APPENDIX

Appendix A: Fourth Appellate District.

32.1 motion to withdraw. Case #20ca6

Doc #3 PAIGEID#231

Judgement Entry: May 18, 2021

Appendix B: Athens County Common Pleas (Trial Court)

32.1 motion to withdraw. Case #18cr0273

Doc#3 PAIGEID# 155

Judgement Entry: May 28, 2019

Appendix C: Supreme Court of Ohio

Memorandum in Response. Case #2021-0784

Doc#3 PAIGEID#237

Judgement Entry: July 21, 2021

Appendix D: Bill of Information

Doc#3 PAIGEID#84

No. 22-3627

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DECHAUN TOLIVER,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

ORDER

Before: GRIFFIN, Circuit Judge.

Dechaun Toliver, 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. Toliver has filed an application for a certificate of appealability ("COA") and a motion to proceed in forma pauperis on appeal.

In April 2018, a grand jury returned an indictment charging Toliver with two counts of trafficking in cocaine, in violation of Ohio Revised Code § 2925.03(A)(1). Two months later, the State presented an information charging Toliver with engaging in a pattern of corrupt activity, in violation of Ohio Revised Code § 2923.32(A)(1). The cases were consolidated, and Toliver pleaded guilty to all three counts. Toliver was sentenced to concurrent one-year terms of imprisonment for the cocaine-trafficking convictions and eight years' imprisonment for the pattern-of-corruption conviction.

Toliver did not file a timely appeal of his convictions. Instead, he filed a petition for post-conviction relief in the trial court. He argued that the bill of information was defective because it did not charge an element of the offense of engaging in a pattern of corrupt activity, i.e., that he was involved in an illegal enterprise, and thus that his conviction was invalid. The trial court denied the petition, concluding that Toliver's claim lacked merit and was barred by res judicata

because he failed to raise it in a direct appeal. The Ohio Court of Appeals affirmed on res judicata grounds. Toliver did not appeal to the Ohio Supreme Court.

In May 2019, Toliver moved to withdraw his guilty plea, again arguing that the bill of information was defective. Toliver also asserted that counsel was ineffective for failing to present a defense that "Ohio law rejects a sole proprietor to an illicit enterprise." The trial court denied the motion. Toliver did not appeal. In November 2019, Toliver filed a "Motion for Leave to Traverse Motion to Withdraw Plea, Instanter" in the trial court. Because it had already denied Toliver's motion to withdraw his guilty plea, and Toliver did not appeal that ruling, the trial court dismissed the motion as moot. The Ohio Court of Appeals affirmed that ruling. Toliver appealed, and the Ohio Supreme Court declined to accept jurisdiction.

Meanwhile, more than one year after sentencing, Toliver filed a notice of appeal and moved for leave to file a delayed appeal of his conviction and sentence. The Ohio Court of Appeals denied the application, finding that Toliver had not provided a satisfactory explanation for the delay, and denied reconsideration. Toliver did not seek leave to appeal in the Ohio Supreme Court.

In September 2021, Toliver filed his § 2254 petition, raising five claims: (1) he did not knowingly and intelligently enter his guilty plea because he was not advised of the illegal-enterprise element of the charge of engaging in a pattern of corrupt activity; (2) counsel was ineffective for erroneously advising him that the two charges for cocaine trafficking were enough to show that he engaged in a pattern of corrupt activity; (3) his conviction for engaging in a pattern of corrupt activity is a miscarriage of justice because it was not supported by sufficient evidence; (4) there was "no evidence or documentation of group activity" to satisfy the enterprise element of the pattern-of-corruption charge; and (5) the two cocaine-trafficking charges did not qualify as corrupt acts to satisfy the pattern-of-corruption charge. Upon the recommendation of a magistrate judge, the district court denied Toliver's petition, concluding that claims one and two were procedurally defaulted and that claims three, four, and five were not cognizable on habeas review and were procedurally defaulted. The court declined to issue a COA. Toliver filed a motion to alter or amend the judgment, pursuant to Federal Rule of Civil Procedure 59(e), which the district court denied.

