointed counsel"). The Daniels quotation is, likewise, meant to be limited to the facts there, different from Cody's facts: the Daniel's defendant, first and fully, accepting one appointed counsel, then, after the trial court appointed a replacement counsel , saying he wanted the first appointed counsel back. These quotations both deal with choice of counsel of defendants with appointed counsel and satisfied with their being appointed counsel, it only being the identity of the appointed counsel the defendants find at issue. Caplin's holding about indigents having access to outside counsel for prospective representation inquiry is not disputed by either Gonzalez-Lopez or Daniels.

13. There is no law that a defendant declared or found indigent can be prohibited by state action from attempting to contact outside counsel to negotiate the terms of

25. "...the right to counsel of choice does not extend to defendants who require counsel to be appointed for them."

Instead, Gonzalez-Lopez, 548 U.S. 140, 144, indeed, quotes Caplin at 624-25, in support of Caplin's relevant holding there on indigent defendants accessing counsel willing to represent them even though they are without funds.

prospective representation;[26] indigent defendants do exactly that every day, yet that is exactly what happened, uniquely, in Cody and, on the merits, was approved of by the courts; this aspect of the Opinion's denial of the Ground 6 IAAC claim because the merits of the underlying claim fails is primarily why there is something in the Opinion's dispositive determination on ground 6 which is debatable, or wrong.

Ground 6:

Summarized Issue:

VI. Did the Opinion err, on law and the facts, in concluding that petitioner's Ground 6 underlying habeas claim of denial of petitioner's right to access prospective counsel of choice for retention was procedurally barred?

Procedural Default Analysis of Underlying Claim Portion of Ground 6 (Opinion, Doc. 75: 8757-58):

14. The Opinion errs in procedurally defaulting the underlying claim based on Davie, because Cody cannot apply IAAC as cause and prejudice, solely because appellate counsel had no obligation to raise an underlying claim lacking merit. In other words, procedural bar turns on the lack of merit in the underlying claim itself, a proposition with which Cody effectively takes issue with in Ground 6 Opinion error Issues, immediately supra.

Ground 16/17:

Summarized Issue:

VII. Did the Opinion err,at law, in concluding that petitioner's Ground 16/17 (or, as referenced in the Opinion's nomenclature, Grounds 16 and 17) were procedurally defaulted?

26. Indeed, such action is clearly proscribed by a clearly established Supreme Court holding: "A state [can] not infringe in any way the right of individuals ... to be fairly represented in lawsuits...." Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964), cited at Cody's Objections, p. 15, and ignored by the Opinion.

Issues Pertaining to Combined Ground 16/17 (Opinion, Doc. 75: 8758-63):

Grounds 16/17 are one ground[27] as applied to IATC as a PCRP matter, of a continuum of counsel's ineffective actions and failures to act to investigate and develop evidence on the pertinent CIA/White House employment based defenses, including, but not limited to, his failure to obtain a CIA FOIA response to a request for all documents related to Cody's CIA employment,[28] continuing into, and leading to, his failure to affirmatively pursue, present or argue those defenses at trial, or to argue at all (abandonment of those defenses at trial, including refusing to call Cody to testify at trial), under a totality of the circumstances. The existence of off-record evidence of this IATC makes this IATC, under Ohio law, a PCRP and not a direct appeal matter.

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27. Whether they are one ground or two stems not from Cody's arguments, but from the Ohio court of appeals combining Cody's 2018 PCRP and his 2018 motion for new trial actions into one appellate case, although Cody's other arguments are compelling. The appellate court case's (the last state court case dealing with all of these matters) decision invoked one sole reason for denying Cody's claims under both actions, a state law - based procedural default based upon untimely filing because unavoidable delay in discovering the evidence did not apply.

28. As a standalone matter, this is a proper subject for an Ohio motion for new trial proceeding. See, infra, discussion on motion for new trial.

15. Addressing procedural default of 16/17 in the state courts[29], the Opinion errs, as the R&R did, mixing law and fact, in adopting without the de novo review required by Abela v. Martin, 380 F. 3d 915, 922 (6th Cir. 2004), followed Alexander v. Smith, 311 Fed. Appx. 875 (6th Cir. 2009):

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29. The Opinion rejects the R&R approach to, and framework for, analysis of Claim 16/17 procedural default, which was , from a number of post-conviction collateral attack proceedings originally dispositive of the IATC issues in combined Claim 16/17, to pick solely one of the proceedings the magistrate court believed was the "correct" one ("[T]he [sole] operative court opinion for the Court to review [on claim 16] is the Ohio court of appeals 2015 decision denying relief on appeal from [Cody's] 2014 postconviction proceeding." Doc. 65, p.47) and to apply a finding of habeas procedural bar to it. Instead, the Opinion, at Doc. 75: 8759-63, impliedly concludes it must apply habeas procedural bar to each one of these decisions separately (which it does, erroneously, in each case) in order to conclude a habeas procedural bar applies to combined Claim 16/17. Petitioner recommends the Opinion's approach and framework, which flows correctly from the analysis of this Court in Carter v. Mitchell, 693 F.3d 555, at 566 (6th Cir. 2012), to this Court, and addresses here the issues for non-application of a habeas procedural bar, likewise, in each of the Opinion-designated Claim 16/17 actions separately. However, as to excuse for procedural default allegedly created in the PCRP actions, and by their decisions, the Opinion adds the opinion of the trial court in the 2014 PCRP to the one referenced in the R&R, supra, so this statement of Issues by Cody is Cody's first opportunity to apply federal court error to that decision.

In citing, correctly, to, first, the trial court opinion in the 2014 PCRP, the Opinion points out, Doc. 75: 8759, the trial court gave no reason which noted or addressed either cause for federal habeas bar, or Maupin-based reasons for cause and prejudice excuse, stating only Cody's PCRP affidavit was "speculative," without citing how or why [a non-procedural state law-based (O.R.C. 2953.21) grounds for denying a PCRP without hearing, which need not be addressed here because the Opinion's sole reason for rejecting 16/17 is procedural default; and this state court statement does not invoke a state law based procedural default; if, on the other hand, this statement is a procedural default reason being given by the state court, the details of why Cody's affidavit was "speculative" needed to be analyzed by the habeas courts de novo under Abela, supra, and they were not, with a view to see if the non-speculativeness constituted state-law compliance under the first prong of Maupin, supra. In these affidavits [Cody used the term correctly; there were more than one], Cody stated affirmatively, as fact, based upon first-hand knowledge presumed from the wording of his affidavit oath, that defense counsel never subpoened any of the witnesses Cody listed (who, Cody had stated, in his trial court Motions for Subpoenas to Issue for them, referenced at Doc. 42-1: 2228, would have testified he was CIA); since subpoenas may be served under the Ohio Rules of Criminal Procedure without filing them of record, this is a "fact outside the record;" it also impliedly turns on conversations between Cody and counsel off-record; that defense counsel withdrew his own motion for a private investigator to pursue discovery of Cody's CIA/White House employment; Cody proferred his testimony to matters clearly dehors the trial record (as well as the need for subpoening Michael DeWine's testimony at an evidentiary hearing) that DeWine, while a U.S. Senator on the Senate Select Committee for Intelligence, was informed of Cody's CIA employment on the Navy association operation (the subject of the Counts 1 - 11 Cody was convicted on); that DeWine had assisted the Navy association with its Ohio fundraising as part of his official duties, also dehors trial evidence; and that DeWine had solicited Cody for an unrequited substantial contribution to his U.S. Senate 2006 re-election campaign, also dehors trial evidence. It is obvious almost all of Cody's proferred evidence related

to conversations and communications made dehors trial record; and these statements, cited in this paragraph, do not, facially or otherwise, constitute speculation; Martinez v. Ryan, 566 U.S. 1, 14-15, followed, Hill, infra, at 842 F. 3d 910, 938, likewise excuse procedural default here because Cody was not appointed counsel, although requested, for the PCRP trial court action]; and that Cody provided no "documentation" [Emphasis added]"from outside the record" to demonstrate why the IATC claim could not have been considered on direct appeal. In addition to the erroneous reasons given, cited in this paragraph above, the most important reason for the error of the Opinion, with regard to the trial court's opinion as applied to the Opinion's procedural bar, is that the turning of relevant evidence of any kind, not just documentary evidence, outside the record, as applied to a non-held Ohio post-conviction relief action hearing, establishes an excuse for a habeas federal procedural bar based upon the state-law based procedural default (Hutton v. Mitchell, 839 F.3d 486, 504 (6th Cir. 2016); Hill v. Mitchell, 842 F.3d 910, 936 (6th Cir. 2016) (if any claim in any Ohio post-conviction collateral attack proceeding turns on dehors record evidence (to be determined de novo by the habeas court, Abela, supra), e.g., as to an IATC off-record defendant-counsel communication, no federal habeas procedural bar attaches to the claim).

In the Opinion's then referencing, second, at Doc. 75: 8759-60, on 16/17 procedural bar, the Ohio court of appeals decision on Cody's appeal of the 2014 IATC PCRP trial court judgment, which, affirming the trial court's judgment, merely invoked res judicata (IATC could have been raised in the direct appeal) as the ground for its state-law based procedural default. The Opinion errs in applying federal habeas bar because (a) Abela, supra, requires a de novo review of the decision, and the Opinion provides no review, de novo or otherwise; and (b) the original proceeding turned on off-record from the trial evidence, supra, which excuses the federal bar (Hill, supra); and (c) the fact Cody requested counsel for the PCRP trial court action and none was provided excuses the federal bar (Martinez, supra; Hill, supra).

Third, and finally, the Opinion concludes federal procedural bar applies because the Ohio court of appeals, in its 2018 PCRP/motion for new trial decision, "denied those filings because they were

untimely."[30] Doc. 75: 8762. But, the Opinion concludes, thereupon, solely, " Thus the [district] court finds [Emphasis added] that Cody [is defaulted] [and that Maupin's first, second and third prongs providing an excuse for cause and prejudice do not apply]." The error of the Opinion is itself procedural ; it is not an Abela de novo review (in fact, it is not even a deferential review, or any kind of review at all) of the substance of the state court opinion as to the default, or as to any substantive merit to Cody's claims, i.e., the state court decision was not that the CIA and federal government issued documentary evidence (Cody limited his habeas argument to two documents in the state appellate court decision: the CIA written response to Cody's FOIA request, and a federal agency's (Office of Government Information Services ("OGIS"), the federal agency hearing Cody's administrative appeal from what Cody considered (the CIA FOIA response) to be an unsatisfactory result because the response refused to provide Cody with his requested, full CIA files; the OGIS document is that administrative agency's written opinion on the appeal. it could not issue, obviously, until the CIA had first provided its written FOIA response) Cody proferred was not relevant or outcome-determinative at trial, but that Cody was not "unavoidably prevented" from discovering and acquiring those documents within the relevant Ohio-state law based 120 day period. As pleaded by Cody in both his Traverse and Objections, a de novo review favoring Cody would have to address the merits of the reasons he gave the state court for the delay as constituting unavoidable prevention. Those reasons address Maupin's first prong cause and prejudice excuse of compliance with the state rule, i.e. unavoidable prevention (as pleaded by Cody to

30. Res judicata, based on either claim or issue preclusion, stemming from the direct appeal, the 2014 trial court PCRP, or the 2015 PCRP appellate decision, was not invoked as to the PCRP claims or the motion for new trial ("MNT") claims in this decision. Cody argued in his Objections, at Doc. 74-1, p. 27, and re-argues here, that it was error for the Opinion to invoke res judicata (and therefore any state-law based res judicata) based upon the 2014/2015 PCRP decisions, because this (same) appellate court, reviewing Cody's new off-record documentary and testimonial evidence of CIA employment for the first time as evidence, also, of IATC, and not finding it not outcome-determinative, sub silentio overruled the res judicata default of the two earlier actions based upon their "could have been raised in the direct appeal" argument, citing Y lst v. Nunnemker, 501 U.S. 797, 801-02 (1991) ("State procedural bars are not immortal; they may expire because of later actions by state courts.").

to the state and to the two habeas courts, Cody requested the FOIA response from the CIA after his arrest, as soon as he obtained the FOIA coordinator's address and an envelope pretrial, and again, immediately after he arrived in an Ohio prison (where and when the no contact order died); and he received no response from the CIA on either occasion ; and he received no response until 2017, when he made a re-request under a new administration, both in Washington, and at Langley CIA headquarters (his written request made from the Cuyahoga county jail was made before imposition of the no contact order); and that defense counsel refused to help him in the pre-trial request, or to make counsel's own request (IATC excusing the overlying reason , "avoidable delay" for the default - as well as the alleged default of all the other of Cody's 16/17 IATC claims (all PCRP actions) - a theory of certain types of IATC supporting excuse for a default of an IATC claim or, more importantly, on the MNT side of the house instantly, a default of untimeliness which is being used in a "per se" sense, based upon IATC used in the general sense of failure to pursue discovery)),[31] fully supported by Cody's habeas pleadings' argument and

31. IATC is not relevant per se in the Ohio motion for new trial ("MNT") section of Cody's action in either the Ohio trial or appellate court actions . Ohio MNT law to obtain new trial simply makes relevant the identification of relevant and outcome-determinative trial evidence the defendant was unavoidably prevented from discovering before or during the Statute's 120 day period, running until 120 days after jury verdict. The PCRPs, on the other hand, are about IATC.

citations.[32]

16. The procedural defaults for all the four PCRP actions the Opinion cites as determinative of the procedural default of claim 16/17 were also excused because the relevant evidence was off-record, supra, under federal habeas bar excuse as established by Hill, supra, at 842 F.3d at 936 (Objections, Doc. 74-1, p. 27) unmentioned by the Opinion.

17. The Opinion also errs at law, as its sole , and newly made, reasoning for rejecting one ground for habeas excuse of bar of "claim" 17, at Doc. 75:8762, stating: "Cody did not present this claim in his 26(B) Application [of IAAC excusing, under Maupin cause and prejudice, a federal procedural bar in a habeas case] and therefore, any such ineffective assistance of appellate counsel claim is procedurally defaulted." The Opinion appears to be arguing, on this issue, that, first, it agrees with Cody that IAAC for failure to make claim can serve as cause and prejudice. Second, the Opinion then limits its defintion of claim 17 strictly, i.e., as not being read in conjunction with a continuum of IAAC actions also evidenced in claim 16. But it is to be so read, because counsel's actions in refusing investigation, discovery, pursuit and presentation did not occur as isolated events in the context of the larger IAAC referenced in the App. R. 26(B) application, even if that application also focused its searchlight beam on some of those IAAC events. The "claim" can thus fairly be said to have been noticed in the App. R. 26(B) application, and therefore it is at least debatable to conclude that IAAC as excuse is to be ruled out simply because it was not, as Doc. 8762, n.18 would have it.

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32. Cody cited four federal circuit court authorities, and the Supreme Court authority cited by one of the four; Cody cited (with summaries of the relevance of their holdings on procedural default) these authorities in his Objections, Doc. 74-1, p. 30. The Opinion claimed, without explanation, that these were not "relevant authority" for the theory. Dietz v. Money , 391 F.3d 804, 807-808, 811 (6th Cir. 2004), of the four, is particularly on point (trial counsel's failure to file a timely appeal is cause to excuse the procedural bar of petitioner's habeas substantive claim that trial counsel was ineffective for failure to file a timely appeal, i.e. that an untimeliness procedural default could be excused where there was IAAC for the untimely filing). Moreover, Cody's IAAC "theory" of cause to excuse procedural default constitutes nothing more than following Martinez v. Ryan's, 566 U.S. 1 (2012) ruling, since a section of this action and appellate court decision was an Ohio PCRP proceeding and appeal; since Ohio law requires a PCRP proceeding for IAAC turning on dehors trial record evidence of IAAC to be brought in an O.R.C. 2253.21 PCRP; and since the

Miscarriage of Justice Grounds

Summarized Issue:

VIII. Did the Opinion err, on law and the facts, in concluding that petitioner's miscarriage of justice (a.k.a. actual innocence) claim was denied for lack of merit?

Issues on Opinion's Analysis of Claim of Miscarriage of Justice (a.k.a. "Actual Innocence") (Doc. 75: 8763-8765):

In summary, as to matters at law, and, from time to time, as to matters of mixed questions of law and fact, the Opinion, at Doc. 75: 9763-64, makes statements and uses case quotations creating debatable propositions of what the law is, as the Opinion summarily applies its positions to Cody's proffers of new evidence. It is because of the Opinion's omissions of other case law statements and case law quotations from the Supreme Court and this Court about what miscarriage law clearly is, and how it is to be applied, which would be favorable, or at least more favorable, to the outcome of a determination instantly of the application of a ruling of the miscarriage standard having been met, and of the application of the omitted holdings on that standard and standards instantly, in order to open the gateway to a thorough review of Cody's constitutional claims regardless of any procedural default, that this debatability emerges as important. It is from the error of those omissions, as well as the omissions themselves, that debatable propositions of law from those sources spring, making the Opinion's unfavorable determination of failure of the miscarriage claim instantly questionable or wrong. And, from outcome-determinative time to outcome-determinative time, the Opinion's factual conclusions of what Cody did or did not say in his miscarriage proffer, and of what Cody did or did not do in his miscarriage proffer and his explanation of it, are just plain, and clearly, erroneous.

Before stating projected issues for review of specific examples of these Opinion errors, some more generalized points of error at law of the Opinion

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32. [Cont'd from p. 52]

documentary evidence as well as the proffered testimonial evidence in the other PCRP actions the Opinion references, was clearly dehors trial record, as were defense counsel's statements to Cody he would not pursue further the CIA evidence.

should be noted:

The standard for a miscarriage review, including a credibility review of the new evidence, is that, after considering the new evidence, the habeas court concludes it would be more likely than not that "any" reasonable juror would have reasonable doubt of guilt, in order to effectuate a gateway to review of the petitioner's constitutional claims regardless of any procedural default of those claims, and with less stringent standards than the district court used in any of its so-called reviews of Cody's claims when and where it did, in fact, make such reviews. See, House v. Bell, 547 U.S. 518, 538-39 (2006). The standard for determination of the miscarriage issue is not, as erroneously implied by the Opinion instead of the "any juror" standard, supra, that the habeas court must determine that all 12 hypothetical jurrors must be convinced to an absolute certainty, upon consideration of the new evidence, that the defendant "actually" and "factually" did not commit the crime.