Toliver now appeals and seeks a COA from this court. This court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the petition was denied on procedural grounds, the petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To decide whether a habeas petitioner procedurally defaulted a federal claim in state court, a federal court considers 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, if no means by which to raise the claims remains available. The exhaustion requirement is deemed satisfied when the "highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). As a general rule, a petitioner must present his claims to both the state court of appeals and the state supreme court for the claim to be considered exhausted. *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009).

Because Toliver could have raised his first claim in a direct appeal, Ohio's res judicata doctrine would bar him from raising it in a new post-conviction proceeding. *See Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000). And in fact, the trial court enforced this rule against Toliver when he raised his claim that his conviction was invalid because he was not advised of the illegal-enterprise element of the pattern-of-corruption charge in his petition for post-conviction relief. In his motion to alter or amend the judgment, Toliver argued that the application of res judicata in his claim should not preclude review of his claims. Citing *Gibbs v. Huss*, 12 F.4th 544 (6th Cir. 2021), Toliver argued that Ohio's res judicata rule is not an adequate state ground for denying review of his federal constitutional claim because it "is applied excessively, extremely and unfairly in Ohio . . . even though there is a longstanding tenet that prohibits raising

constitutional issues for the first time on appeal." Reasonable jurists could not disagree with the district court's rejection of this argument. *Gibbs*'s holding was limited to the circumstances presented in that case: where the petitioner could not have been aware of the constitutional violation—denial of his right to a public trial by closing the courtroom during voir dire—application of Michigan's contemporaneous-objection rule would not be an adequate state ground for denying review of the claim on habeas review. *Id.* at 553-54. *Gibbs* has no bearing on whether Ohio's res judicata rule is an adequate state procedural rule for barring habeas review. Indeed, this court has held that it is. *See Coleman v. Mitchell*, 268 F.3d 417, 427-29 (6th Cir. 2001).

With respect to claim two, the record reveals that Toliver never presented this ineffective-assistance claim to the state courts. Although he raised a claim of ineffective assistance in his motion to withdraw his guilty plea, that claim differed from the ineffective-assistance claim that he raised in his § 2254 petition. In his motion to withdraw, Toliver asserted that counsel was ineffective for failing to pursue a defense that he acted as a sole proprietor and therefore could not have engaged in an illegal enterprise. Moreover, even if the ineffective-assistance claim Toliver raised in his motion to withdraw could be construed as a fair presentation of the ineffective-assistance claim raised in his § 2254 petition, Toliver never appealed the denial of his motion to withdraw and thus failed to exhaust the claim. Reasonable jurists would not disagree with the district court's determination that claims one and two are procedurally defaulted.

Nor would reasonable jurists disagree with the district court's conclusion that Toliver failed to overcome the procedural default of these claims. 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). Toliver argued that failing to consider his claims would result in a fundamental miscarriage of justice.

A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004). A credible actual-innocence claim must be supported with "new reliable evidence," such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Toliver offered

no such evidence to support his assertion of actual innocence. Rather, he argued that the State did not present evidence that he was involved in an illegal enterprise or that his drug sales satisfied the monetary threshold to support a conviction for engaging in a pattern of corrupt activity. But the State did not need to present such evidence because Toliver admitted to the conduct by pleading guilty. Toliver also contended that the information failed to include these essential elements of the pattern-of-corruption charge and thus there was not a factual basis for his guilty plea, rendering him actually innocent of the offense. The information charged that Toliver

> unlawfully while employed by, or associated with, any enterprise did conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt, to wit: Defendant did traffic large quantities of Heroin and Cocaine in Athens County, Ohio. On or about June 27, 2017, Defendant did sell Cocaine to a confidential informant. On or about July 20, 2017, Defendant did sell Cocaine to a confidential informant. Further investigation into Defendant's drug activity led officers to obtain a search warrant for the residence in which Defendant was staying. On May 15, 2018 . . . Defendant was found to be in possession of Heroin and Fentanyl; Cocaine; Methamphetamine; Cocaine; Heroin; Methylphenidate; and Psilocyn as tested by the Bureau of Investigation (BCI). Defendant was also found to be in possession of $7,180.00, which was seized for forfeiture as drug money. Defendant did consistently traffic drugs in an illegal enterprise in Athens County, Ohio, for over ten (10) months, making dozens of sales of the felony of the fourth[-]degree threshold.

By pleading guilty to this count as charged in the information, Toliver admitted the facts supporting the illegal-enterprise element and the monetary threshold. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Even if Toliver could show that there was not a sufficient factual basis for his plea of guilty to the pattern-of-corruption charge, it would not establish his actual innocence. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency," and Tolliver's challenge to the sufficiency of the information alleges legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Reasonable jurists would not debate the district court's rejection of Toliver's assertion that failure to consider claims one and two would result in a fundamental miscarriage of justice.

Toliver's third, fourth, and fifth claims all assert that his pattern-of-corruption conviction was a miscarriage of justice because there was no evidence to show that he was involved in an

illegal enterprise or that his drug trafficking rose to the level of corrupt activity within the meaning of the statute. To the extent that Toliver's arguments assert a freestanding claim of actual innocence independent of any underlying constitutional violation in the state court proceeding, no reasonable jurist could disagree with the district court's denial of relief. Freestanding claims of actual innocence are not cognizable on habeas review in a non-capital case. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993); *Hodgson v. Warren*, 622 F.3d 591, 601 (6th Cir. 2010). But even if such claims were cognizable, they are, like claims one and two, procedurally defaulted due to Toliver's failure to raise them in a direct appeal. And for the reasons stated above, Toliver failed to make a substantial showing that failure to consider the claims would result in a fundamental miscarriage of justice.

For these reasons, Toliver'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

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 01/06/2023.

Case Name: Dechaun Toliver v. Jay Forshey
Case Number: 22-3627

Docket Text:
ORDER filed denying a certificate of appealability [6840430-2] [6847300-2], denying as moot motion to proceed ifp [6847288-2] filed by Mr. Dechaun Toliver. Richard Allen Griffin, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Dechaun Toliver
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, OH 43724

A copy of this notice will be issued to:

Ms. Jerri L. Fosnaught
Mr. Richard W. Nagel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Dechaun Toliver,

Petitioner, **Case No. 2:21-cv-4703**

v. **Judge Michael H. Watson**

Warden, Noble Correctional Institution, **Magistrate Judge Merz**

Respondent.

OPINION AND ORDER

Petitioner moves to alter or amend the Court's Opinion and Order dismissing his habeas petition. Mot., ECF No. 15. Magistrate Judge Merz issued a Report and Recommendation ("R&R") recommending the Court deny Petitioner's motion because it fails to satisfy the standard for amendment under Federal Rule of Civil Procedure 59(e). R&R, ECF No. 16. Petitioner timely objected to that recommendation, asserting he cited an intervening change in controlling law. Obj., ECF No. 17.

Upon de novo review, the Court agrees that Petitioner fails to cite an intervening change in controlling law. As the magistrate judge explained, *Gibbs v. Huss*, 12 F. 4th 544 (6th Cir. Aug. 30, 2021), is not an intervening change in controlling law for the simple reason that it was available to Petitioner when he filed his reply brief. Moreover, *Gibbs* supports Petitioner's general proposition that a state procedural rule that is typically "adequate and independent" enough to foreclose review of a federal constitutional claim can nonetheless "be

inadequate in exceptional cases in which exorbitant application . . . renders the state ground inadequate to stop consideration of a federal question." *Id.* at 551 (cleaned up). But *Gibbs* did not address the further issue of whether *res judicata* was a sufficiently adequate state procedural rule, and it does not undermine the soundness of the Court's procedural default analysis in Petitioner's case.