The any juror standard is that, for the gateway to be open in light of the new evidence, the habeas court must find it "...more likely than not any reasonable juror would have reasonable doubt." House, at ***37-38, quoting Schlup. The Court makes this restatement of the "no reasonable juror" standard, it explicitly says, to clear up the double negative in the "no reasonable juror" iteration, the latter inherently leading to implications such as that applied by the Cody Opinion, that all 12 jurors, instead of any juror, would have to agree on a not guilty verdict by an absolute certainty, in accordance with the other tenets of the miscarriage standard.

Penney v. U.S., 870 F.3d 459, at **9-10 (6th Cir. 2017), omitted of mention by the Opinion, explains, further, House's referenced standard, focusing the miscarriage analysis on legal burden of proof and reasonable doubt about the legal elements of the crime. "Actual innocence" means "conviction] for a crime that the law does not deem criminal." Id. Smith v. Warden, 780 Fed. Appx. 208, 220 (6th Cir. 2019), also omitted of mention by the Opinion, makes that explanation even more explicit, stating that the "use of the term 'actual innocence' is actually a misnomer" since the miscarriage "... inquiry focuses on legal proof relating to reasonable doubt of the existence or not of each element

of the crime]...[not] factual innocence," such as, simply, whether the defendant was or was not at the scene of the crime, or whether the actus reas having been committed, whether the State has the right defendant or the "wrong guy." Id., at 221. This language goes clearly contra to the Opinion's interpretation of the quotations it cites, in creating, impliedly, for application to Cody's profferred new evidence in his "Traverse,"[33] a debatable or erroneous standard of "all the hypothetical jurors, to an absolute certainty, must be convinced of factual innocence."

Smith's "focusing on legal proof" explanation is not, moreover, a mere new iteration of an "insufficiency of the evidence" analysis; nor does it have anything to do with such a constitutional claim. "Insufficiency" has to do solely with an appellate court analyzing the presented State's evidence, by itself, to see whether it met a due process of law standard of sufficiency of proof beyond a reasonable doubt and, if not, reversing the conviction; defense evidence is not even considered. Smith's "legal proof focus" for miscarriage, instead, has the analysis made, not for the purpose of reversing any conviction, but, instead, for merely providing a gateway for further analysis of a separate (constitutional) claim or claims, going straight to the defense miscarriage proffer of new evidence, determining if it meets the "any juror" standard, certainly with respect to legal proof of elements beyond a reasonable doubt (with the State's pre-existing trial entered evidence to be considered), but, also certainly, without any "due process insufficiency standards" or rulings being applied to either sets of evidence of the two parties.

Cleveland v. Bradshaw, 693 F.3d 626 (6th Cir.2012), also explaining House, supra, also omitted of mention in the Opinion, makes clear that when the petitioner asserts only constitutional error, miscarriage serves to excuse any procedural default, and becomes a gateway to obtain habeas review of the claims applying "less stringent" standards for review of those claims than would apply without the showing of miscarriage. Id., at 631-633.

Also omitted of mention by the Opinion is House's clear statement that,

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33. This statement analyzes issues springing specifically from that application, for error, infra.

although Cody's proffer in his Traverse, Doc. 57, at pp. 31-48, is almost 100% eyewitness testimony, new evidence to be considered for a miscarriage claim analysis is not limited to the list contained in Schlup, and is to be considered regardless of evidentiary issues of admissibility. House, supra, 547 U.S. 518, 537-38 (2006). Thus, Cody's submitted CIA FOIA response, stating, in reply to Cody's request for all documents related to his CIA career, including, specifically, the CIA's Navy association operation,[34] stating the CIA refuses to confirm or deny a covert relationship of Cody with the CIA, along with the federal government administrative appeal agency's written decision on Cody's administrative appeal of the FOIA response analyzing the sections of federal statutes and executive orders cited by the CIA in its response as authorities for its exemptions from disclosure of Cody's requested material, as to what types of information those cited authorities covered, as well as Cody's statements of fact, in his Traverse (Doc. 57) proffer p. 20, as a former Agency desk officer reviewing requests of former officers made pursuant to the FOIA, that such a "Glomar" response as Cody received is never given where the requester in fact had no such covert relationship; as well as Cody's sworn statements as to defense counsel's refusal during pre-trial and trial to investigate or pursue CIA employment evidence leads (to which (the FOIA response and the administrative appeal agency written explanation of it) Cody limited (in his Objections, a limitation repeated here) his "newly discovered evidence" claim in his state-court motion for new trial 2018 proceeding; see Doc. 57, pp. 19-22; the R&R errs factually, at its pp. 50-51, in describing this evidence differently), becomes part of the miscarriage new evidence, in addition to the remainder of Cody's Traverse SS testimony at Doc. 57, pp. 31-48.

Analogous to the review of, and the decision on the facts in, House, supra, an appellate court cannot say, since there was no counter-evidence presented by the State that Cody was not CIA at all relevant times, or that he did

34. The CIA's (and the federal courts') position in FOIA cases is that the agency response provided is to a specific request for specific documents. Yagman v. Pompeo, 868 F. 3d 1075, 1081-82 (9th Cir. 2017); Public Eples. v. EPA, 314 F.Supp. 3d 68, 80 (D.D.C. 2018).

not have an exemplary career as a covert intelligence officer with operations as he details them in his proffer, from 1967 through April, 2012, which paid him sufficient monies in cash to make the political contributions the State said he did, as personal contributions, and still to save the amount - $981,500 - seized from his private storage in Portland, that the evidence Cody proffers would not cause real doubt, reasonable doubt, in the mind of any juror as to the intent element of the crimes as charged, or whether any "theft" occurred at all, or whether Cody's use of a cover identity - any cover identity, Bobby Thompson or not - was not for a "lawful purpose"; or that the lack of any direct State's evidence that Cody was not CIA following lawful orders, or of theft (e.g., a confession or admission or an eyewitness testifying she saw Cody take donor funds and place them so that he was treating them as his own) would do otherwise than prevent the jurors from placing "significant reliance" on a state case based simply on insinuation. See, House, 547 U.S. at 547-48. There is nothing in House to suggest, moreover, that the defendant's personal eyewitness testimony is to be deemed less than credible just because he is the accused in the case, or because the State presented circumstantial evidence of guilt not addressing, at all, the petitioner's new evidence, or less than credible because the district court summarily determined it to be. See, House, 547 U.S. at 553-54, followed, Whitfield v. Graham, 2016 U.S. Dist. LEXIS 120206, at *8 (S.D.N.Y.). When Cody's detailed argument on the applicability of miscarriage instantly, found at the Traverse, pp. 48-54, is also considered, with the above analysis, it becomes clear the Opinion's summary conclusion, at Doc. 75: 8765, that Cody did not provide a 'persuasive explanation' of that applicability, creates both Opinion positionings at law contra the authorities Cody used, and uses, which is

debatable[35], or wrong; and Opinion factual postures as to what Cody did or did not say

35. The uniqueness, for example, of the facts described in the Traverse's profferred new evidence, fundamental to Cody's defense at trial, in the history of reported Ohio-state-based criminal [redacted] cases, brings the instant case squarely within the concise, dictum, certainly, of Schlup, as to the "rarity" of miscarriage cases. Miscarriage is, after all, otherwise undefined, and otherwise unspecified as to a "type" or "types" of circumstances or facts it applies to, but reflects an equitable concern about the defendant's guilt justifying the opening of a less rigorous analysis of his constitutional claims.

This Court may note that, pursuant to the State's evidence at trial, the activities alleged in the indictment, the acts rea of all these charges, took place in at least 40 states, [redacted] justifying jurisdiction for those type of offenses to be tried both in all three states, and by federal prosecutors, and that the plausible, one reason for the failure to indict as to Navy [redacted] association activities in any such jurisdiction other than the state of Ohio, including [redacted] sponsored charges for the illegal political contributions alleged as massive by the State in its presentation of its criminal case against "Bobby Thompson, and IRS - laundered charges for tax fraud alleged as massive by the State in its presentation of its criminal case against "Bobby Thompson," is presented in Cody's new evidence portion, that, simply put, he was CIA at all relevant times; and that no federal indictment is, or was, forthcoming, and that federal discovery standards, presumably taken seriously by any U.S. attorney, would have required disclosure to the defendant of his entire CIA relationship history as exculpatory, and more than exculpatory, exonerating; and that no state prosecutor (since the state could, and did in Cody's case, claim no such disclosure obligation because it was not a party in "actual possession" of such evidence), anywhere, other than Ohio prosecutors, were willing, even with its critical questions evident, to risk a case [redacted] against the defendant with the parts of miscarriage evidence Cody profferred possible, the grading of that evidence being an alternative to that [redacted] These circumstances certainly constitute a "rarity" among miscarriage cases at least equal to the rarity of prosecutions where the defendant convicted is mistakenly identified.

in the Traverse brief [redacted] and Objections which are clearly in error.

As to these debatable propositions of law and clearly erroneous statements of "fact," more particularly:

18. The Opinion errs, in its end result of not applying miscarriage to all Cody's constitutional claims, at fact and law, in its constant use of the 'actual innocence' nomenclature, inasmuch as the term implies factual innocence, such as an alibi, is required to be shown, when, especially in the context of Cody's proffer by habeas affidavit (Doc. 57, pp. 19-22; 31-48), the substance of which is unmentioned, undiscussed and unanalyzed [redacted] in the Opinion [although in referencing Cody's proffer in its Schlup context, neither the Opinion nor the R&R ever clearly and specifically refers to Cody's profferred evidence, (when summary referencing does occur, [redacted] infrequently, and incongruously in both documents side-by-side with statements Cody provided "no" evidence, as lacking credibility (see, Doc. 75: 8765)] and to which there was (nor was there any assertion by the Opinion or the R&R that there was) nothing in the evidence at trial which would, or could have, served as either refutation or rebuttal to Cody's profferred evidence of his CIA employment from 1967 through his arrest in 2012, that profferred evidence going persuasively, based upon the unrefuted, unrebutted specificity of the details of the profferred evidence on [redacted] CIA and White House [redacted] (for certain temporal periods), direction of Cody's operational activities from 1967 through and including the Navy association operations, and beyond, to the date of his arrest, despite those being details limited by page restrictions placed upon petitioner's habeas pleadings by the magistrate and district courts, but nevertheless overwhelming any summary or assumptive challenge to Cody's, or the evidence's credibility or reliability pursuant to Schlup or [redacted] House), including specifically going persuasively, under Smith's test, supra, and Penney's test, supra, to:

(a) the issue of defeating the specific intent[36] required as an element of the offense

36. Cody's statements about the subject crimes (a) - (d), supra and infra, being "specific intent" crimes under Ohio law, are made with the meaning to be attached to that concept, as constitutionally required, by Supreme Court and federal precedent cited at Doc. 57, pp.48-54, which went unchallenged by the respondent, R&R and the Opinion.

by Ohio's theft statute as charged to "deprive" the donors to the Navy association of their property, their donations, by not fulfilling the purpose of those donations [T.Tr. 4395] "to help" U.S. Armed Forces members and veterans (see, infra, testimony of the only two donor witnesses to testify (for the State) as to their purposes in making their donations in response to the solicitations they received), based upon the CIA's federal law mandate to protect sources and methods of its intelligence operations, infra, and CIA and White House specific direction to (it being clearly erroneous to call this evidence as profferred as merely being evidence of the ignoring,by these agencies and persons,of an act of fundraising, or an act of making expenditures, or an act of theft of funds, or an act of the taking and moving of funds) Cody to take the unaccounted-for-at-trial funds donated to the Navy association [also for that very purpose, "to help veterans"] to make payments [37] to foreign officials and influence agents in Global War on Terror allied countries to secure the substitution of their frontline armed forces combat personnel for ours in the Iraqi and Afghan wars, keeping up, at the same time, the undeterred, undiminished, robust and relentless allied drive to victory against Islamist terror emanating from those two countries, of approximately $1 million per payment, such payments profferred by Cody as having been accomplished; as presented on the facts, and argued at law, by Cody (Doc. 57, pp. 48, 50, 51, 52, 53).

Cody's Traverse argument on the sufficiency of his proffer as to the FOIA evidence under the Schlup/House standard,detailed how his proffer put forth classified details of what Cody did and did not do, as a Navy association officer, and the fact he was operating as a CIA officer during that time (see, on the totality of the related evidence on the FOIA response, Traverse, pp. 20-22; Wearry, Porter), and made watershed arguments, especially when it is considered Cody's credibility/reliability went unchallenged-by-the- state-courts-or-by- the-R&R, or Opinion.

These arguments were based upon Cody's explicitly detailed, extensive

[37] Political opponents of Bush [43] war policies in Iraq and Afghanistan would call these payments "bribes." Petitioner,instead, avoids this term, and uses, instead, the terminology used by his CIA superiors and the President of the United States in discussing, and issuing, directions for petitioner's participation in the making of these payments.

1967-2012 Agency employment career, including Cody's stints with the CIA's office of general counsel (made in Cody's 2018 motion for new trial/post-conviction relief petition action affidavit, and, again, at Traverse, p. 20), factually, stating that "Glomar FOIA responses" for an Agency employee's "own" covert and classified files as an officer, a refusal "to confirm or deny," have never been issued unless the file or files as requested existed. These factual statements were effectually conceded by the Magistrate court's statement that the documents showing the Navy association employment were denied to Cody "because such records are classified." R&R, p. 51. That's what the CIA did, and does, and was, and is, charged to do, honorably, to maintain secrets to protect the national security of the United States; and that's what Cody did, honorably, and as charged by his Agency, and his president, with regard to, and in, all Navy association operations and activities. The honorable purpose of the lies told by CIA covert officers is what destroys, 'actually,' the ability of the State to secure a conviction for a crime charged but requiring specific mal-intent, as Cody's pertinent crimes all did, i.e. the ability to obtain a "conviction for a crime that the law does not deem criminal." That those records detailing Cody's activities on behalf of the Navy association (sometimes herein "USNVA"), and the United States Government (sometimes herein "USG"), "are classified" is exactly what the USG's Office of Government Information Services (sometimes herein "OGIS") (the administrative agency for an appeal of a CIA FOIA determination) said in its administrative appellate determination letter to Cody (also, in the R&R, at times ignored, and at other times stated as new or newly discovered), stating, further, the reasons for classification were that the subject matter (Cody's request for his covert files and what was covered in them, including, but not limited to, the Navy association operation) related to "military," "national defense," "national security" and national "intelligence" matters, matching, exactly, albeit as labels, what Cody says, in detail, was going on with regard to all the USNVA expenditures and "missing funds," the sine qua non predicate for insinuation of the State's theft and money laundering counts, at his Traverse, p. 34, sworn statement.

As a matter of clearly established federal law, miscarriage analysis provides that, first, where the petitioner makes his actual innocence claim with an assertion of constitutional error at trial,

the conviction may not be entitled to the same degree of respect as one that is the product of an error free trial. Schlup, 513 U.S. at 315-16, citing Herrera v. Collins, 506 U.S. at 419, 426 (O'Connor, J. concurring), and more importantly, because "Schlup makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to ... admissibility...." [Emphasis added]. House v. Bell, 547 U.S. at 537-38, citing Schlup, 513 U.S. at 327-28.

The State's entire case on theft and, the theft-dependent money laundering counts was predicated , solely, on a "missing funds," or end use of funds, and lack of records as to where funds went theory (testimony of Gus Palaibis, the State's forensic accountant (Doc. 43-13: 6222,7-6223,16, et al.), including his testimony he could not testify as to the end use of "missing" funds (his testimony going to both the mens rea and the actus reas of Ohio's theft statute, O.R.C. 2913.02(A), of "purpose to deprive"), i.e. deprivation of the donors' funds going to an unintended purpose (see, R&R and Opinion ignored Traverse SS, p. 35), the relevance of Cody's CIA/White House employment being that the classified "missing" expenditures, made in cash (regardless of what accounts they went through first prior to cash withdrawals) Cody described in his R&R/Opinion ignored Traverse SS (to secure , not an end to the destruction of Al Quaeda in Iraq and the Taliban, and their terror-based values, but the withdrawal of U.S. Forces from the Afghan and Iraqi theatres by their substitution with foreign, allied frontline, vetted forces who should have willingly been there in the first place) were clearly within the parameters of the USNVA authorized solicitations made, and the USNVA (sanitized to avoid direct statements of classified matter) statements of purposive activities registered with numerous (35) state and federal government agencies, including those of Ohio.

Incorporated into this inference[38] of theft and money laundering was a

38. There was no direct evidence of theft provided by the State at trial. Nobody saw Cody "steal" money from USNVA. Nobody saw Cody direct USNVA funds to some purpose overtly indicating deprivation of donor funds, or other than to a legitimate USNVA, or CIA, or White House approved purpose, or to spend any of such funds on himself, or for his personal increment. Nor did anybody hear Cody make any such admission, or any otherwise inculpatory statement. There was no evidence he bought anything, ever, suggestive of greed or a desire for personal possessions, no real estate, no motor vehicles, no boats, no jewelry, no gambling, no prostitutes, no fancy clothing, no lavishness at all. There was no indicia of greed, and political contributions he made (although sometimes made with pressure by Republican officials) came out of his own pocket, his life savings of working for the Agency. The co-defendant (a guiltless, USNVA secretary) did not testify [because, if she had, she would have supported Cody's facts as described above]. There was no evidence introduced which denied Cody's miscarriage claim evidence of his CIA and White House intelligence operative employment, because Cody's evidence was not introduced at trial due to the denial of Cody's self-testimony and IAC. The State's entire case as to the actus reas of theft, and to the specific mal-intent for theft (two distinct issues) was circumstantial, as was the case for the same elements of the money laundering transactional movement of funds for an unlawful purpose (Traverse, pp. 48-54, with record citations). All of these matters , as a matter of miscarriage analysis, are ignored by the R&R and the Opinion.

[Cody says all this above not to assert an 'insufficiency' constitutional claim, for such was never made, but to simply delineate the State's evidence actually presented at trial, which House, supra, clearly permits for consideration as part of the miscarriage analysis.]

to be drawn conclusion that the $981,500 seized in Portland was part of those "missing funds", an inference refuted (as it only could have been, given the IATC the Traverse described) by Cody's testimony, his trial-desired testimony, in the Traverse SS, pp. 31-48, 19-22, detailing his employment assignments by the CIA, 1967-2012, for specific amounts of (largely) cash compensations and allowances over those years from which that amount was generated in savings. As to tampering with records, the specific intent requirement of the Ohio statute (R&R/Opinion ignored, Traverse, p. 48, with citations) is denied by Cody's intent to sign his name "Bobby Thompson" to the Ohio Attorney General's Office documents,designated by the State's evidence as the "records" in question, to further his CIA directed, and National Security Act of 1947, as amended (infra) sanctioned cover protection activities; likewise the defense of lawful purpose to Ohio's identity fraud statute (O.R.C. 2918.49(F)(2)(b))is established by Cody's trial-denied, R&R/Opinion ignored, Traverse SS testimony on, not just his CIA-directed personal use of identity cover going back to to 1974, but also with reference to his experience and expertise, from his CIA office of general counsel assignments and associations.

The specific mal-intent required for the Ohio crimes of theft and money laundering (Traverse, p. 48; R&R/Opinion ignored) is, moreover, and likewise, denied by Cody's USNVA activities, as directed, in furtherance of his CIA and White House national security and intelligence-related purposes described and established at his R&R/Opinion ignored Traverse SS pp. 31-48; and id. at 19-22.

Ohio's Corrupt Activity crime can only be established on conviction for two or more of the incidences identified in the theft, money laundering or tampering with records counts, a legal point made by Cody in his habess proceeding not disputed by the respondent, R&R or Opinion (Traverse, p. 53, n. 89, with citations).

Finally, to its implication raised as to miscarriage analysis value, of non-direct evidence, and, in denying miscarriage as to a procedural bar excuse to all claims, the R&R appended its conclusory remark that "...nowhere in his filings does Cody explain how [his] 'affiliations' with the CIA demonstrate actual innocence of the charges....," ignoring both the entirety of what Cody would have testified to on that very subject, Traverse SS pp. 31-48, and Cody's very specific argument, including numerous authorities on outcome-determinativeness of CIA "affiliations" to the specific intent requirements of many crimes, including economic crimes (Traverse, pp. 48-54), summarized above.

Ignoring Cody's sworn traverse statements, and ignoring Cody's traverse legal arguments on miscarriage application

either are gross oversights in the nature of factual error, or reflect a silent rejection of Penney's, and Smith v. Warden's, supra, clear holdings that, in this circuit at least, "legal innocence" and "factual innocence" for miscarriage purposes mean the same [redacted] thing, and that the rejection of that application to Cody's miscarriage claim by the Opinion is at least debatable at law, or wrong; and/or clearly erroneous on the facts.

As clearly specified in Cody's Traverse proffer, during all times covered by the indictment, Cody was directed to make all the end-use payments he made, or authorized, out of USNVA funds, and to do all the other financial-related activities of USNVA he did, or authorized, from which the State's evidence at trial was propounded as inferentially leading to the conclusions of theft and money laundering, and all other activities which that evidence was propounded as inferentially establishing records tampering and identity fraud, by his CIA superior officers, and,,as to certain of those activities, by President George W. Bush, and his duly appointed designees, payments which did not involve theft, or any other crime, but which were, instead, designed to support, and which were totally supportive of, both the stated Navy association purposes, and the legitimate goals and strategy of the Office of President Bush, to help veterans. Specifically, Cody's habeas testimony, the only possible source for an outcome-determinative, made clearly erroneous factual conclusion in the R&R, that "...the CIA was [merely] aware of USNVA's expenditures," was that, instead, the CIA and the White House directed all the activities of the USNVA objected to in the indictment and the State's case at trial, including but not limited to its expenditures. See, Traverse testimony: pp. 42-45 ("Cody had been assigned...."); p.39 ("[T]he Agency used...."); pp. 33,39 (creation of USNVA "being formulated officially....;" aspects of USNVA activity "conceptualized...in meeting with [SecDef, later Vice-President] Dick Cheney"); p.34 (description of payments to foreign leaders; "PFRs [public fundraisers]... selected by the Agency..."; [describing payments to foreign leaders not made personally by Cody] "... personally confirmed to [Cody] as having been made ...by the President of the United States, by the Special Assistant to the President of the United States [Karl Rove], by [Cody's] NOC [non-official cover] handler, and by others reasonably known to [Cody] as officers of the CIA, on multiple occasions"); p. 47 ("Cody's CIA directed experiences ..." in covert assignments

almost identical to the USNVA activities [from 1971-1989 described]. See, also, Doc. 42-3:3038 et seq (Cody's 18 page 2018 MNT/PCRP affidavit): 3040 (Para 9): (Both my [non-official cover] and my [deep non-official cover] status, and ... orders [and] directions ... [redacted] to my CIA assignments, as well as the authority of the authenticator ... were authenticated, [redacted] communicated and reported to me personally, continuously in an unbroken line of CIA NOC handlers stretching back to my service as a staff CIA ... operations officer .... in CYs 1974, 1975, and 1976 [naming first and last handler] ... continuing to [the last] [at or around] the time of my arrest in Portland ..., April 29, 2012; and also .... were authenticated, communicated and reported to me personally by publicly identifiable, high-level officers, ... officeholders and authorities of the United States government having a national intelligence or national security function .... having made such.... orders [redacted] [and] directions ... in the regular practice of the activity of each such government office or entity"); 3045 (Para 22): ("The Defendant ... made detailed efforts, overseen by, and with the assistance of the CIA and other qualified U.S. government intelligence officers to make known [without releasing classified details] where USNVA expenditures went ..."; (Para 23): (Cody describes that not one cent of any Navy association receipts went, at any time, to the personal benefit or use of the Defendant, '[redacted] his pocket,' or 'into his piggy bank' ...; (Para 25): ("Those [redacted] purposes ... included .... covert intelligence related expenditures ... on behalf of the ... policies of the Office of the President ... designed [to be] beneficial to the interest of all active duty, and veteran members of the United States Armed Forces"); 3053 (Para 48): ("intelligence, defense and national security officials of the USG and the Bush[43] Administration personally informed [then U.S. Senator Mike DeWine, [redacted] in 2006] ... [of] the classified intelligence affiliation of the Navy ... Association ... with the CIA and Bush[43] White House [and] that large sums of money were flowing into USNVA as donations ... [that USNVA's] original concepts ... lay in ... Cody's classified intelligence activities for the CIA and for the Bush[43] administration's intelligence, national security, foreign policy and ... defense policy iniatives ... and with officials generating and [redacted] executing the same ... and [involved the] directions of those officials for covert [redacted] of, and by, USNVA ....") [Emphasis added, in each case].

These sworn statements made (immediately above), identified explicitly in Cody's Traverse as a part of his [redacted] proffer, constituted a large part of the heart of his miscarriage new evidence establishing his actual, factual and legal innocence under the House, Penney and Smith v. [redacted] tests for miscarriage. They were either ignored entirely by the Opinion and the R&R, constituting clear factual error, or, in the R&R cited above, clearly erroneously mistated factually.

(b) the issue of justifying the movement of monies ("transactions") through a limited number of public record U.S. based accounts to defeat the [redacted] intent required as an element of the offense by Ohio's money laundering [redacted] statute as charged, of moving the money or monies, or doing anything else with it "knowing the property involved is the proceeds of ... unlawful activity" [T.Tr. 43-22: 8132, 15 - 8133, 8], for the same proffered and argued basis given, 18(a), supra (as argued by petitioner, Doc. 57, pp. 48, 52, 53);

(c) the issue of defeating the specific intent required as an element of the offense by Ohio's tampering with records statute as charged, "to defraud" or to knowingly facilitate fraud [O.R.C. 2913.42], based upon the details of Cody's proffer on the history of his employment by the CIA from and including the years 1967 [redacted] 2012 [redacted] (it being clearly erroneous to call the work history Cody proffered, as the R&R did, as being merely "decades old"); [redacted] and based upon CIA direction to Cody, and policies on, and authorizations of, with respect to the Agency's mandate under the National Security Act of 1947, as amended (see, n. 40, infra) [redacted] to protect the sources and methods of its intelligence operatives, the acquisition and use of the [redacted] possessed and used [redacted] false identifiers, including identifiers of living American citizens, justifying Cody, in not having that specific mal-intent of wrongdoing as required, signing his name "Bobby Thompson" to the Ohio government documents in issue in the tampering counts (as argued by Cody, Doc. 57, pp. 48, 52);

(d) the issue of establishing a "lawful purpose" for the acquisition, possession or use of the acquired, possessed or used identifier(s) of the "real" Bobby Thompson [O.R.C. 2913.49(F)(2)(a)] established as a defense by Ohio's identity fraud statute as charged, based upon the last part of the substantive proffer detailed, 18(c), hereabove, as argued by Cody, Doc. 57, pp. 48, 52. [redacted] 39.

(e) Cody's Traverse 88 proffer also described details of, and during, the temporal extent (1967-2012) of his CIA assignments. This testimony establishes a number of Schlup/House standard determinative points of fact, in addition to those made concerning the expenditures and activities of the Navy association, none of which were refuted, or even addressed, by the State's evidence at trial: (1) the personal and operational relationship of Cody with President Bush[41] (when he was Director of Central Intelligence ("DCI") in 1976), DCIs [redacted] William Colby and Bill Casey, and President George W. Bush, the son of the first President Bush; (2) Cody's extensive continuum of CIA cover employment on classified White House originated [redacted] CIA operations involving the raising of funds in the private sector to support presidential foreign, military and intelligence policies, from the time of the Nixon administration (1972) (veterans/military affairs policies and causes involving veterans' organizations), the Reagan administration (1981-1988) (overthrowal of Nicaragua's Sandinista regime, and the overthrowal of Soviet domination and Communism in eastern Europe involving religious charities); and the Bush[43] administration (Afghan and Iraqi war policies as they effected all veterans through [redacted] the Navy association); (4) Cody's attachment to and contacts with, over those years, the CIA office of general counsel, qualifying him to comment upon the legal posture of the CIA as communicated to, and observed by, him, as applied to Cody, CIA relationships with the FBI and all agencies of the Department of Defense, for those years; on all operations Cody was assigned to, interpretations and applications of the National Security Act of 1947, as amended, and the CIA Act (see, infra, n. 40), Executive Order 12333, CIA FOIA "Glomar" [redacted] responses, and, as applied to Cody and other non-official cover CIA operations officers, on policies

39. As stated at Doc. 57, p. 52, n. 69, and going unchallenged by either respondent, the IRR or the Opinion, a violation of Ohio's "Corrupt Activity" statute [O.R.C. 2923.32(B),(1)], as charged to petitioner in Count I of the indictment, requires a conviction on two or more incidents, in his case, in the theft, money laundering or tampering with records counts.

and procedures on the use of personal cover and the identities of others as used for [redacted] personal and operational cover.

In summary of this multi-faceted issue 18, the [redacted] Opinion, first, does not challenge the credibility of anything in Cody's proffered new evidence. Given the factual detail Cody presents of a life in the CIA, including his participation in the Navy association mission, it is [redacted] probabilistically almost impossible to conclude that a reasonable juror hearing this evidence would be convinced:

(1) Cody had not been in the CIA during the times he said he was, and was not following orders of his CIA superiors, and Office of the President staff during the times he said he was, and that the expenditures of all unaccounted for funds of the Navy association were [redacted] made for, pursuant to those directions, purposes which did [redacted] deprive the donors of their intended use of their property, i.e., not made for legitimate purposes, albeit classified and covert [and within the scope of promised activities (as promised to public donors) for Navy association expenditures as established by the only witnesses to receive solicitations who testified at trial, State's witnesses Keith [redacted] Roberts and Dr. [redacted] Patrick Bray (see "Traverse," pp. 35 and 52) to "help veterans" and to help veterans transition back into civilian life], directed payments to [redacted] foreign leaders to influence them to have front line combat personnel from their countries substituted for ours in the Iraqi and Afghan combat theatres, in a process which, ultimately, but which was neither unlawful per se, nor asserted as unlawful [redacted] per se, commingled [redacted] funds for both cash-non-foreign-leader-payments (such as cash gifts or cash purchased gifts, to needy veterans) and for the normal and reasonable administrative expenses of running this "covert" veterans' organization) with cash-foreign-leader-payments, to do exactly what the CIA is supposed to do, keep its [redacted] classified [redacted] operations secret[40] from paying, unwitting, no-need-to-know eyes, foreign or domestic, as opposed to witting, need-to-know agents of the government, such as the IRS auditors who conducted the 2010 field audit of a USNVA subordinate. (In the Navy association's since 2003 physical,

40. See, n. 41, infra.

leased premises on Farragut [redacted] in Washington), and passed it, even though 75%-80% of all its expenditure receipts were missing;

(2) Thusly, Cody's profferred testimony being also that these sorts of financial transactional movements through banks and/or charity covers being common, reasonable and normal for NOC officers engaged in a [redacted] financial based operation, it is probabilistically [redacted] almost impossible to conclude that a reasonable juror hearing this evidence would be convinced Cody made these transactions "knowing that the property involved [was] the proceeds ... of unlawful activity," as charged by the trial court to the jury (T.Tr. 43-22: 8132, 15 - 8133, 8), beyond a reasonable doubt, as to the money laundering counts;

(3) And, thusly, it is probabilistically almost impossible to conclude that a reasonable juror hearing this evidence would [redacted] be convinced Cody signed his name "Bobby Thompson" on the OAG filed documents (which, pursuant to the prosecutor's sole closing argument, constituted the sole factual basis of the specific-intent-required charges of tampering) other than with the intent to follow the lawful and proper use of a cover identity and name assigned legitimately by the CIA for those purposes, to maintain cover, such signings by NOC officers living under non-true-name cover commonly occurring as part of the normal covertness of their cover authorities, beyond a reasonable doubt, as to the tampering [redacted] counts;

(4) And, thusly, and likewise, it is probabilistically almost impossible to conclude that a reasonable juror hearing this evidence would be convinced Cody's possession and use of any identifier of the "real" Bobby Thompson was other than for the lawful purpose of protecting his cover, beyond a reasonable doubt, as to the remaining identity fraud count.

Cody's basis for his lawful vs, unlawful purposes, intent, and knowledge of the same statements is the mandate to the Director of the CIA and his subordinates to "protect" the sources and methods of covert intelligence, its operatives, and its operations found in the National Security Act of 1947, as amended, and the other [redacted] federal statututes dealing with the

authority and responsibilities of America's intelligence organizations.[41]

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41. For the federal mandate to protect intelligence sources and methods, see, the National Security Act of 1947, as amended (currently 50 U.S.C. §3024 (1)(1)), and its predecessor statutes, esp. 50 U.S.C. §403 (d)(3); and the CIA Act, as amended, 50 U.S.C. §3507. Although the 2005 amendments to the National Security Act of 1947 superimposed these mandates to the Director of National Intelligence, federal statutes made clear the responsibility on the newly established (in 2005) office of the Director of the Central Intelligence Agency, and his subordinates, to protect intelligence sources and methods, as applied to the CIA, remained intact as it existed in the previous legislative mandates. See, DiBacco v. U.S. Dept. of the Army, 983 F.Supp. 2d 44, at *61-62 (Dist. D.C., 2013). This protection authority is "very broad," unlimited beyond the fact the protection deals [redacted] Agency's mandate to conduct foreign intelligence," CIA v. Sims, 471 U.S. 159, 169 (1985), followed: ACLU v. DOJ, 681 F. 3d 61, 74 (2d Cir. 2012), Knight v. U.S.C. L.A., 872 F. 2d 660, 661 (5th Cir. 1989), Elgebrowny v. CIA, 2019 U.S. Dist. LEXIS 54807, at *37-38 (Dist. D.C. 2019), and flows from the state secrets privilege inherent in national sovereignty under international law, the latter explained in Totten v. U.S., 92 U.S. 105 (1876). See, also, the National Security Act of 1947 (Act [redacted] July 26, 1947, ch. 343, Title I, §102A(i)(1), as amended 50 U.S.C. [redacted] §3024(i)(1)).

These authorities form the basis for the unanimous declarations of federal cases Cody cited in his Doc. 57 ("Traverse"), at pp. 49-53, that working for the CIA on an assigned, lawful mission, is outcome determinative of legal and actual innocence on any charge requiring specific mal-intent; or because, as one case opined, mistake of fact. In ignoring these cases, in summarily, weakly and vaguely calling Cody's facts, and argument based on them, and based on very relevant propositions supporting a miscarriage finding instantly, "no persuasive explanation" (Doc. 75: 8765), the Opinion creates an at least debatable proposition of law as to the [redacted] relevance of those authorities instantly; errs as a matter of fact in ignoring in large measure the details of the facts in Cody's proffer; and brushes under the table, in the process, those embarrassing-only-to-some details of, and detailed history of, and related to, the covertly made-in-accordance-with-federal -law "bribes" to foreigners which lie as a large, if not the largest, part of the heart of Cody's innocence claim as it pertains to the theft and money laundering counts, and which were part of President Bush's strategic objective of destroying the Taliban in Afghanistan and Al Qaeda in Iraq by making those wars the multinational effort they should have been from the start, to the benefit of American soldiers, sailors, marines and air force personnel who were being asked to fight wars while others who had as much a stake in the outcome as we did shirked their responsibilities while using the bodies of our service men and women as their shields, all of this made, as only fate itself could have had it, even more relevant, and newsworthy, with the fall of Afghanistan occurring literally as this IFP motion is filed.