Accordingly, Petitioner's objection is **OVERRULED**, the R&R is **ADOPTED**, and Petitioner's motion to alter or amend judgment is **DENIED**. Reasonable jurists would not disagree with this conclusion, and Petitioner is **DENIED** a certificate of appealability. The Court **CERTIFIES** that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*. The Clerk shall terminate ECF No. 15.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION AT COLUMBUS

DECHUAN TOLIVER,

Petitioner, : Case No. 2:21-cv-4703

- vs - District Judge Michael H. Watson
Magistrate Judge Michael R. Merz

JAY FORSHEY, Warden,
Noble Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS ON MOTION TO AMEND THE JUDGMENT

This habeas corpus case, brought *pro se* by Petitioner Dechuan Toliver under 28 U.S.C. § 2254, is before the Court on Petitioner's Motion under Fed.R.Civ.P. 59(e) to Amend the Judgment (ECF No. 15).

For a district court to grant relief under Rule 59(e), "there must be '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006)).

> Motions to alter or amend judgment may be granted if there is a clear error of law, *see Sault Ste. Marie Tribe*, 146 F.3d at 374, newly discovered evidence, *see id.*, an intervening change in controlling constitutional law, *Collison v. International Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n.3 (1st Cir. 1993); *School District No. 1J v. ACANDS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), or to

> prevent manifest injustice. *Davis*, 912 F.2d at 133; *Collison*, 34 F.3d at 236; *Hayes*, 8 F.3d at 90-91 n.3. *See also North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).
>
> To constitute "newly discovered evidence," the evidence must have been previously unavailable. *See ACandS*, 5 F.3d at 1263; *Javetz v. Board of Control, Grand Valley State Univ.* 903 F. Supp. 1181, 1191 (W.D. Mich. 1995)(and cases cited therein); Charles A. Wright, 11 *Federal Practice and Procedure* § 2810.1 at 127-28 (1995).

Gencorp, Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999), accord, *Nolfi v. Ohio Ky. Oil Corp.*, 675 F.3d 538, 551-52 (6th Cir. 2011), quoting *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010).

A motion under Fed. R. Civ. P. 59(e) is not an opportunity to reargue a case. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)(citation omitted). Thus, parties should not use them to raise arguments which could and should have been made before judgment issued. Id. Motions under Rule 59(e) must establish either a manifest error of law or must present newly discovered evidence. Id. In ruling on a Fed.R.Civ.P. 59(e) motion, "courts will not address new arguments or evidence that the moving party could have raised before the decision issued. See 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2810.1, pp. 163-164 (3d ed. 2012) (Wright & Miller); accord, *Exxon Shipping Co. v. Baker,* 554 U. S. 471, 485-486, n. 5, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) (quoting prior edition)." *Bannister v. Davis*, 140 S. Ct. 1698, 1703, 207 L.Ed. 2d 58 (2020).

Petitioner acknowledges that his principal argument in his case in chief was that his various procedural defaults were overcome by his proof he met the actual innocence exception to procedural default (Motion, ECF No. 15, PageID 369-70). Judge Watson's Opinion and Order sought to be amended thoroughly discussed the actual innocence "gateway" exception as it is applied in the Sixth Circuit in cases where the facts admitted or proven have been held to be

insufficient to support a conviction. *Toliver v. Forshey*, 2022 WL 1442005 *2-3 (S.D. Ohio May 6, 2022). Where such a claim is based on an intervening change in the law,

> In the Sixth Circuit, a petitioner can establish such a claim by showing:
>
> > (1) the existence of a new interpretation of statutory law, (2) which was issued after the petitioner had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions, (3) is retroactive, and (4) applies to the merits of the petition to make it more likely than not that no reasonable juror would have convicted him.

Toliver at * 3, quoting *Wooten v. Cauley*, 677 F.3d 303, 307–08 (6th Cir. 2012). Judge Watson found "Petitioner does not satisfy the gateway actual innocence standard because he cites no *intervening* decision that changed the way the Ohio RICO statute [footnote omitted] was construed between the time of his guilty plea and the filing of his § 2254 petition." *Toliver* at *3. In his instant Motion, Toliver also cites no intervening change in Ohio law.