19. The Opinion errs, in both the [redacted] weakness of its argument, and in its wrong, or at least debatable at law, and in its clearly erroneous analysis of the facts, in its application of its (correctly) [redacted] quoted controlling authority of McQuiggin, at Doc. 75:8763, that the miscarriage [redacted] gateway "should open ... when a petitioner presents evidence of innocence so strong that a court cannot have confidence of the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error,"[42] because, although the Opinion does not find, as a matter of law, constitutional error as alleged in petitioner's habeas documents, this Court should find that it is not satisfied that Cody's trial was free of it,[43] based upon Cody's habeas alleged constitutional claims (and because of the applicability of that standard because of miscarriage), a different standard than that used by the Opinion, on [redacted] appeal and, in that case, McQuiggin's quoted standard (or bar) is not even so high as the profferred evidence meeting a preponderance of the evidence ("more likely than not") test as to a [redacted] "lack of confidence" in the verdict, an analysis found at McQuiggin, 569 U.S. at 395, and an analysis made even more applicable by the legal fact, established by the record in Cody's case, the state appellate court, in Cody's direct appeal, [redacted] already had found Cody went to trial, and was convicted, in a trial loaded with State's evidence on Cody's alleged thefts of 11 identities (other than those of the real "Bobby Thompson"), on 11 counts for which the constitutional error of lack of subject matter jurisdiction did apply (referenced at Doc. 75:8713).

[redacted]

[redacted]

42. Neither the Opinion nor the R&R asserts that any of Cody's constitutional errors were non-harmless. Nor is there any specificial charge in either document that the profferred evidence was not "new," other than one side-reference in the R&R mentioned, infra, p. 76.

43. The "not satisfied" standard is freely used to open the gateway, not as a final standard to rule on the constitutional claims the petitioner makes. The Opinion misses this point of law. Part of the problem is that McQuiggin's language both bifurcates the analysis, "reliable evidence," and ruling on the constitutional claim, into two separate events and concepts, at certain times, and, at other times, treats them as if a reviewing court [redacted] should be making a unitary analysis.

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20. To the extent the Opinion might arguably be said to have adopted the following specific R&R conclusions, it errs:

(a) Factually, in concluding Cody did not provide the habeas court with his evidence (R&R, Doc. 65, p.49): Cody did so, explicitly labelling it as such, in his "traverse," Doc. 57, pp. 19-22 and 31-48, a traverse serving as his petition because the magistrate court struck his original petition, other than its bare-bones statement of claims found in an outline, from the record, supra; thus a court does not look elsewhere, as the R&R erroneously asserts, id., to find out what Cody's testimony would have been:

(b) a page later, Doc. 65, p. 50, the R&R relates that in the profferred evidence of Cody, Cody is saying the CIA only [redacted] "was aware" of the Navy association expenditures; factually, instead, the profferred evidence was that the CIA, and President George W. Bush personally, "directed" those expenditures (Doc. 57, pp. 42-45, 39, 33, 34, 47; and at Doc. 42-3: 3038 et seq. (Cody's 19 page 2018 MNT/PCRP affidavit, incorporated into his habeas profferred evidence at Doc. 57, p. 19 [redacted] (Doc. 42-3: 3040 ¶9, Doc. 42-3: 3045, ¶¶ 22,25, Doc. 42-3: 3053, ¶48)); and

(c) to the extent the Opinion might arguably be said to have adopted the R&R's conclusion that the miscarriage "outcome-determinativeness" test would not be met by Cody's profferred evidence because "it is not reliable evidence that Cody's actions operating the USNWA were excused by virtue of his alleged CIA affiliation [redacted]" (R&R, Doc. 65, id.), it is unclear whether the conclusion is about the reliability of the testimony, or whether it is about Cody propounding at law some non-relevant determinative affirmative "excuse." As to reliability, Cody's testimony was reliable because: (1) of its detail, unrefuted and unrebutted by any State's [redacted] evidence at trial;

44. It is fairly clear the Opinion's analysis of Cody's miscarriage claim is a summary one, not making specific rulings on the R&R conclusions which follow, infra, and an analysis of error to be found in it for miscarriage purposes should be limited to the Opinion's specific, mixed-law-and-fact -issues, and summary conclusion that Cody's proffer and brief did not "reasonably explain" how from his profferred evidence it "would be more likely than not that no reasonable juror would have convicted him," limited to the newness of the evidence, and its not supporting a 'claim of actual innocence." Opinion, Doc. 75: 8764-65.

(2) it was coming from a 66 year old man, previously unconvicted of any crime, whose society, and government, had provided an honored and respected education for him through the University of Virginia, majoring in government and foreign affairs, graduating magna cum laude, and Phi Beta Kappa, and the Harvard Law School, with course emphasis on transnational and international law, through an M.B.A. at a Manila graduate school of business funded by the Rockefeller and Ford Foundations and the CIA, a witness formerly a Captain with the United States Army Reserve, Military Intelligence branch, with 17 years of honorable reserve status service, and a CIA operations officer with many years of operational related training and experiences, certainly a work history, along with its compensation, relevant to the amount Cody could, and did, acquire from that source, as his life savings, and the (largely cash) method of that acquisition (as opposed to the State, as part of its burden of proof on the theft and money laundering charges, inferentially attempting to prove those charges beyond a reasonable doubt merely by presenting evidence of approximately $981,500 seized in cash from Cody's locker in Portland, Oregon); and from a witness with the remainder of Cody's curriculum vitae presented as part of the miscarriage proffer, Doc. 42-3, p.318, referenced at Doc. 65, p.50, which, "new" or not, Cody may use to establish reliability for miscarriage analysis purposes; and he, like any credentialed witness attempting to establish his credibility, and the relevance of the substance of his trial testimony in the context of those credentials, should and would be allowed to testify to at the outset of that testimony at trial.

As to Cody providing merely a non-relevant excuse in his miscarriage proffer, both habeas courts err factually and at law. Cody analyzed his own evidence, at Doc. 57, pp. 48-54, in the context of what miscarriage is, as to burden of proof as to the State under the different charges, under the miscarriage standards, and not as an assertion of some imaginary legal "excuse,"[45] that analysis being ignored without comment on it by [redacted] both habeas courts.

45. Cody did, certainly, quote from, or cite to, id., 12 federal cases holding CIA (or U.S. government) employment of a person going to commission of acts otherwise criminal, if specific intent were required as an element of the crime, negated that element of the crime in an outcome-determinative on the facts way, as a matter of law. These citations and accompanying argument were also ignored by both habeas courts.

That leaves us, again, with credibility, but there are no facts asserted as to Cody's intent, or his credibility, other than inherent unbelievability. See, n. 44, supra. "Inherent unbelievability" of a defendant going into trial or new trial, simply because his testimony favored an outcome of a not guilty verdict (so-called "self-interest") or because of only the circumstantial and opinion-based testimony of agents of the state as to subjects not even covered in the defendant's relevant testimony, a testimony which was actual, factual and eyewitness, and when especially applied to a witness-defendant who would be testifying under a presumption of innocence, applied to reject reliability here would be offensive constitutionally. It is "not for appellate courts to say that a particular witness spoke the truth or fabricated a cock-and-bull story.... [T]he court has been unable to find a single case where a court has ruled [that inherent unbelievability without more as to lack of credibility as a matter of law] may be applied against [a] defense witness[ ]." U.S.v. Smith, 780 F. 2d 1102 (4th Cir. 1985), quoting U.S. v. Bailey, 444 U.S. 394, 414-15 (1980).

As to the "newness" of Cody's evidence, the two habeas courts erring at law if they were implying otherwise, it is "new" because the fact the evidence was not presented at Cody's trial makes it new for the purposes of the actual innocence deliberation. Souter v. Jones, 395 F.3d 577, 596, n. 9 (6th Cir. 2005), followed, Reed v. Sheldon, 2020 U.S. Dist. LEXIS 7658, at *7 (N.D. Ohio). If the Schlup court had wanted to make the requirement "newly discovered" evidence instead of "new" evidence, it would have done so.

It would be, further, a reductio ad absurdum in circularity, in legal argumentation to say that Cody's constitutional claims of ineffectiveness, and of denial of right to testify, for trial counsel refusing to call Cody to testify, and for not pursuing Cody's CIA employment based leads and defenses in either investigation or at trial, given Cody's passed-on-to-counsel knowledge of that employment (which Cody had to have in order to communicate it to counsel) barred as a matter of law Cody's miscarriage claim because the knowledge of the petitioner's claims by counsel (or Cody, as a necessary predicate of his communicating the employment fact to counsel) made the fact of the employment not "new" for miscarriage purposes, thus [redacted] the application

of the less stringent miscarriage-based standards for court review of the constitutional claims, and even the claims themselves. Thusly the knowledge of the truth of the miscarriage proffer evidence would potentially defeat the constitutional claim, when the purpose of applying the miscarriage exception to procedural default cases is exactly the opposite, that the potential truth of the miscarriage proffer evidence, even if known by the declarant at time of trial, makes the less stringent review of the constitutional claim possible, not impossible. In House, supra. e.g., petitioner House knew he was not at the scene of the crime at the time of his first trial.

Henderson v. Sargent, 926 F.2d 706, at 713-14, addresses the very point. Miscarriage analysis there incorporated a favorable to the defendant outcome on a constitutional claim of ineffectiveness of trial counsel for failure to investigate and develop leads, analogous to Cody's claim trial counsel refused to investigate leads of Cody's CIA and White House employment related to the means rear of all the crimes asserted, refusal to call Cody to testify, refusal to subpoena witnesses, and refusal to even make a closing statement, which were outcome-determinative to the petitioner's conviction, a miscarriage given petitioner's habeas proffer; amended by 939 F. 2d 586 (8th Cir. 1991). See, also, the conflation McQuiggin makes, supra, n.43.

On "newness," the R&R, pp. 49-50, for miscarriage analysis purposes, also erroneously, as a matter of law, conflates Schlup's "new" evidence requirement (of "new, reliable evidence" (R&R, p. 49) (as to Cody's propounded claim 16/17 evidence, found at Traverse, pp. 19-22 and pp. 21-48)) with the "newly discovered" (within 120 days of a jury verdict) concept of a state law procedural default, found in O.R. Crim. P. 33(B). Clear factual error is present in the R&R's first statement about Cody's propounded new evidence, sworn to by Cody as a matter of his habeas affidavit (evidence which, coincidentally includes Cody's statements in his state court 2018 MNT/PCRP proceeding affidavit with incorporated exhibits): "As an initial matter, Cody does not provide the [habeas] Court with his newly discovered (sic) evidence," (R&R, p. 49), when, both in the headings and in the cited sworn-to texts, Cody did, in great detail, exactly that (and error at law is present in citing to the miscarriage evidence requirement as "newly discovered" evidence

when it is "new" evidence instead). Then, however, the R&R (p.51) makes argument from its sole cited reference to Cody's traverse, pp. "38-61," which contain 11 of the 17 pages of Cody's sworn-to miscarraige "new evidence" (Traverse, pp. 31-48).

Denial of Evidentiary Hearing

Summarized Issue:

IX. Did the Opinion err, at law and on the facts, in denying petitioner's motion for a habeas evidentiary hearing?

Issues on Opinion's Denial of Petitioner's Motion for Habeas Evidentiary Hearing (Doc. 75: 8765):

21. The Opinion's summary denial of petitioner's motion for an evidentiary hearing on grounds he did not sufficiently demonstrate the need for an evidentiary hearing erred at law and on the facts because:

The bar of Pinholster, limiting review to matters in the habeas record, is utilized almost exclusively as the authority to deny motions for an evidentiary hearing. But that bar is not relevant to any issue concerning procedural default, Cullen v. Pinholster, 563 U.S. 170, 181-82, 185 (2011), because the bar extends only to state court adjudications on the merits.

Procedural default was used extensively by the Opinion to deny or dismiss a number of petition claims, supra. In many instances, however, that invoked procedural default turned upon, even as the Opinion analyzed the subject, whether trial counsel was ineffective in his action, actions, failure to act, or failures to act, and/or the cause of trial counsel's

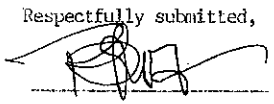
act, acts , failure or failures to act alleged by Cody to constitute IATC, i.e., whether the causation lay with counsel or the defendant, e.g., the procedural default of Cody's underlying Ground 4 claims as to trial counsel's involvement in denial of Cody's right to testify (Opinion, Doc. 75: 8746-48); and a procedural default of Claim 16/17 which turned on, in part, alleged failure to act by defense counsel as IATC.

Cody propounded the record was sufficient to determine these causation issues in his favor; the Opinion agreed it was sufficient, but determined each issue against the petitioner. But a strong and debatable case can be made the record does not contain all the available evidence relevant to this alleged theory of waiver of his right to testify by Cody. It is clear from Cody's habeas pleadings that he would speak, as to such a hearing , as to having spoken at the time, so as to clear himself of any intent to waive, or plan to waive, and to further explain his words of record as constituting non-waiver, and his failures to speak or act at the time as constituting non-waiver; while it should be clear that neither Cody nor any other petitioner in this situation could predict with exact accuracy what defense counsel's exact words would be at such a hearing, petitioner understands that he would be testifying under oath, and therefore would be presumed to accurately portray his actions or failures to act, not Cody's , as the root causation of this alleged, presumed waiver. In that case, outcome -determinative evidence of what counsel said to Cody in off-record conversations regarding not calling Cody to testify and his pursuit of evidence of Cody's CIA and White House employment, or did or did not do off-record on those subjects, and what Cody said to counsel in those conversations, and what Cody did or did not do, and his reasons therefor, and what Cody's and counsel's intents were at the time with respect to those issues, should be had, for a correct determination at law of those issues surrounding the "waiver" question, pursuant to Plummer v. Jackson, 491 Fed. Appx. 671 (6th Cir. 2013).

Statement of Issues Conclusion

While petitioner has a desire to raise the above issues on appeal, his respectfully made request to this Court reviewing his IFP motion and this statement is to find that the district court did make, or apply, outcome-determinative propositions of law in this habeas action which are at least debatable, or in error, in whole or in part, and, interwtwined with those applications issued outcome-determinative conclusions of fact which were clearly erroneous, and thereupon to issue a certificate of appealability delineating such outcome-determinative issues as this Court may deem appropriate for panel consideration after briefing on appeal.

Respectfully submitted,



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Appendix L

An Analysis of the 5th Circuit's Refusal to Adopt the Supreme Court's COA Standard in Capital Cases, 48 Am. J. Crim. L.

ARTICLE: A SHORTCUT TO DEATH: AN ANALYSIS OF THE FIFTH CIRCUIT'S REFUSAL TO ADOPT THE SUPREME COURT'S CERTIFICATE OF APPEALABILITY STANDARD IN CAPITAL CASES, 48 Am. J. Crim. L. 1

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Reporter
48 Am. J. Crim. L. 1 *

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Introduction

When a person is sentenced to death in the United States, their case embarks on a long journey of appeals that will often take years, and in some cases decades. After a capital trial is complete, a defendant may appeal through their state court system and all the way up to the Supreme Court, before beginning a set of post-conviction habeas corpus proceedings at the state level, and finally, a set of post-conviction habeas corpus proceedings in federal courts. The process calls for meticulous reinvestigation of the case, the circumstances of the offense, and the defendant's background, in order to uncover any potential grounds for relief. **1**The Supreme Court has recognized that since the death penalty "differs from all other forms of criminal punishment, not in degree but in kind," **2**death sentences carry with them a heightened "need for reliability" **3**in order to be carried out.

In 1996, a Congress eager to carry out death sentences more quickly as part of the "tough on crime" movement **4**significantly shortened the federal habeas corpus process through the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). **5**The purpose of the law was, according to Justice Antonin Scalia, "not obscure," as it served to "eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal justice system, produced by various aspects of this Court's habeas corpus jurisprudence." **6**Justice Scalia's evaluation of the supposed problem of "interminable delays" is questionable at best. Between 1973 and 1995, nearly 70 percent of death penalty cases were overturned on appeal, with 40 percent of those reversals coming in federal habeas corpus proceedings, **7**suggesting that the problem was not delay but that state trial courts were not effectively safeguarding the constitutional rights of capital defendants. Nevertheless, Justice Scalia's (misleading) perception of the issue did accurately reflect the perceptions of those who passed AEDPA: the goal was quicker - or, as the law stated, more "effective" - death sentences. **8**

Despite its promise to speed up death sentences, Congress did not use AEDPA to test the limits of just how abbreviated post-conviction habeas corpus review may permissibly be under the Constitution. **9**While AEDPA certainly shortens the appeals process, it is not in itself a shortcut - if criminal defendants and their attorneys are able to follow the esoteric procedural mess imposed by the law, **10**federal courts will still review their claims in full, though with great deference to state court adjudications. **11**

However, the United States Court of Appeals for the Fifth Circuit has erroneously relied on AEDPA to take a true shortcut to the execution of death sentences, aggressively flouting Supreme Court rules to short-circuit the appeals process for those condemned to the ultimate punishment. The Fifth Circuit's shortcut has run through what is called a "Certificate of Appealability," **12**or "COA," a step in the habeas corpus process in which a petitioner must make "a substantial showing of the denial of a constitutional right" **13**in order to appeal a denial of habeas relief from a federal district court. It is merely a "threshold inquiry" **14**to ensure that the federal courts are only spending their time on plausibly meritorious petitions. Thus, the Supreme Court has held that a COA should issue as long as the merits of the petition could be debated by a reasonable jurist. **15**This is not a merits-review process, and in fact if a court treats it as such, that court has exceeded its jurisdiction. **16**Rather, it is a stepping stone in the federal habeas corpus process that ensures that a claim meets a threshold of plausibility before an appellate court hears it on the merits.

The Fifth Circuit has consistently used the COA process not to make this threshold inquiry but to decide the merits of the case - at times without even a full briefing on the merits - improperly shortening the federal appeals process beyond what even AEDPA allows. The Supreme Court has consistently reiterated to the Fifth Circuit that it is flouting the COA standard, to no avail. After four reversals on this one issue and another statement of concern from a group of three justices, the Fifth Circuit continues to short-circuit the federal appeals process at the COA stage, clearing the way for Texas, Louisiana, and Mississippi - particularly the former - to execute those sentenced to death without the full benefit of the great writ of habeas corpus. It is a dangerous shortcut to death that defies the heightened standards of reliability that the Supreme Court has demanded when states seek to execute their citizens.