Toliver relies in his Motion on *Gibbs v. Huss*, 12 F. 4th 544 (6th Cir. Aug. 30, 2021). Gibbs is not in any way related to a change in Ohio law relating to the elements of the crimes of which Toliver was convicted. Instead, the Sixth Circuit held that Michigan's usually adequate rule requiring contemporaneous objection to preserve error for review was not adequate in circumstances where the petitioner could not have been aware of the constitutional violation – closure of the courtroom to the public during voir dire -- at the time it happened.

In the Motion, Toliver complains of the application of Ohio's *res judicata* doctrine to his case.

> The doctrine of res judicata is applied excessively, extremely and unfairly in Ohio and this case exemplifies such allegation. Res judicata was applied to my post-conviction relief proceedings, even though there is a longstanding tenet that prohibits raising constitutional issues for the first time on appeal. *State v. Combs*, 62

> Ohio St. 3d 278, 290 (1991); *State v. Awan*, 22 Ohio St. 3d 120 (1986). By virtue of the plain language of the law, O. R. C. § 2953. 21 et seq., creates the avenue to overcome such barrier. The application of res judicata to such a situation created invidious discrimination, which is guarded by the Equal Protection Clause of the Constitution. *Skinner v. Oklahoma, ex rel. Williamson*, 316 U. S. 535, 541 (1942).

Motion, ECF No. 15, PageID 370-71.

This argument does little if anything to support Toliver's position. First of all, *Gibbs*, to the extent it is applicable, was decided in August 2021 and thus available to Toliver when he filed his Reply in December 2021 (ECF No. 9).

Second, his argument misunderstands Ohio *res judicata* doctrine which holds that if a constitutional claim can be made on the basis of the direct appeal record, it must be made on direct appeal or be barred by *res judicata*. The Supreme Court of Ohio has repeatedly held that constitutional claims which are supported by the appellate record must be raised on direct appeal and will be barred by *res judicata* if attempted to be raised later in post-conviction. *State v. Reynolds*, 79 Ohio St. 3d 158, 161 (1997); *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994); *State v. Lentz*, 70 Ohio St. 3d 527 (1994); *In re T.L.*, 2014-Ohio-1840, ¶ 16, 2014 Ohio App. LEXIS 1804 (8th App. Dist. 2014). Ohio Revised Code § 2953.21 does not provide an exception.

Ohio's doctrine of *res judicata* in criminal cases, enunciated in *State v. Perry,* 10 Ohio St. 2d 175 (1967), is an adequate and independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent,* 17 F.3d 155, 160-61 (6th Cir. 1994)(citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001). The *Perry res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state rule. *Mason v. Mitchell,* 320 F.3d 604, 628 (6th Cir. 2003);

Coleman v. Mitchell, 268 F.3d 417, 429 (6th Cir. 2001); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000), *cert. denied,* 531 U.S. 1082 (2001); *Rust v. Zent,* 17 F.3d 155, 160-61 (6th Cir. 1994); *Van Hook v. Anderson*, 127 F. Supp. 2d 899 (S.D. Ohio 2001). Toliver does not even begin to show how application of *res judicata* violated the Equal Protection Clause.

Conclusion

Toliver has not persuaded the Magistrate Judge that the Opinion and Order is founded on any manifest error of law or that there has been an intervening change of law requiring amendment of the Judgment. Petitioner's Rule 59(e) Motion should therefore be denied. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis.*

May 18, 2022.

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

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's

objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION AT COLUMBUS

DECHUAN TOLIVER,

Petitioner, : Case No. 2:21-cv-4703

- vs - District Judge Michael H. Watson
Magistrate Judge Michael R. Merz

JAY FORSHEY, Warden,
Noble Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This habeas corpus case, brought *pro se* by Petitioner Dechuan Toliver under 28 U.S.C. § 2254, is before the Court for decision on the merits. Relevant pleadings are the Petition (ECF No. 1), the State Court Record (ECF No. 3), the Return of Writ (ECF No. 4), and Petitioner's Traverse (ECF No. 9)[1].

Litigation History

The January 2018 term of the Athens County Grand Jury issued an indictment charging Toliver with two counts of trafficking in cocaine in violation of Ohio Revised Code §

[1] At one point Toliver characterizes this pleading as a "32. 1 motion to withdrawl [sic]." (Traverse, ECF No. 9, PageID 308). A motion to withdraw a guilty plea is brought under Ohio R. Crim. P. 32.1 in the court in which the plea was made. This Court has no authority to grant a motion to withdraw and assumes the reference to 32.1 is because of copying and pasting from a state court pleading.

2925.03(A)(1)(Indictment, State Court Record, ECF No. 3, Ex. 1). A later bill of information added a count of engaging in a pattern of corrupt activity in violation of Ohio Revised Code § 2923.32(A)(1). *Id.* at Ex. 3. On June 27, 2018, Toliver withdrew his former pleas of not guilty and pleaded guilty to all the pending charges, in return for an agreed sentence of eight years. *Id.* at Ex. 6. Although the trial judge was not bound by the agreed sentence, he nevertheless honored it and sentenced Toliver to an aggregate imprisonment term of eight years. *Id.* at Ex. 8.

Toliver did not take a direct appeal, but filed a petition for post-conviction relief under Ohio Revised Code § 2953.21 on September 28, 2018. *Id.* at Ex. 16. The trial court denied relief. *Id.* at Ex. 20. Toliver then appealed to the Ohio Fourth District Court of Appeals which affirmed. *State v. Toliver*, 2019-Ohio-3669 (Ohio App. 4th Dist. Aug. 29, 2019)("*Toliver I*"). That court dismissed Toliver's Application for Reconsideration as untimely filed, rather than on the merits (Decision, State Court Record, ECF No. 3, Ex. 27). Toliver did not appeal to the Supreme Court of Ohio. Toliver later filed a motion to withdraw his guilty plea, but did not appeal from its denial in May 2019.

On September 18, 2019, Petitioner sought leave to file a delayed appeal from sentencing (State Court Record, ECF No. 3, Exs. 9-10). The Fourth District denied leave both initially and on reconsideration. *Id.* at Exs. 13 and 15. Toliver's May 1, 2020, motion for judicial release was also denied.

On November 12, 2019, Toliver filed another motion to withdraw his guilty plea (State Court Record, ECF No. 3, Ex. 32) which the trial court denied. *Id.* at Ex. 33. Toliver appealed, but the Fourth District affirmed. *State v. Toliver*, 2021-Ohio-1790 (Ohio App. 4th Dist., May 18, 2021) ("*Toliver II)*, appellate jurisdiction declined, *State v. Toliver*, 164 Ohio St.3d 1421(2021).

Toliver filed his Petition for Writ of Habeas Corpus in this Court by depositing it in the

prison mail system on September 13, 2021[2], pleading the following grounds for relief:

> **Ground One:** The Defendants plea was not intelligently made which renders enforcement of the plea unconstitutional under the U.S. Constitution.
>
> **Supporting Facts:** Toliver wasn't apart [sic] of an enterprise (licit nor illicit) and his two fifth degree felony drug sales fell short of the monetary threshold of $1,000, only totally $180. The Defendant wasn't knowledgeable of advised as to what the charge required and entered an unintelligent plea to a crime he was innocent of, for an eight (8) year prison term.
>
> **Ground Two:** Defendant['s 6th Amendment right to effective assistance was violated where counsel breached his duty to ensure a fair outcome.
>
> **Supporting Facts:** Defendant was advised by counsel that his two fifth degree felony charges for two grams of cocaine was enough to show he engaged in a pattern of corrupt activity. If it wasn't for this misinterpretation of the law, by counsel, the defendant would not have plead guilty. After reviewing the case against his defendant, seeing that all the essential elements of the charge against his client were non existent, counsel still advised defendant to enter a plea of guilty.
>
> **Ground Three**: Miscarriage of justice is a grossly unfair outcome when a defendant is convicted despite lack of evidence on a [sic] essential element.
>
> **Supporting Facts:** Defendant was convicted despite all the essential elements of the crime being nonexistent, and lacking enough evidence to support the conviction itself. There is no evidence of an enterprise, also the corrupt acts used in this case do not qualify as "corrupt act" where they fell short of the threshold of $1000, totaling $180.
>
> **Ground Four:** Engaging in a Pattern of Corrupt Activity requires a person to be employed by or associated with an enterprise.
>
> **Supporting Facts:** There is no evidence or documentation of group activity in this case. Toliver acted as a lone dealer and was never being investigated for the OHIO RICO before the time of sentencing. There are no co-defendants or other known associates