This Article will first examine the restrictions on federal habeas corpus relief put into place by AEDPA and specifically examine the COA standard and how it has been implemented by the Court. Part two will examine the Supreme Court's reiteration to the Fifth Circuit that it is not following the correct COA standard and the Fifth Circuit's continued defiance after its last reversal in 2017. Part three will examine the harm suffered by petitioners sentenced to death when the Fifth Circuit takes a shortcut in the process prescribed by statute, and part four will examine how the Supreme Court can address an inferior court's decades-long "open defiance" of its rulings.

I. Background of the Constriction of Habeas Corpus and the Anti-Terrorism and Effective Death Penalty Act

Appendix L

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 17revising the statute governing federal courts' review of state criminal convictions in fifty years, 18and arguably the most consequential revision to federal review of state court convictions since just after the Civil War. 19While the federal habeas corpus statute, first passed in 1867, 20issues a broad command that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," 21this broad expansion of the so-called "great writ of liberty" was restrained by AEDPA's "twisted labyrinth of deliberately crafted legal obstacles" 22to the vindication of a prisoner's constitutional rights.

AEDPA's legal obstacles to relief for habeas corpus petitioners were designed "to address the perceived phenomenon of abuse[] of the writ" 23- that is, the perceived issue of people sentenced to death using habeas corpus to delay their execution - and to "accord extreme deference to state court determinations of federal law." 24Put simply, "AEDPA's purpose [is] to further the principles of comity, finality, and federalism." 25Most infamously, while federal courts could review state court decisions *de novo* prior to AEDPA, 26AEDPA requires that federal courts defer to state court legal determinations unless they are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 27The law requires similar deference to state court determinations of facts; 28limits situations in which federal courts can hold evidentiary hearings to develop new facts; 29bars second or successive petitions from the same petitioner, save for narrow exceptions; 30imposes a strict one-year statute of limitations for the filing of a federal habeas petition after state habeas proceedings have ended; 31and provides for perfunctory review of a district court's determination absent a threshold substantial showing of the denial of a constitutional right. 32These restrictions on the federal courts' ability to review state court convictions have resulted in a scenario where "except when a state has done something truly shocking in the course of convicting someone (and even then, only sometimes), habeas corpus no longer provides a meaningful avenue for protecting the constitutional rights of criminal defendants." 33Between 1973 and 1995, before AEDPA, 68 percent of death sentences were overturned, with 40 percent of those reversals coming in federal habeas proceedings. 34A study of federal habeas petitioners in death penalty cases between 2001 and 2006, after AEDPA, found reversals in just 12.4 percent of cases. 35

This Article will not examine the merits of AEDPA as policy, or the ways that the Supreme Court "has deliberately exacerbated the worst aspects of" the statute. 36Rather, this Article will explain how the Fifth Circuit has abused one of AEDPA's features - the Certificate of Appealability - to create a perfunctory review process of habeas corpus petitions that has aided the circuit in all-but barring habeas relief for state prisoners, most notably capital litigants, in Texas, Louisiana, and Mississippi. 37

A. Certificates of Appealability in AEDPA

AEDPA bars federal appellate courts from hearing appeals from federal district court denials of claims in habeas petitions unless a circuit judge issues a Certificate of Appealability ("COA"). 38A COA should issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 39While the COA was a new statutory restriction on federal appellate courts' ability to review district court denials of habeas relief, it was essentially a codification of the pre-AEDPA standard for appellate review. 40Under the pre-AEDPA standard, petitioners needed to obtain a COA-like "certificate of probable cause" ("CPC") in order to appeal denial of habeas relief by the district court. 41The Court announced in the 1983 case *Barefoot v. Estelle* that this standard "requires [the] petitioner to make a substantial showing of the denial of [a] federal right." 42In 2000, the Court reasoned in *Slack v. McDaniel* that since AEDPA copied this standard verbatim, except for substituting "constitutional" for "federal," the COA standard was a codification of the CPC standard from *Barefoot*. 43Therefore, the Court imported the standard that it had arrived at in *Barefoot*: in order to obtain a COA, 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." 44This standard applies to both procedural and substantive constitutional claims, meaning that if a petition is disposed of on procedural grounds by a district court, the petitioner must show that reasonable jurists could both debate the decision's procedural bar and that a substantial underlying constitutional claim debatably exists. 45

The COA standard announced in *Slack* is a "threshold inquiry." 46For this reason, the Court has "emphasized" that the COA inquiry "is not coextensive with a merits analysis." 47Indeed, the statute forbids using this threshold inquiry to "require full consideration of the factual or legal bases adduced in support of the claims." 48Accordingly, the Court has noted that "when a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." 49It is for this reason that "a COA does not require a showing that the appeal *will* succeed," and "that a COA will issue in some instances where there is no certainty of ultimate relief." 50

The Fifth Circuit is the one appellate court that has consistently failed to implement the *Slack* standard when performing its COA analysis. Too often, the court has used the COA stage not to make a "threshold inquiry" into whether a habeas petitioner should be entitled to an appeal, but to essentially do a merits analysis and dispose of cases before a true appeal is heard. The Supreme Court has rebuked the Fifth Circuit's refusal to implement the *Slack* standard five times in the past two decades, including in four reversals. The following section will break down the Fifth Circuit's refusal to follow the Court's direction.

II. The Fifth Circuit's Refusal to Adopt the COA Standard

The Fifth Circuit has developed a reputation for going "rogue" on contentious social issues, such as abortion 51and anti-police protests, 52ignoring Supreme Court precedent in favor of more conservative positions. This is no less true in federal habeas cases, particularly high-profile cases involving the death penalty, where the Fifth Circuit has ignored blatant "rubber- stamping" of prosecutors' arguments by state courts 53and facilitated with little scrutiny the government death machine. 54Said law professor David Dow, who regularly litigates death penalty cases in the circuit, "The Fifth Circuit does not understand that it is an inferior tribunal to the United States Supreme Court, and it acts lawlessly." 55Nowhere has the Fifth Circuit misapplied the law and "tr[ied the] Supreme Court's patience" more than on the issue of COAs. 56

A. The Fifth Circuit Has Routinely Defied the Supreme Court's COA Standard for the Past Twenty Years

Ever since the Supreme Court announced the proper standard for evaluating petitioners' requests for a COA in the 2000 case *Slack v McDaniel*, the Court has had to grant certiorari at least in part to "reiterate" 57to the Fifth Circuit that it has been applying the wrong standard on four different occasions, and a three-justice panel has indicated on another occasion that the circuit has a troubling habit of refusing to follow the correct standard. Those decisions, all of which fall between 2003 and 2017, follow below.

1. Miller-El v. Cockrell (2003)

The Court first rebuked the Fifth Circuit's refusal to follow the COA standard it announced in *Slack* in *Miller-El v. Cockrell* in 2003. Thomas Miller-El was convicted of capital murder and sentenced to death by a court in Dallas County, Texas, in 1986. **58**After voir dire, Miller-El, who is Black, moved for a new jury selection, arguing that African-Americans were illegally and systematically excluded from his jury. **59**The trial judge found no evidence of discrimination and allowed the trial to proceed. **60**During Miller-El's appeals, the Court decided *Batson v. Kentucky*, which created a framework for determining whether the State had unconstitutionally used race in exercising its peremptory strikes. **61**Under the framework, the petitioner must make a prima facie showing of discrimination, in which case the burden shifts back to the State to explain why its peremptory strikes were race-neutral. **62**

The Texas Court of Criminal Appeals ("CCA") remanded the case to the trial court to determine whether voir dire was conducted impermissibly under *Batson*. Miller-El demonstrated considerable evidence of purposeful discrimination. Ninety-one percent of eligible black jurors were removed by the prosecutors through peremptory strikes, while only 13 percent of non-black jurors were removed. **63**Black prospective jurors were also given a more graphic description of the death penalty than white prospective jurors, in order to make them more likely to indicate that they were not constitutionally eligible to sit on a capital jury. **64**Prosecutors also "shuffled" the venire when there were African-Americans at the front of the panel, in order to make it more likely that more white prospective jurors would be called for individual voir dire. **65**Perhaps most damning was evidence from former Dallas County District Attorney's Office officials that there was an office policy against allowing African-Americans on the jury. **66**Indeed, a former office manual stated: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." **67**

Despite this mountain of evidence, the trial court again found no discrimination, and the CCA affirmed. **68**Miller-El subsequently filed a federal habeas petition, but he was denied relief despite the district court having noted that he was "troubled by some of the evidence adduced in the state court proceedings." **69**Miller-El then filed for a COA with the Fifth Circuit, but his claim was denied. **70**The Fifth Circuit recited the COA standard that the Court had implemented in *Slack*, **71**but it essentially just decided the merits of the case, rather than determining whether the district court's decision regarding Miller-El's *Batson* claim - with his substantial evidence of potential racial discrimination - was debatable. **72**Given just how much evidence Miller-El had demonstrated, the Court reversed the Fifth Circuit, with the majority stating that "we have no difficulty concluding that a COA should have issued." **73**In reversing the Fifth Circuit, the Court "reiterated that a prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right." **74**Yet despite this reiteration of the COA standard, the Fifth Circuit continued to short-circuit the habeas appellate process created by AEDPA.

2. Banks v. Dretke (2004)

The year after it reversed the Fifth Circuit in *Miller-El v. Dretke*, the Supreme Court rebuked the appellate court for its improper analysis under the COA standard, this time in *Banks v. Dretke*. Delma Banks, Jr., was convicted of capital murder and sentenced to death in East Texas in 1980. **75**More than a decade after his death sentence, Banks discovered that the State had withheld important evidence that could have been used to impeach the State's two witnesses at his sentencing proceeding. **76**Banks alleged in a state habeas application that the State had withheld from him that one of the witnesses was a paid police informant, and that the other "had been intensively coached by prosecutors and law enforcement officers." **77**The State denied these allegations, and the CCA found in the State's favor in a one-page *per curium* order. **78**

Banks filed a federal habeas petition in 1996, arguing that he was denied due process of law under *Brady v. Maryland*. **79**The federal magistrate judge allowed for discovery regarding only one of the State's witnesses. **80**Subsequently, in 1999, Banks produced affidavits and other evidence indicating that the State "had wrongly withheld crucial exculpatory and impeaching evidence" from both of the State's witnesses. **81**The magistrate judge recommended relief from the sentence based on the discovery from 1996, but not relief from the conviction. **82**Banks moved to amend the report given the newly uncovered 1999 evidence, but the district court judge denied that motion and adopted the magistrate judge's report in full, concluding that Banks "had not properly pleaded a *Brady* claim" in 1996 predicated on the evidence that came about in 1999. **83**Banks sought a COA in the district court, claiming that the evidence from 1999 should have been treated as if it were raised in the pleadings, under Federal Rule of Civil Procedure 15(b). **84**In an unpublished *per curium* opinion, the Fifth Circuit also denied a COA on this claim *and* reversed the district court's grant of habeas relief from the death penalty on the initial *Brady* claim. **85**

On the eve of Banks's scheduled execution, the Supreme Court granted certiorari on the *Brady* claims, reversing the Fifth Circuit's judgment dismissing the initial *Brady* claim and reversing the denial of a COA on the Rule 15(b) claim. **86**In reversing the Fifth Circuit's COA denial, the Court struggled to decipher the appellate court's reasoning - noting that it "stated its position on this point somewhat obliquely" - but gathered that the Fifth Circuit "appears to have viewed Rule 15(b) as inapplicable in habeas proceedings." **87**The Court pointed out that it had "twice before referenced Rule 15(b)'s application in federal habeas proceedings" and that it had indeed "noted that Rule 15(b)'s use in habeas proceedings is "noncontroversial."' **88**Accordingly, the Court recited the COA standard that it had put forward in both *Slack* and *Miller-El* - that a petitioner must "demonstratee that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" - and held that "this case surely fits that description." **89**

3. Tennard v. Dretke (2004)

The Court overturned yet another one of the Fifth Circuit's COA denials in 2004, this time not only criticizing the appellate court's analysis of the COA framework but airing its frustration with the court's refusal to apply that standard at all. Robert Tennard was convicted of capital murder in Texas in 1986 and sentenced to death. **90**During the sentencing phase of Tennard's trial, his attorneys presented evidence that he had an IQ score of 67, which would suggest that he had "limited mental faculties." **91**In state post-conviction proceedings, Tennard argued, relying on the Court's 1989 decision *Penry v. Lynaugh*, **92**that the Texas sentencing statute did not adequately allow the jury to give effect to this mitigating evidence. **93**(In *Penry*, the Court had held that the same Texas statute did not adequately allow the jury to consider that petitioner's evidence of intellectual disability in its consideration of mitigating evidence.) **94**A split CCA denied the claim, holding that Tennard's low IQ score did not alone make him intellectually disabled, and thus that *Penry* is inapplicable. **95**

Tennard sought federal habeas relief, and the district court determined that the state court was correct in determining that the jury had "adequate means" under *Penry* to consider Tennard's low IQ score and give effect to it as mitigating evidence if it so chose. **96**Tennard subsequently applied for a COA and was denied relief by the Fifth Circuit. **97**The Court noted that the Fifth Circuit paid "lipservice to the principles guiding issuance of a COA" but that its "analysis proceeded along a distinctly different track." **98**Rather than address the debatability of Tennard's *Penry* claim, the appellate court addressed the *merits* on the *Penry* claim with "full briefing and oral argument." **99**Ironically, the Fifth Circuit's own merits analysis was incorrect, as well, as it applied a "relevance test" for mitigating evidence that "has no foundation in the decisions of [the Supreme] Court." **100**The majority ended its opinion with a "turn to the analysis the Fifth Circuit should have conducted," **101**and ultimately the Court held that "reasonable jurists could conclude that the low IQ evidence Tennard presented was relevant mitigating evidence", and that the CCA's "application of *Penry* to the facts of Tennard's case was unreasonable." **102**

4. Jordan v. Fisher (2015)

Despite these three-straight rebukes from the Supreme Court, the Fifth Circuit refused to implement the Court's command in *Slack*: that the COA analysis is not coextensive with a merits analysis. The Court did not overturn another one of the Fifth Circuit's COA decisions until 2017, but in dissenting from denial of certiorari in *Jordan v. Fisher* in 2015, three justices noted that the appellate court had, yet again, made a habit out of ignoring the *Slack* standard. **103**Richard Jordan was originally convicted of capital murder and sentenced to death in Jackson County, Mississippi, in 1976. **104**Jordan was actually sentenced to death on three separate occasions for the same crime, because his sentence kept getting overturned, and he kept getting re-tried by the same prosecutor, who at one point left the district attorney's office for private practice but still represented the State as a special prosecutor in this case at the behest of the victim's family. **105**After Jordan's death sentence was overturned for a third time, the prosecutor agreed to a plea agreement in which Jordan would be sentenced to life without the possibility of parole if he promised not to challenge his sentence. **106**However, this sentence was also illegal, because Mississippi law did not allow for sentences of life without parole unless the person was a "habitual offender," which Jordan was not. **107**In another case with "a plea agreement materially identical to Jordan's," the Mississippi Supreme Court held that the plea was void and that both parties were placed back in the positions "they occupied prior to entering into the agreement." **108**

Jordan subsequently asked for a resentencing to life with parole, but while his motion was pending, the Mississippi Legislature amended the criminal code to permit life without parole in cases like Jordan's. **109**The court agreed that Jordan's prior sentence was invalid and remanded the case for resentencing, where Jordan asked the special prosecutor once again for the same agreement. **110**While other capital defendants in the state received the same deal after their prior plea agreements were invalidated, the prosecutor decided to renege on the prior deal and seek the death penalty instead. **111**Jordan argued that this was improperly vindictive under the Due Process Clause, but the trial court disagreed, and Jordan was re-sentenced to death. **112**He appealed to the Mississippi Supreme Court but lost, over a dissent. **113**

Jordan subsequently filed a habeas petition in federal district court, where he lost, and he was denied a COA by both the district court and the Fifth Circuit. **114**In its denial, the Fifth Circuit addressed the merits of the case, holding that Jordan had "failed to prove actual vindictiveness" under its precedent. **115**The panel admitted that the *en banc* Ninth Circuit had granted relief in a very similar case, but under the COA standard, it ostensibly held that the claim was not debatable by jurists of reason. **116**One jurist of reason, Judge Dennis, dissented from the panel's denial of a COA, noting that the majority had improperly done a merits analysis at the COA stage. **117**

In dissenting from denial of certiorari, Justice Sonia Sotomayor, joined by Justices Ruth Bader Ginsburg and Elena Kagan, criticized the Fifth Circuit both for ignoring the COA standard and making a pattern out of doing so. Instead of limiting its analysis to the "threshold inquiry" demanded by *Slack*, *Miller-El*, and subsequent cases, "the Fifth Circuit engaged in precisely the analysis *Miller-El* and the COA statute forbid: conducting, across more than five full pages of the Federal Reporter, a detailed evaluation of the merits." **118**The dissent noted that a COA should have issued because not only *could* reasonable jurists differ on the merits of the opinion, many reasonable jurists - Judge Dennis, a judge on the Mississippi Supreme Court, and a majority of the *en banc* Ninth Circuit - *had differed*. **119**As the justices noted, "When a state appellate court is divided on the merits of [a] constitutional question, issuance of a certificate of appealability should ordinarily be routine." **120**The judges indicated that for this reason, they would have summarily reversed the Fifth Circuit's judgment against Jordan. **121**

However, it was not just Jordan's case that troubled the justices. Justice Sotomayor noted that the Fifth Circuit had demonstrated a "troubling" "pattern" of refusing to follow the COA standard created by Congress and explained repeatedly by the Court. **122**She identified a non-exhaustive list of five times between *Tennard*'s issuance in 2004 and this opinion in 2015 where "the Fifth Circuit has denied a COA after engaging in an extensive review of the merits of a habeas petitioner's claims" and two times where the appellate court had denied a COA over a dissenting opinion. **123**Ultimately, the full Court would not rebuke the Fifth Circuit's troubling pattern of misapplying the COA standard until two years later.