[2] Respondent concedes this filing date satisfies the statute of limitations, 28 U.S.C. § 2244(d)(Return, ECF No. 4, PageID 280-81).

> linked to this case of the defendant. The enterprise element does not exist.
>
> **Ground Five:** The two fifth degree charged do not qualify as corrupt acts, where they don't meet the threshold.
>
> **Supporting Facts:** The drug buy report states that on June 27, 2017 the buy was $80 for one gram and on July 20, 2017 the buy was worth $100 for one gram. Evidence has been supported to back this claim.

(Petition, ECF No. 1, PageID 5, 7-8, 10, 12).

Analysis

Ground One: Invalid Guilty Plea

In his First Ground for Relief, Toliver claims his guilty plea was not intelligently made because he neither knew nor was properly advised of what was required to prove he engaged in a pattern of corrupt activity.

Procedural Default

Respondent asserts this claim is barred by Toliver's procedural default in not presenting it to the Fourth District Court of Appeals on direct appeal (Return, ECF No. 4, PageID 288-90).

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

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless

> the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional rights claim he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). "Absent cause and prejudice, 'a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review.'" *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000), quoting *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle*, 456 U.S. at 110; *Wainwright*, 433 U.S. at 87.

> [A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. E.g., *Beard v. Kindler*, 558 U.S. 53, 55, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009). This is an important "corollary" to the exhaustion requirement. *Dretke v. Haley*, 541 U.S. 386, 392, 124 S.Ct. 1847, 158 L.Ed. d 659 (2004). "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address" the merits of "those claims in the first instance." *Coleman* [*v. Thompson*], 501 U.S. [722,] 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 [(1991)]. The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine. See *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

Davila v. Davis, 137 S. Ct. 2058, 2064 (2017). "[A] federal court may not review federal claims that were procedurally defaulted in state courts." *Theriot v. Vashaw*, 982 F.3d 999 (6th Cir. 2020), citing *Maslonka v. Hoffner*, 900 F.3d 269, 276 (6th Cir. 2018) (alteration in original) (quoting *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017)).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Barton v. Warden, S. Ohio Corr. Facility,* 786 F.3d 450, 464 (6th Cir. 2015), *Guilmette v. Howes,* 624 F.3d 286, 290 (6th Cir. 2010)(*en banc*); *Eley v. Bagley*, 604 F.3d 958, 965 (6th Cir. 2010); *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), *citing Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594, 601-02 (6th Cir. 2001); *Jacobs v. Mohr*, 265 F.3d 407, 417 (6th Cir. 2001).

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

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); accord, *Hartman v. Bagley,* 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002). A habeas petitioner can overcome a procedural default by showing cause for the default and prejudice from the asserted error. *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015).

Ohio has a relevant procedural rule: any constitutional claim which can be raised and decided on direct appeal must be raised there or be barred by *res judicata*. *State v. Perry,* 10 Ohio St. 2d 175 (1967). That rule was enforced against Toliver by the Fourth District. *Toliver I* at ¶ 14. Then Sixth Circuit has repeatedly held that the *Perry res judicata* rule is an adequate and

independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent,* 17 F.3d 155, 160-61 (6th Cir. 1994)(citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001).