5. Buck v. Davis (2017)

The Court's most recent rebuke of the Fifth Circuit's refusal to apply the correct COA standard came in *Buck v. Davis* in 2017. Duane Buck was convicted of capital murder and sentenced to death in Harris County, Texas, in 1996. **124**Under the Texas death penalty statute, "the jury could impose a death sentence only [after] it found that Buck was likely to commit acts of violence in the future." **125**Buck argued that his attorney was unconstitutionally ineffective because he called a psychologist who testified "that Buck was statistically more likely to act violently because he is black." **126**However, because his attorneys never raised this claim in his state post-conviction proceedings, a federal district court judge who heard the claim determined that it was procedurally defaulted under AEDPA and not reviewable. **127**In 2014, after two Supreme Court decisions that made it easier for petitioners to overcome procedural defaults that were themselves the fault of ineffective attorneys, **128**Buck filed a motion under Federal Rule of Civil Procedure 60(b)(6) to reopen his case, arguing that these changes in the law and a number of other factors "constituted the "extraordinary circumstances' required to justify reopening the 2006 judgment under the Rule." **129**The district court denied the Rule 60(b) motion, and the Fifth Circuit subsequently denied a COA on the issue. **130**

After granting certiorari on the Rule 60(b) issue, the Supreme Court reversed, determining not only that the COA should have issued, but also that Buck was entitled to relief under Rule 60(b) and that his attorney was unconstitutionally ineffective. **131**This means that the denial of a claim that the Fifth Circuit ostensibly held was not debatable by jurists of reason was actually debatable, and in fact considered to be wrong, by five members of the Supreme Court.

The Court devoted much of its opinion to the fact that the Fifth Circuit had simply recited the COA standard but really had only done a merits analysis:

The court below phrased its determination in proper terms - that jurists of reason would not debate that Buck should be denied relief - but it reached that conclusion only after essentially deciding the case on the merits. As the court put it in the second sentence of its opinion: "Because [Buck] has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA." **132**

This analysis, the Court noted, is a "merits determination[] the panel should not have reached." **133**The question before the Fifth Circuit was not the ultimate merit of the Rule 60(b) argument but rather a "threshold inquiry into the underlying merit of the claim[]." **134**The Court "reiterated" to the Fifth Circuit, as it had before in *Miller-El*, that the COA standard it has imposed since *Slack* "flatly prohibits ... a departure from the procedure prescribed by § 2253." **135**

B. After Buck v. Davis: Open Defiance

Despite the reiteration by the Court over the course of nearly 20 years that it must follow the standard set forth in § 2253 and in *Slack*, the Fifth Circuit has continued to ignore Court's COA standard, testing the limits of how long "the system can tolerate open defiance by an inferior court." **136**

In the 2019 case *Gonzales v. Davis*, the court denied a COA on the issue of whether the petitioner's waiver of his state habeas proceedings was "voluntary and intelligent," even though two judges on the Texas CCA dissented from the court's determination that the waiver was adequate. **137**This despite the fact that "when a state appellate court is divided on the merits of [a] constitutional question, issuance of a certificate of appealability should ordinarily be routine." **138**In the 2018 case *Halprin v. Davis*, the court recited the COA standard but proceeded to do an extensive analysis of the claims under the case law in a way that mirrored a merits analysis. **139**The petitioner noted in his petition for a writ of certiorari that on one claim, the Fifth Circuit "invoked its own [circuit-created] restrictive gloss" to determine the merits of the claim, just as it had been told was incorrect in *Tennard*. **140**In the 2018 case *Hummel v. Davis*, the Fifth Circuit applied the wrong standard entirely to a COA request, denying a COA on an issue because "reasonable jurists cannot debate the reasonableness of the district court's conclusion." **141**The question at the COA stage is not whether the district court's decisions reasonableness could be debated, as decisions can be reasonable even though some might disagree with them, but whether the outcome on the merits is debatable. Finally, in the 2018 case *Freeney v. Davis*, the Fifth Circuit made the suspect claim that no reasonable jurist could debate that a petitioner's claims had actually been "adjudicated on the merits" in state court when the state court rubber-stamped the prosecution's proposed findings of fact and conclusions of law before the defense even had a chance to respond. **142**In doing so, the court did its own analysis of the applicability of a Supreme Court case on what constitutes an adjudication on the merits - a nuanced standard that requires an individualized analysis of each case **143**- in what was essentially a merits determination, not a COA analysis. **144**The Court did not grant a writ of certiorari in any of these cases.

In the interest of brevity, the preceding paragraph is merely a non-exhaustive list of cases in which the Fifth Circuit has defied the Supreme Court's COA standard since its re-reiteration in *Buck*. While these cases make it clear that the Fifth Circuit has at the very least failed to adopt the correct COA standard full-scale, the data indicates a persistent problem across the board.

Between 2008 and the end of 2019, the courts in the Fifth Circuit **145**heard 529 capital cases. One hundred nine of those cases - 20.6% of them - were disposed of with the denial of a COA. Only the Eighth Circuit, with its mere 133 capital cases in that timespan, came close denying COAs at such a rate. While the Fifth Circuit had the highest number of total capital cases, the Sixth, Ninth, and Eleventh Circuits each had more than 300 cases. They disposed of cases by COA denial in a mere 2.9% (Sixth Circuit), 1.9% (Ninth Circuit), and 11.1% (Eleventh Circuit) of their respective cases.

Table 2
Shockingly, the Fifth Circuit disposed of a *higher* percentage of cases overall through COA denial after *Buck v. Davis* than it did between 2008 and the end of 2019. In the nearly three years between the *Buck* decision and the end of 2019, the Fifth Circuit heard 107 death penalty cases and disposed of a whopping 30% of them by COA denial. The other three circuits with a significant number of capital cases have disposed of them by COA denial at far lower rates in that timespan: 6.3% (Sixth Circuit), 6.5% (Ninth Circuit), and 15.4% (Eleventh Circuit).

While *Buck* and the cases before it should have caused the Fifth Circuit to reevaluate its approach to COA requests, particularly when considering the denial rates of other circuits, the court has dug its feet in the sand, continuing to impose a harsh, unfounded standard and short-circuiting the federal habeas process to more quickly dispose of cases. Despite the Court's continued instructions to stop flouting the COA standard, the Fifth Circuit is fighting back with "open defiance."

III. The Problems with a Shortcut to Death

The Fifth Circuit has never stated why it does not believe it needs to follow the COA standard - after all, it cannot do that as an inferior court - but Texas's briefing in *Buck* explains what is likely the court's motivation: they do not think doing the merits analysis earlier in the process really matters. Texas noted that in *Buck* and in its general approach to COA adjudications, the Fifth Circuit "regularly [allows] comprehensive briefing from both sides and occasionally involves oral argument." **149**Therefore, the state argued, "the Fifth Circuit's practice thus provides substantial process to capital COA applicants." **150**In the context of *Buck*, in which the Court was trying to determine if the Fifth Circuit was improperly doing a merits analysis rather than a threshold inquiry, Chief Justice John Roberts pointed out that "this hurts rather than helps the State's case." **151**However, Justice Roberts's analysis of the problems with the Fifth Circuit's approach to COAs was limited to the fact that it refuses to follow the COA statute. Of course, it is problematic for courts to refuse to follow a statute, even if they do not agree that it makes a lot of sense. That alone was enough for the Court to reverse, as it should have been. However, the practical danger to those sentenced to death in the Fifth Circuit goes far beyond the fact that the circuit has not technically followed a statute. The truncated merits adjudication performed at the COA stage means that petitioners often have potentially meritorious claims rejected without full consideration by the federal courts.

At the heart of the issues with the Fifth Circuit's short-circuiting of the federal habeas process is that petitioners in the most significant cases in the criminal legal system are receiving an ad hoc review process. This can hardly be squared with the Constitution's demand that defendants in death penalty cases receive a process with heightened reliability. **152**For instance, while in *Buck* the Fifth Circuit did allow for extensive briefing and oral argument, that is not always the case. The Court is under no obligation to treat the COA stage briefing as a merits briefing - indeed, it is instructed not to do so - so by treating the COA stage as a quasi-merits stage, the Fifth Circuit can effectively give various petitioners varying degrees of process and adjudication. When the court does call for oral argument at the COA stage, petitioners and their attorneys are inherently forced to make a strange combined argument for relief on both the threshold inquiry and the merits, even though the burden for both is substantially different. Such an amorphous inquiry makes it nearly impossible to determine what kind of showing the petitioner must make.

Because the Fifth Circuit's review process is so ad hoc and its inquiry so amorphous, it can often become impossible to determine what kind of review a petitioner has actually received. For instance, as described by Justice Sandra Day O'Connor in *Tennard*, the Fifth Circuit will often pay "lipservice" to the COA standard, as if that is the standard it is applying, but then "proceed[] along a distinctly different track," with what appears to be a merits adjudication. **153**However, since the court will not specifically say that it is judging the merits of the petition, it is not clear that the court actually applied the correct case law, or what its "threshold" analysis really was. Sometimes, the issue on the merits is glaring enough that the Supreme Court will take the case and reverse. For instance, in Mr. Tennard's case, the Court granted certiorari and noted that the test the Fifth Circuit appeared to be applying had "no basis in our precedents." **154**In *Banks*, the Court also granted certiorari to reverse when the Fifth Circuit "somewhat obliquely" did a quasi-merits adjudication. **155**In these

cases, the Court reversed without interrogating what, if any, COA standard the Fifth Circuit was really applying. However, in other cases, the Fifth Circuit will apply standards that do not appear to satisfy either the COA or merits inquiries during COA proceedings and deny a COA. For example, in *Hummel*, the Fifth Circuit denied a COA because "reasonable jurists cannot debate the reasonableness of the district court's opinion" **156**- a standard that appears to have just been made up by the court, even though it presents a much stiffer obstacle to success than the true COA standard.

With so many different standards flying around - some explicit but wrong, as in *Hummel*, and some not specifically stated, as in *Tennard* and *Banks* - petitioners have no idea what, exactly they have to show at the COA stage in order to obtain relief in the Fifth Circuit. In practice, it appears the Fifth Circuit has just taken a convenient shortcut, deciding off-handedly at the COA stage, without adherence to any particular standard, whether it believes the petitioner really has much of a case, or whether it can be disposed of early on in the proceedings. This defies good judicial practice, as courts should follow the rules propagated by the legislature and the Supreme Court in order to ensure due process for all petitioners. However, more important is that this practice has led to some glaring injustices. The petitioners in *Miller-El* and *Buck* both won on the merits at the Supreme Court, despite the Fifth Circuit's apparent willingness to throw their cases away at the COA stage. After further litigation, Delma Banks **157**and Robert Tennard **158**had their sentences reduced to life in prison. All of these people are alive today because they were lucky to obtain a rare grant of certiorari from the Supreme Court. Under the Fifth Circuit's haphazard process, all would have been executed. While these litigants were spared, others have not been. For instance, John Hummel, whose COA was denied under the entirely wrong standard, is scheduled to be executed in June 2021. **159**The State has also sought an execution date for Michael Gonzales, whose COA was denied even though two judges on the CCA dissented from his denial of relief, which should have caused a COA to issue as almost a matter of course. **160**This is the consequence of a haphazard, amorphous process in which the Fifth Circuit refuses to apply the COA standard as instructed by AEDPA and the Supreme Court.

IV. A Call for Increased Supervision from the Supreme Court

It is clear by now that no matter how many times the Supreme Court recites the COA standard in reversing Fifth Circuit decisions, the Fifth Circuit is uninterested in following the Court's command. What is less clear is what can be done about it. Generally, it is not within the Supreme Court's duties to supervise a lower court - the high court is supposed to proffer rules and guidance, and the lower courts are supposed to follow that guidance. However, when necessary, the Court has recognized its obligation to "exercise [its] supervisory power" when a lower court "has so far departed from the accepted and usual course of judicial proceedings." **161**

In many ways, the Court has already been exercising its supervisory power over the Fifth Circuit by overturning the court on this one issue four times in less than 15 years, the last time choosing to not even give the circuit a chance to get the merits adjudication right. **162**However, given the gravity of the situation - that the Fifth Circuit's defiance has seemingly only *increased* since *Buck* and that the defiance is causing people to be executed - there is a strong argument that the Supreme Court must take an even more active supervisory role in enforcing the COA standard in Fifth Circuit cases.

Justices have already advocated for a stronger supervisory role when a lower court fails to follow the Supreme Court's rules **163**or demonstrates that it has "manifested a strong bias for or against a particular class of litigants." **164**Over the past two decades, the Fifth Circuit has demonstrated a strong bias against habeas petitioners in capital cases. Since 2000, 151 death row inmates in Texas have completed their federal habeas proceedings. **165**Only one has had their sentence overturned by the Fifth Circuit. **166**This means the Fifth Circuit will have granted relief in just more than half of one percent of Texas death penalty cases since 2000. Forty percent of capital cases nationwide were overturned on federal habeas review prior to AEDPA, **167**and 12.4 percent have been overturned since AEDPA. **168**The Fifth Circuit appears to be an extreme outlier in refusing to grant federal habeas relief. It is unconvincing that these disparities can be explained away as the Fifth Circuit supervising state courts that are simply excellent at guaranteeing the constitutional rights of litigants - on the contrary, Texas has been described as having "a runaway criminal justice system and a gatekeeper high court that [has done] nothing to control it," **169**and Louisiana's system has been described as "uniquely terrible." **170**Instead, the Fifth Circuit appears intent on refusing to give those sentenced to death within its jurisdiction their day in court, regardless of the constitutional deprivations the condemned endured at their trial.

This naked display of bias against capital defendants demands the increased supervision required in only the most extreme circumstances. The Court receives far more petitions for writs of certiorari than cases it can hear each year, but it does have other tools at its disposal. For example, the Court can flag COA denials from the Fifth Circuit and summarily reverse every time the lower court appears to adjudicate the merits of a claim, or make a quasi-merits adjudication, at the COA stage. This would take few resources for the Court but would force the Fifth Circuit to spend far more time on each case if it is to continue to use extensive briefing at the COA stage (in some cases) as an excuse for refusing to follow the COA standard. At that point, it would make far more sense from the standpoint of judicial economy for the circuit to simply make its merits adjudications at the correct stage. The Court could also issue a much firmer "benchslap" **171**than it did in *Buck*. Such a strategy appears to have worked in a recent series of Texas cases. For years, the Texas CCA used a standard for the determination of intellectual disability that did not comport with modern science, and thus, the standard was struck down by the Court in its 2017 case, *Moore v. Texas*. **172**The Court remanded the case to the CCA to determine whether the petitioner, Bobby Moore, was intellectually disabled under modern scientific standards. **173**However, the CCA ignored the Court while paying lipservice to its approved standard, much like the Fifth Circuit has done in COA denials, and still determined that the Moore was not intellectually disabled. **174**The Court took the case again, and without argument, reversed the CCA in a *per curium* opinion, and did its own factfinding - implicitly indicating that it could not trust the lower court to do so - to determine that Moore is intellectually disabled and ineligible to be executed. **175**Chief Justice Roberts, who dissented in the 2017 decision, concurred in the 2019 decision, noting that "on remand, the court repeated the same errors that this Court previously condemned - if not quite *in haec verba*, certainly in substance." **176**The original decision and subsequent benchslap appear to have had some effect. For a decade pre- *Moore*, the CCA failed to authorize any state habeas applications from petitioners who argued that they were intellectually disabled and were looking to come back into court following the conclusion of their original state habeas proceedings - a procedural maze the court used to essentially allow execution of people with valid claims of intellectual disability, whose executions should have been barred by the Eighth Amendment. **177**Since the 2017 decision, and particularly since the 2019 decision, the CCA has been much more willing to entertain intellectual disability claims. **178**It is unclear whether such a strategy would work with the Fifth Circuit, but given that the court's COA jurisprudence has been similarly defiant, if not even more flagrantly so, such review by the Supreme Court would be warranted.

Regardless of how the Supreme Court goes about it, it is imperative that the Court use its supervisory role in some way to curb the Fifth Circuit's flagrant defiance of the Court's COA jurisprudence. The circuit's refusal to recognize its role as an inferior tribunal - and its eagerness to flout that role in denying relief to capital defendants - undermines the United States' judicial system, and given the consequences in capital cases, the court's defiance is all-the-more grave and in need of correction. Only the Supreme Court has the power to curb the Fifth Circuit's abuse of its judicial role.

Conclusion

The past three decades have not been kind to capital defendants hoping to vindicate the constitutional rights that they were deprived of at trial. While the federal courts previously played an important role in safeguarding those rights, AEDPA created a major roadblock for petitioners to obtain a new trial as a remedy for those constitutional deprivations. However, AEDPA was not meant to be a complete bar on relief - rather, it was meant to allow greater deference to state courts in their determinations of the merits of petitioners' constitutional claims and to end delays in the execution of those who had been sentenced to death.

In its implementation of AEDPA, the Fifth Circuit has gone far beyond what the statute requires, creating a near-blanket ban on relief for capital federal habeas petitioners in Texas, Louisiana, and Mississippi. In doing so, it has misapplied one of AEDPA's features - the certificate of appealability - and used it to effectively short-circuit the appeals process. Despite four reversals between 2003 and 2017 on this very issue and another warning from a group of three justices, the Fifth Circuit continues to defy the Court's clear instructions about the COA inquiry. This has resulted in petitioners being denied relief on an amorphous, ever-changing standard in the most serious of cases. The Court has already intervened, continuously, with no success. Without even further supervision from the Court, the Fifth Circuit will likely continue to defy the AEDPA and the Court's commands, denying virtually every capital defendant who comes through its chambers a fair chance for relief, in its effort to create a shortcut to death.

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Appendix M

Statutory Provisions / Rules of Court

M-1: 28 U.S.C. § 2253

M-2: Ohio Appellate Rule 26(B) ("App. R. 26(B)")

M-3: 28 U.S.C. § 2254 (d)

M-3(A): 28 U.S.C. § 2254 (e)

M-4: Ohio Revised Code § 2953.21 et seq.

Constitutional Provisions

M-5: United States Constitution, Amendment VI

M-6: United States Constitution, Amendment X

M-7: United States Constitution, Amendment XIV

Appendix M-1

28 U.S.C. § 2253

Statutory Provision

28 U.S.C. §2253 Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review on appeal by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Appendix M-2

Ohio Rule of Appellate Procedure 26(B)
with Staff Notes

Rule of Court

Ohio App. Rule 26

Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.

(A)Application for reconsideration and en banc consideration.

(1)Reconsideration.

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A).

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2)En banc consideration.

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App.R. 30(A). A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App.R. 26(A)(2)(c) and, if so vacated, shall be reentered.

(c) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B)Application for reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

History

Amended, eff 7-1-75; 7-1-93; 7-1-94; 7-1-97; 7-1-10; 7-1-11; 7-1-12.

Commentary

Staff Notes

7-1-12 AMENDMENT

The amendment to App.R. 26(A)(2)(c) removes language added in 2011 that required a court of appeals to vacate a panel decision in the event of a sua sponte decision to consider a case en banc. That language was added to ensure that a party's time to appeal to the Supreme Court would not begin to run while en banc consideration was pending. But the language is no longer necessary in light of a 2011 amendment to S.Ct.Prac.R. 2.2.

7-1-10 AMENDMENT

App.R. 26(A) has now been subdivided into two provisions: App.R. 26(A)(1) governs applications for reconsideration (former App.R. 26(A)), while App.R. 26(A)(2) is a new provision governing en banc consideration. The amendment to former App.R. 26(A) (now App.R. 26(A)(1)) contemplates a future amendment to the Supreme Court Practice Rules that will extend the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration in the court of appeals. It also ensures a responding party's full ten-day response period, even if that party does not receive the application on the day it is filed. Because the ten-day response period now begins to run from the date of service, a party served by mail now has an extra three days to file an opposition. See App.R. 14(C). Finally, the amendment permits the moving party a reply in support of the application within seven days of service of the opposition; this clarification avoids any ambiguity about the right to file a reply in support of a motion under App.R. 15(A).

The addition of App.R. 26(A)(2) is designed to address the Supreme Court's decision in *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672 and, in particular, the holding that "if the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." Id., paragraph two of the syllabus. The new provision establishes a

standard for parties to seek en banc consideration under the same procedures that govern applications for reconsideration under App.R. 26(A)(1), except that a party may also seek consideration en banc within ten days of a judgment or order ruling on an application for reconsideration if that ruling itself creates an intra-district conflict that did not appear from the panel's original decision. The new provision also allows courts of appeals to establish their own procedures to the extent consistent with the statewide rule.

Former App. R 26(C), which required courts of appeals to decide applications for reconsideration within 45 days, has been eliminated in anticipation of an amendment to the Supreme Court Rules of Practice that will toll the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration or en banc consideration in the court of appeals.

7-1-97 AMENDMENT

RULE 26(A) APPLICATION FOR RECONSIDERATION.

The Supreme Court Rules of Practice were amended effective June 1, 1994, to provide that an appeal from a court of appeals is perfected by filing a notice of appeal in the Supreme Court; Rule II, Section 2(A)(1). The previous rule had required that the notice be filed in the court of appeals. The 1997 amendment to App.R. 26(A) was to conform this rule with the Supreme Court Rules of Practice.

RULE 26(B) APPLICATION FOR REOPENING.

The amendment changed the rule's reference from "referee" to "magistrate" in division (B)(8) in order to harmonize the rule with the terminology adopted in the 1995 amendments to Civ.R. 53. The amendment is technical only and no substantive change is intended.

7-1-94 AMENDMENT

RULE 26(C).

The 1994 amendment added division (C), which addresses those situations where the Supreme Court and the court of appeals have concurrent jurisdiction. See Proposed S.Ct. Prac. R. II, § 2(D) (O.S.B.A. Rpt., 12/21/92). Judicial economy is promoted when the court of appeals resolves applications for reconsideration before the Supreme Court begins its review of the case, thereby avoiding duplicative effort by the Supreme Court. Division (C) will apply, however, in all cases regardless of whether an attempt has been made to invoke the Supreme Court's jurisdiction to review the case.

7-1-93 AMENDMENT

RULE 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING.

The 1993 amendment was in response to the Supreme Court's opinion in State v. Murnahan (1992), 63 Ohio St.3d 60, 66 n. 6. In Murnahan, the Court held that claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals, syl. 1, and requested that a rule be drafted to govern such applications. Id. at 66 n. 6.

App.R. 26 previously permitted applications for reconsideration to be filed within ten days of the journalization or announcement of the appellate decision. The Court noted in Murnahan that although reconsideration under Rule 26 appeared to be restricted to issues already presented to the appellate court, the Court "construe[d] claims of ineffective assistance of appellate counsel to be tantamount to constitutional claims that should have been presented on appeal, and but for their omission the outcome of the case would be otherwise." Id. at 65 n. 3. Because "claims of ineffective assistance of appellate counsel may be left undiscovered due to the inadequacy of appellate counsel or the inability of the defendant to identify such errors within the time allotted for reconsideration," the Court stated that it may be necessary for defendants to request delayed reconsideration. Id. at 65-66. The amendment thus provides for reconsideration in criminal cases beyond the previous limitation of time. The rule permits delayed reconsideration only of the direct appeal and does not apply to appeals related to post-conviction proceedings pursuant to R.C. 2953.21. The amendment permits applications to be filed more than ninety days after the appellate judgment's journalization if good cause is shown. See App.R. 14(B).

The term "ineffective assistance of counsel" is intended to comprise the two elements set forth in Strickland v. Washington (1984), 466 U.S. 668, that is, deficiency in the representation and prejudice resulting from such deficiency. The term "deficient" representation is intended to refer to the first prong of the Strickland standard, and is not intended to introduce a different type or quantum of proof than that already developed in the Strickland line of cases. See, e.g., State v. Bradley (1989), 42 Ohio St.3d 136.

The amended rule presents a two-stage procedure. The first stage involves a threshold showing for obtaining permission to file new appellate briefs. See Murnahan, 63 Ohio St.3d at 66 (stating that defendant must "put forth a colorable claim of ineffective assistance of appellate counsel"). The second stage involves filing appellate briefs and supporting materials with the assistance of new counsel, in order to establish that prejudicial errors were made

in the trial court and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to the court of appeals. Thus, in order to have the prior appellate judgment altered, in the second stage the applicant must establish not only the merits of the appeal but also that the Murnahan standard has been met. See also State v. Bradley (1989), 42 Ohio St.3d 136 (under which the applicant must prove that there exists a reasonable probability that without counsel's deficiencies the result of the trial would have been different). Ordinary principles of res judicata are applicable unless "the circumstances render the application of res judicata unjust." Murnahan, 63 Ohio St.3d at 66.

"Arguments" as used in division (B)(2)(c) may include citations to legal authority or to the record.

If the applicant claims that the record is incomplete or unavailable, the applicant may submit an affidavit setting forth that claim and the matters that the applicant believes that the record contains or should contain. Division (B)(2)(e) permits but does not require submission of supplemental affidavits and portions of the record with the application.

Although counsel for the appellant must take action to have the record transmitted to the court of appeals after reopening is granted, pursuant to the usual procedure on appeal, the court of appeals may request from the clerk of the trial court any portion of the record that it wishes to review in its consideration of the application.

Where matters outside the record are raised that must be resolved in order to reach a determination of the relevant issues, and where the usual rules regarding preservation of issues for appeal are not applicable, the court of appeals may order that a hearing be conducted to determine these factual questions.

Finally, the "appropriate judgment" under division (B)(9) may include a remand to the trial court, a modification of a judgment, or entering the judgment that the court of appeals concludes should have been entered by the trial court.

Appendix M-3

28 U.S.C. § 2254 (d)

Statutory Provision

28 U.S.C § 2254(d)

(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; 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.

Appendix M-3 (A)

28 U.S.C. § 2254 (e)

Statutory Provision

28 U.S.C. § 2254 (e)

(e)
(1) 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.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
(A) the claim relies on—
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Appendix M-4

Ohio Revised Code § 2953.21 et seq.

Statutory Provision

ORC Ann. 2953.21 et seq.

Current through File 85 (HB 184) of the 134th (2021-2022) General Assembly; acts signed as of March 14, 2022.

§ 2953.21 Petition for postconviction relief.

(A)

(1)

(a) A person in any of the following categories may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief:

(i) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States;

(ii) Any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict;

(iii) Any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that 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 person's case as described in division (D) of section 2953.74 of the Revised Code provided results that 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;

(iv) Any person who has been convicted of aggravated murder and sentenced to death for the offense and who claims that the person had a serious mental illness at the time of the commission of the offense and that as a result the court should render void the sentence of death, with the filing of the petition constituting the waiver described in division (A)(3)(b) of this section.

(b) A petitioner under division (A)(1)(a) of this section may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(c) As used in division (A)(1)(a) of this section:

(i) Actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available

admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(ii) "Serious mental illness" has the same meaning as in section 2929.025 of the Revised Code.

(d) As used in divisions (A)(1)(a) and (c) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to July 6, 2010.

(e) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1) (e), (A)(1) (f), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:

(i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

(ii) For any witness with respect to whom division (A)(1) (e)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

(f) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1) (e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.

(g) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1) (e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or

undue burden or expense, including but not limited to the orders described in divisions (A)(1) (h)(i) to (viii) of this section. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

(h) If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order under division (A)(1) (g) of this section and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery as described in division (A)(1) (e) of this section. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case shall a court require a petitioner who is indigent to pay expenses under those provisions.

Before any person moves for an order under division (A)(1) (g) of this section, that person shall make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order under division (A)(1) (g) of this section shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

The orders that may be made under division (A)(1) (g) of this section include, but are not limited to, any of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the court;

(vi) That a deposition after being sealed be opened only by order of the court;

(vii) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(viii) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(i) Any postconviction discovery authorized under division (A)(1) (e) of this section shall be completed not later than eighteen months after the start of the discovery proceedings unless, for good cause shown, the court extends that period for completing the discovery.

(j) Nothing in division (A)(1) (e) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.

(k) Division (A)(1) of this section does not apply to any person who has been convicted of a criminal offense and sentenced to death and who has unsuccessfully raised the same claims in a petition for postconviction relief.

(2)

(a) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1)(a)(i), (ii), or (iii) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(b) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1)(a)(iv) of this section shall be filed not later than three hundred sixty-five days after the effective date of this amendment.

(3)

(a) In a petition filed under division (A)(1)(a)(i), (ii), or (iii) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(b) A person sentenced to death who files a petition under division (A)(1)(a)(iv) of this section may ask the court to render void the sentence of death and to order the resentencing of the person under division (A) of section 2929.06 of the Revised Code. If a person sentenced to death files such a petition and asks the court to render void the sentence of death and to order the resentencing of the person under division (A) of section 2929.06 of the Revised Code, the act of filing the petition constitutes a waiver of any right to be sentenced under the law that existed at the time the offense was committed and constitutes consent to be sentenced to life imprisonment without parole under division (A) of section 2929.06 of the Revised Code.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A)(1)(a)(i), (ii), or (iii) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(6) 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 petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on the length of, a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to

death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.

(B) The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1) (e) of this section is filed shall docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1) (e) of this section is filed immediately shall forward a copy of the petition and a copy of the request if filed by the petitioner to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately shall forward a copy of the request to the petitioner or the petitioner's counsel.

(C) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1) (e) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.

(D) The court shall consider a petition that is timely filed within the period specified in division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

(E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Division (A)(6) of this section applies with respect to the prosecuting attorney's response. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

With respect to a petition filed under division (A)(1)(a)(iv) of this section, the procedures and rules regarding introduction of evidence and burden of proof at the pretrial hearing that are set forth in divisions (C), (D), and (F) of section 2929.025 of the Revised Code apply in considering the petition. With respect to such a petition, the grounds for granting relief are that the person has been diagnosed

with one or more of the conditions set forth in division (A)(1)(a) of section 2929.025 of the Revised Code and that, at the time of the aggravated murder that was the basis of the sentence of death, the condition or conditions significantly impaired the person's capacity in a manner described in division (A)(1)(b) of that section.

(G) A petitioner who files a petition under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(2) If division (G)(1) of this section does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(3) The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) or (2) of this section.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, except as otherwise described in this division, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the court finds grounds for relief in the case of a petitioner who filed a petition under division (A)(1)(a)(iv) of this section, the court shall render void the sentence of death and order the resentencing of the offender under division (A) of section 2929.06 of the Revised Code. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(I) Upon the filing of a petition pursuant to division (A)(1)(a)(i), (ii), (iii), or (iv) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(J)

(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or

reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the

Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

ORC Ann. 2953.22

Current through File 85 (HB 184) of the 134th (2021-2022) General Assembly; acts signed as of March 14, 2022.

§ 2953.22 Hearing.

If a hearing is granted pursuant to section 2953.21 of the Revised Code, the petitioner shall be permitted to attend the hearing. Testimony of the prisoner or other witnesses may be offered by deposition.

If the petitioner is in a state correctional institution, he may be returned for the hearing upon the warrant of the court of common pleas of the county where the hearing is to be held. The approval of the

governor on the warrant shall not be required. The warrant shall be directed to the sheriff of the county in which the hearing is to be held. When a copy of the warrant is presented to the warden or other head of a state correctional institution, he shall deliver the convict to the sheriff, who shall convey him to the county. For removing and returning the convict, the sheriff shall receive the fees allowed for conveying convicts to the correctional institution.

ORC Ann. 2953.23

Current through File 85 (HB 184) of the 134th (2021-2022) General Assembly; acts signed as of March 14, 2022.

§ 2953.23 Time for filing petition; appeals.

(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) (c) 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) (d) 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 attorney may file a response or briefs that exceed the limit specified for the answer or briefs.

Appendix M-5

United States Constitution, Amendment VI

United States Constitution Amendment VI

Amendment VI Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix M-6

United States Constitution, Amendment X

United States Constitution Amendment X

Amendment X Powers reserved to states or people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appendix M-7

United States Constitution, Amendment XIV

United States Constitution Amendment XIV

Amendment XIV, Section 1

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix N

Cody v. Sheldon U.S. District Court numbered habeas record docket sheets for trial court State v. Cody Cuyahoga county common pleas No. CR-12-565050 A showing 3/19/2013 No Contact Order and petitioner's 7/26/2013 trial court motion objecting to trial court's No Contact Order's bar to the opportunity to access prospective counsel because he wanted to retain outside counsel of choice:

"7/26/2013 D1 Mo Defendant's Continuing Objection of Record to Opportunity to Retain Outside Counsel/ Related Motion"

				DEFENDANT'S MOTION FILED 2/4/2013 ORAL ARUGMENT REQUESTED TO CHANGE CAPTION IS DENIED. 04/15/2013 CPROB 04/15/2013 12:09:09
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/12/2013 FOR ORAL ARGUMENT FOR RELEIF FROM PRE JUDICIAL JOINDER ON COUNTS 13 THROUGH 24 IS DENIED. 04/15/2013 CPROB 04/15/2013 12:05:57
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/4/2013 TO ALLOW DEFENDANT TO PRESENT OPENING STATEMENT AT CLOSE OF STATES CASE IS DENIED. 04/15/2013 CPROB 04/15/2013 12:04:54
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/4/2013 FOR PROCESSING UNDER PAPER FILING SYSTEM IS DENIED. 04/15/2013 CPROB 04/15/2013 12:02:11
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED 2/12/2013 TO DISMISS UNFAIR PREJUDICE MOTION FOR GAG ORDER AND ORAL ARGUMENT REQUESTED TO LIFT GAG ORDER IS DENIED. 04/15/2013 CPROB 04/15/2013 11:54:04
04/15/2013	04/15/2013	N/A	JE	DEFENDANT'S MOTION FILED ON 2/5/2013 TO WITHDRAW SPECIFIC EX-PARTE MOTIONS FOR COMPUTER EXPERT, LITIGATION EXPERT, FORENSIC ACCOUNTANT AND INVESTIGATOR IS GRANTED. 04/15/2013 CPROB 04/15/2013 11:48:15
04/15/2013	04/15/2013	N/A	CS	COURT REPORTER FEE
04/11/2013	04/12/2013	N/A	JE	CRIMINAL DEPOSITION OF RONNIE D. BRITTAN HELD 04/11/2013 CPROB 04/11/2013 16:41:33
04/09/2013	04/09/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO DISMISS/SUPPRESSRE: COUNT 24 VOID FOR VAGUENESS/I INSUFFICIENT NOTICE OF OFFENSE/ LACK OF CUSTODIAL CONTROL OF EVIDENCE.
04/09/2013	04/09/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION CONCOMITANT TO APPOINTMENT AS COUNSEL, FILED. PRO-SE
04/09/2013	04/09/2013	P	MO	STATE OF OHIO SUPPLEMENTAL WITNESS LIST, FILED..
04/08/2013	04/08/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO DISMISSS FOR TAMPERING WITH EVIDENCE, FILED.
04/05/2013	04/05/2013	D1	SH	MAHONING COUNTY SHERIFF DEPT SERVICE FEE $14.00 SS 895558
04/05/2013	04/05/2013	D1	SH	MAHONING COUNTY SHERIFF DEPT SERVICE FEE $14.00 SS 887850
04/05/2013	04/05/2013	D1	SH	ATHENS COUNTY SHERIFF DEPT SERVICE FEE $14.00 SS 887849
04/05/2013	04/05/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION FOR FORMER DEFENSE COUNSEL TO TURN OVER WORK PRODUCT AND TO DISMISS ADVISORY COUNSEL, FILED.
04/06/2013	04/05/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA MOTION TO DISMISS COUNTS 1-11: INCOMPREHENSIBILITY OF CONFLICTING MENS REA REQUIREMENTS- RECKLESSNESS, FILED.
04/05/2013	04/05/2013	P	MO	STATE OF OHIO NOTICE OF DEPOSITION, FILED.
04/04/2013	04/04/2013	P	MO	STATE OF OHIO REPLY TO MOTION RE: LIMINATION OF THEFT, MONEY LAUNDERING COUNTS TO OHIO MONEY, FILED.
04/04/2013	04/04/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTIONT O COMPEL SUBPOENAS DUCES TECUM RE: ACS, CPS, CSI, FILED.
04/04/2013	04/04/2013	P	MO	STATE OF OHIO MEMROANDUM CONTRA MOTION TO SUPPRESS IN LIMINE / DISMISS EVIDENCE/ CASE RE: VIOLATION OF ATTORNEY-CLIENT PRIVILEGE, FILED.
04/01/2013	04/01/2013	D1	MO	DEFENSE SUPPLEMENTAL OPPOSITION TO STATE OF OHIO MOTION IN LIMINE DEFENSE CLAIM OF UNLAWFUL PURPOSE, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/29/2013	03/29/2013	D1	MO	

				DEFENSE RESPONSE IN OPPOSITION TO STATE OF OHIO MOTION IN LIMINE,FILED. PRO-SE CUYAHOGA COUNTY JAIL [HEARING REQUESTE]
03/28/2013	03/28/2013	D1	MO	DEFENSE RESPONSE TO SECOND STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S EX PARTE MOTION TO SHOW CAUSE, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/28/2013	03/28/2013	D1	MO	DEFENSE REPLY TO STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO COMPEL DISCOVERY: EXTRADITION HEARING TRANSCRIPT, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/28/2013	03/28/2013	D1	MO	DEFENSE REPLY TO STATE OF OHIO MEMANDRUM CONTRA MOTION FOR FURTHER DISCOVERY AND TO COMPEL PRODUCTION OF BANK RECORDS, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/28/2013	03/28/2013	D1	MO	DEFENSE MOTION TO DISMISS COUNTS 1-11: INCOMPREHENISIBILITY OF CONFLICTING MENS REA REQUIREMENTS - "RECKLESSNESS", FILED. PRO-SE CUYAHOGA COUNTY JAIL ORAL ARGUMENT REQUESTED
03/28/2013	03/28/2013	D1	MO	DEFENSE MOTION TO DISMISS: DENIAL OF BASIC AND INTEGRAL RIGHTS, TOOLS AND SERVICES IN PREPARATION FOR TRIAL AND AT TRIAL, FILED. (PRO-SE)
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO COMPEL DISCOVERY: EXTRADITION HEARING TRANSCRIPTS.
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE O OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO MERGE COUNTS 3-9 AND COUNTS 10-11.
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S EX PARTE MOTION TO SHOW CAUSE.
03/27/2013	03/27/2013	P	MO	MOTION FILED FOR STATE OF OHIO MEMORANDUM CONTRA MOTION FOR FURTHER DISCOVERY AND TO COMPEL PRODUCTION OF BANK RECORDS.
03/25/2013	03/25/2013	D1	MO	DEFENCE REPLY TO STATE'S RESPONSE MEMO TO DEFENSE DEMAND FOR MISSING BANK RECORDS, ETC, FILED 2/20/2013, FILED PRO-SE CUYAHOGA COUNTY JAIL
03/25/2013	03/25/2013	D1	MO	DEFENSE REPLY TO STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION FOR FURTHER DISCOVERY, FILED PRO-SE CUYAHOGA COUNTY JAIL
03/22/2013	03/22/2013	N/A	JE	NUNC PRO TUNC ENTRY AS OF AND FOR 02/27/2013. PRETRIAL SET FOR 04/11/2013 AT 01:30 PM. STATE'S MOTION TO CONDUCT CRIMINAL DEPOSITION ON RONNIE BRITTIN IS GRANTED. 03/22/2013 CPROB 03/22/2013 10:01:05
03/21/2013	03/21/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION FOR FURTHER DISCOVERY: COUNT 1 AND FOR EXPANDED BILL OF PARTICULARS, FILED.
03/21/2013	03/21/2013	P	MO	STATE OF OHIO MOTION IN LIMINE: DEFENSE CLAIM OF LAWFUL PURPOSE, FILED.
03/20/2013	03/20/2013	D1	MO	DEMAND AND MOTION FOR DISCOVERY, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/19/2013	03/19/2013	D1	MO	DEFENSE REPLY TO STATE'S MEMO CONTRA DEFENDANT'S MEDICAL TREATMENT, FILED. PRO-SE CUYAHOGA COUNTY JAIL
03/19/2013	03/19/2013	D1	MO	DEFENSE MOTION IN LIMINE TO SUPPRESS ALL PERSONAL IDENTIFYING INFORMATION OF MEMBERS , OR LACK THEREOF, AS EVIDENCE AT TRIAL, FILED. PRO-SE CUYAHOGA COUNTY JAIL (ORAL ARGUMENT REQUESTED)
03/19/2013	03/19/2013	N/A	JE	DEFENDANT IS RESTRICTED TO HAVE NO CONTACT BY PHONE, MAIL OR SOCIAL VISITS 03/19/2018 CPROB 03/19/2013 08:15:55

Appendix N

				REPORTER PRESENT. THE DATE OF 8/1/2013 HAS BEEN ESTABLISHED AS THE CUT OF DATE OF FOR DISCOVERY PRETRIAL HELD 04/22/2013. PRETRIAL CONTINUED TO 08/01/2013 AT 08:30 AM AT THE REQUEST OF DEFENDANT. REASON FOR CONTINUANCE: ONGOING DISCOVERY FINAL PRETRIAL SET FOR 09/23/2013 AT 08:30 AM . AT THE REQUEST OF DEFENDANT. TRIAL PREVIOUSLY SET FOR 04/29/2013 AT 09:00AM IS RESET FOR 09/30/2013 AT 08:30AM AT THE REQUEST OF DEFENDANT. DEFENDANT WAIVES SPEEDY TRIAL FROM 04/22/2013 TO 12/31/2013 IN WRITING AND IN OPEN COURT. MOTION HEARING ON OUTSTANDING MOTIONS SET FOR 08/26/2013 AT 08:30 AM. 08/01/2013 CPROB 08/01/2013 08:11:25
07/31/2013	07/31/2013	D1	MO	MOTION FOR COUNSEL ON APPEAL, FILED.
07/29/2013	07/29/2013	P	MO	STATE OF OHIO NOTICE OF FILING OF DEPOSITION, FILED.
07/26/2013	07/26/2013	D1	MO	MOTION FOR JURY SEQUESTRATION, FILED. PRO-SE CUYAHOGA COUNTY JAIL
07/26/2013	07/26/2013	D1	MO	DEFENDANT'S MOTION FOR SUBPOENAS TO ISSUE FOR SUPPRESSION HEARING , FILED. PRO-SE CUYAHOGA COUNTY JAIL
07/26/2013	07/26/2013	D1	MO	DEFENDANT'S SUPPLEMENTAL WITNESS LIST AND MOTION FOR SUBPOENAS FOR SUPPRESSION HEARING, FILED. PRO-SE CUYAHOGA COUNTY JAIL
07/26/2013	07/26/2013	D1	MO	DEFENDANT'S SUPPLEMENTAL DISCOVERY AND SUPPLEMENTAL WITNESS LIST, FILED. PRO-SE CUYAHOGA COUNTY JAIL
07/26/2013	07/26/2013	D1	MO	DEFENDANT'S CONTINUING OBJECTION OF RECORD TO OPPORTUNITY TO RETAIN OUTSIDE COUNSEL/ RELATED MOTION, FILED. PRO-SE CUYAHOGA COUNTY JAIL
07/22/2013	07/22/2013	D1	CL	AFFIDAVIT OF DISQUALIFICATION OF JUDGE STEVEN E. GALL IS DENIED BY THE SUPREME COURT OF OHIO.
07/18/2013	07/18/2013	D1	MO	DEFENDANT'S SUPPLEMENTAL OFFER OF STIPULATIONS, FILED. PRO-SE CUYAHOGA COUNTY JAIL
07/18/2013	07/18/2013	D1	MO	DEFENSE REPLY TO STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO SUPPRESS ; FILED. PRO-SE CUYAHOGA COUNTY JAIL STATE'S EXPERTS ON FORENSIC ACCOUNTING ISSUES
07/18/2013	07/18/2013	D1	MO	DEFENSE MOTION FOR ADVISORY COUNSEL TO BE PERMITTED TO EXAMINE WITNESSES AND PRESENT ARGUMENT, FILED. PRO-SE CUYAHOGA COUNTY JAIL (ORAL ARGUMMENT)
07/18/2013	07/18/2013	D1	MO	DEFENDANT'S EX PARTE APPLICATION FOR CERTAIN SUBPOENAS TO ISSUE OHIO R. EVID. 404 NOTICES, FILED. PRO-SE CUYAHOGA COUNTY JAIL SUPPLEMENTAL WITNESS LIST, FILED.
07/17/2013	07/17/2013	D1	MO	DEFENDANT'S MOTIONS RELATED TO DEFENSE SUBPOENA'S FOR STATE'S WITNESS LISTL AND FOR COPIES OF STATE'S DISCOVERY, FILED. PRO-SE CUYAHOGA COUNTY JAIL
07/17/2013	07/17/2013	N/A	CS	COURT REPORTER FEE
07/16/2013	07/16/2013	N/A	JE	DEFENDANT IN COURT/COUNSEL JOSEPH C PATITUCE PRESENT. PROSECUTOR(S) BRAD L. TOMMARIO PRESENT. THE DATE OF 8/1/2013 HAS BEEN THE ESTABLISHED CUT OF DATE FOR ALL DISCOVERY AND MOTIONS PRETRIAL HELD 07/16/2013. PRETRIAL PREVIOUSLY SET FOR 08/01/2013 AT 08:30AM IS RESET FOR 08/01/2013 AT 08:30AM. AT THE REQUEST OF DEFENDANT. REASON FOR CONTINUANCE: ONGOING DISCOVERY AND TALKS OF CASE RESOLUTION TRIAL REMAINS SET FOR 09/30/2013 AT 08:30 AM. AT THE REQUEST OF DEFENDANT. 07/16/2013 CPROB 07/16/2013 10:21:13

07/11/2013	07/11/2013	N/A	JE	JUDGEMENT DECISION BY THE OHIO SUPREME COURT IN CASE NO. 13-AP-049 RULING THE AFFIDAVIT OF DISQUALIFICATION IS DENIED AND CASE MAY PROCEED. PRETRIAL SET FOR 07/16/2013 AT 08:30 AM. TRIAL REMAINS SET FOR 09/30/2013 AT 08:30 AM. AT THE REQUEST OF DEFENDANT. 07/11/2013 CPROB 07/11/2013 08:28:17
06/27/2013	06/27/2013	P	MO	STATE OF OHIO REPLY TO DEFENDANT'S MOTION IN LIMINE TO SUPPRESS; UNLAWFUL IRS TARGETING / FRUITS OF THE POISONOUR TREE, FILED.
06/27/2013	06/27/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S SUPPLEMENTARY OSC/REPORT TO THE COURT, FILED.
06/21/2013	06/21/2013	P	MO	STATE OF OHIO MEMORANDUM CONTRA DEFENDANT'S MOTION TO SUPPRESS : STATES' EXPERTS ON FORENSIC ACCOUNTING ISSUES, FILED.
06/12/2013	06/12/2013	D1	MO	DEFENSE RENEWED HOUSEKEEPING AND OTHER MOTIONS , FILED. PRO-SE CUYAHOGA COUNTY JAIL
06/12/2013	06/12/2013	D1	MO	MOTION TO SUPPRESS STATE'S EXPERTS ON FORENSIC ACCOUNTING ISSUES , FILED. (ORAL ARGUMENT REQUIRED) IN LIMINE
06/07/2013	06/13/2013	N/A	JE	CASE IS STAYED PENDING COURT OF APPEALS JUDGEMENT PRETRIAL NOT HELD. 06/07/2013 CPROB 06/13/2013 15:33:54
06/03/2013	06/03/2013	D1	CL	AFFIDAVIT OF DISQUALIFICATION OF JUDGE STEVEN E. GALL, FILED IN THE SUPREME COURT OF OHIO, RECEIVED FOR FILING ON JUNE 3, 2013.
05/31/2013	05/31/2013	D1	MO	MOTION IN LIMINE TO SUPPRESS RE UNLAWFUL IRS TARGETTING FRUITS OF THE POISONOUS TREE, FILED. PRO-SE CUYAHOGA COUNTY JAIL [ORAL ARGUMENT REQUESTED]
05/31/2013	05/31/2013	D1	MO	SUPPLEMENTAL MOTION RE MEDICAL OSC / REPORT TO THE COURT , FILED. PRO-SE CUYAHOGA COUNTY JAIL (ORAL HEARING REQUESTED)
05/31/2013	05/31/2013	D1	MO	RENEWED MOTION FOR EXPERTS AND TO VACATE ORDER , FILED. PRO-SE CUYAHOGA COUNTY JAIL [ORAL ARGUMENT REQUESTED] .
05/22/2013	05/22/2013	N/A	CS	COURT REPORTER FEE
05/22/2013	05/22/2013	N/A	SB	SHERIFF SERVICE FEES FOR SUBPOENA NUMBER 904939, IN THE AMOUNT OF $6.00.
05/22/2013	05/22/2013	N/A	SB	SHERIFF SERVICE FEES FOR SUBPOENA NUMBER 904938, IN THE AMOUNT OF $6.00.
05/21/2013	05/21/2013	N/A	SB	SUBPOENA CLERK'S FEE
05/21/2013	05/21/2013	N/A	SB	SUBPOENA CLERK'S FEE
05/21/2013	05/21/2013	N/A	JE	PRETRIAL HELD 05/21/2013. PRETRIAL CONTINUED TO 08/07/2013 AT 09:00 AM AT THE REQUEST OF DEFENDANT. REASON FOR CONTINUANCE: ONGOING DISCOVERY TRIAL REMAINS SET FOR 09/30/2013 AT 09:00 AM. 05/21/2013 CPROB 05/21/2013 14:27:38
05/16/2013	05/16/2013	P	MO	STATE OF OHIO REPORT ON STIPULATIONS/SETTLEMENT, FILED.
05/15/2013	05/15/2013	N/A	SF	COURT SPECIAL PROJECTS FUND
05/13/2013	05/15/2013	N/A	JE	PRETRIAL SET FOR 05/21/2013 AT 08:30 AM. AT THE REQUEST OF DEFENDANT. TRIAL REMAINS SET FOR 09/30/2013 AT 09:00 AM. AT THE REQUEST OF DEFENDANT. 05/13/2013 CPROB 05/13/2013 16:08:52
05/09/2013	05/10/2013	N/A	JE	IT IS HEREBY ORDERED THAT JOSEPH C. PATITUCE, ESQ., HERETOFORE ASSIGNED AS COUNSEL FOR THE DEFENDANT IN THIS CAUSE, BE ALLOWED $5,840.50 FOR SERVICES SO RENDERED. IT IS ORDERED THAT THE COURT CERTIFY SAID AMOUNT TO THE FISCAL OFFICER AND THE COUNTY EXECUTIVE FOR ALLOWANCE AND PAYMENT. AC 1303818 05/09/2013 CPMKE 05/09/2013 10:59:30

Appendix N-1

Copy of 7/26/2013 Defendant Cody's Motion "Defendant's Continuing Objection of Record to Opportunity to Retain Outside Counsel/ Related Motion" As Received from the Clerk of the Cuyahoga Cnty. Ohio Common Pleas Court, showing Filed Stamp and Case Document No. 80440720

CUYAHOGA COUNTY
COURT OF COMMON PLE

CR12565050-A 80440720

STATE OF OHIO,
PLAINTIFF
V.
BOBBY THOMPSON,
DEFENDANT

RECEIVED FOR FILING
JUL 26 2013
CUYAHOGA COUNTY
CLERK OF COURTS
By Deputy

DEFENDANT'S CONTINUING OBJECTION OF RECORD TO OPPORTUNITY TO RETAIN OUTSIDE COUNSEL / RELATED MOTION

DOCKETED

DEFENDANT HAS BEEN BLOCKED BY JE OF THIS COURT 3.19.2013, AND BY THE DENIAL OF, OR NON-RULING UPON, OTHER DEFENSE MOTIONS, FROM (A) ANY FACILITY, SUCH AS A CLEVELAND PAPER, OR INTERNET, YELLOW PAGES TO RESEARCH CONTACT INFORMATION FOR PRIVATE PRACTICE CLEVELAND ATTORNEYS, AND (B) FROM MAKING ANY TELEPHONE CALLS WHATSOEVER OTHER THAN PAID-FOR-IN-ADVANCE PHONE CARD CALLS AND THEN ONLY TO MR. PATITUCE[1]; AND (C) MAIL, SOCIAL OR PHYSICAL CONTACT WITH ANY PERSON OTHER THAN MR. PATITUCE FOR THE PURPOSE OF HAVING SUCH PERSON CONTACT AN ATTORNEY CONCERNING PRIVATE RETENTION FOR THE DEFENDANT.

INDEED THE DEFENDANT WAS PLACED INTO "DISCIPLINARY PUNISHMENT" ON TOP OF HIS ISOLATION STATUS FOR 5 DAYS FOR PASSING A NOTE TO A FELLOW INMATE TO REQUEST THE INMATE TELL HIS ATTORNEY THE DEFENDANT WISHED TO DISCUSS HIS PRIVATE RETENTION FOR THE DEFENDANT.

THE DEFENDANT OBJECTS OF RECORD TO THIS CONTINUING PROCESS OF DENIAL ONWARD FROM AT LEAST 3.19.2013 AS A VIOLATION OF HIS RIGHT TO RETAINED COUNSEL OF CHOICE PROVIDED BY THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1, SEC. 10 OF THE OHIO CONSTITUTION; AND MOVES TO LIFT SUCH BARS EFFECTIVELY FORTHWITH AND/OR TO DISMISS THIS CASE WITH PREJUDICE.

RESPECTFULLY SUBMITTED,

BCT

BOBBY C. THOMPSON
COUNSEL PRO SE

P.O. BOX 5600
CLEVELAND OH 44101

CLERK OF COURT: PLEASE FILE AND COPY AS PERMITTED / REQUIRED.

1 GENERAL POPULATION CCCC INMATES, WHICH STATUS DEFENDANT HAS BEEN DENIED PURSUANT TO THE 3.19.2013 JE, ARE PERMITTED UNLIMITED COLLECT TELEPHONE CALLS TO ANY PERSON. CCCC "INMATE HANDBOOK," (REV. JAN. 2012), "INMATE USE OF TELEPHONE, P. 17.

Appendix N-1