Petitioner claims that any procedural default he may have committed is excused because his conviction represents a "severe miscarriage of justice" (Traverse, ECF No. 9, PageID 310). Toliver recognizes that "[a] fundamental miscarriage of justice is usually interpreted to mean that an innocent person was convicted (Traverse, ECF No. 9, PageID 309, citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992), and *Reed v. Ross,* 468 U.S. 1 (1984)). Actually, the Supreme Court has held the miscarriage of justice excuse for procedural default **always** requires strong proof of actual innocence. *Calderon v. Thompson*, 523 U.S. 538, 557-58 (1998). And the Supreme Court has also placed stringent limits on the proof necessary to show actual innocence.

> [I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo,* 513 U.S. 298, 316 (1995)." Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321.

Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005).

Toliver has not presented any new evidence at all that was not presented at trial. In fact, no evidence was presented at trial because Toliver pleaded guilty. He asserts what evidence the State had – only two minimal drug buys and no proof of affiliation with an enterprise – but this Court does not know that because the State was not put to its proof by insisting on a trial. Toliver has not established a miscarriage of justice by proving his actual innocence.

In sum, Toliver's First Ground for Relief is procedurally defaulted by his failure to take a direct appeal and he has not shown excusing cause and prejudice or actual innocence.

Merits

In the interest of full discussion of Petitioner's claim, the Magistrate Judge offers the following analysis of the merits of Toliver's First Ground for Relief.

A plea of guilty or no contest is valid if, but only if, it is entered voluntarily and intelligently, as determined by the totality of the circumstances. *Brady v. United States,* 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); *Abdus-Samad v. Bell*, 420 F.3d 614, 631 (6th Cir. 2005); *King v. Dutton*, 17 F.3d 151 (6th Cir. 1994); *Riggins v. McMackin*, 935 F.2d 790, 795 (6th Cir. 1991); *Berry v. Mintzes,* 726 F.2d 1142, 1146 (6th Cir. 1984).

To ensure that guilty pleas are knowing, intelligent, and voluntary, Ohio R. Crim. P. imposes stringent procedural requirements on the taking of a plea in the form of a required colloquy between the trial judge and the defendant. In this case the habeas court has no way of determining whether those requirements were in fact complied with or not because there is no transcript of the plea colloquy. Had Toliver appealed and raised the claim he makes here, the plea colloquy would

have been transcribed at the State's expense so the court of appeals (and this Court eventually) could evaluate the plea colloquy. Federal courts presume the regularity of state court proceedings. *Walker v. Johnston*, 312 U.S. 275 (1941). The burden is on a habeas petitioner to overcome that presumption and Toliver has offered no evidence that the trial judge did not follow Rule 11.

What evidence we do have is embodied in the guilty plea document (State Court Record, ECF No. 3, Ex. 6). That document recites the three charges to which Toliver was pleading guilty – engaging in a pattern of corrupt activity and two counts of trafficking cocaine. *Id.* at PageID 39. Toliver represented "I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advice, counsel and competence." *Id.* at PageID 40. He further represented:

> I understand by pleading guilty I give up my right to a jury trial or court trial, where I could see and have my attorney question witnesses against me, and where I could use the power of the court to call witnesses to testify for me.
>
> I understand that at trial I would not have to take the witness stand and could not be forced to testify against myself and that no one could comment if I chose not to testify.
>
> I understand I am giving up the right to testify on my own behalf.
>
> I understand I waive my right to have the prosecutor prove my guilt beyond a reasonable doubt on every element of each charge.
>
> By pleading guilty I admit committing the offense and will tell the Court the facts and I circumstances of my guilt. . . .
>
> I understand my right to appeal a maximum sentence, my other limited appellate rights and that any appeal must be filed within 30 days of my sentence. I understand the consequences of a conviction upon me if I am not a U.S. citizen. I enter this plea voluntarily.
>
> I understand that the State's recommended sentence in this agreement is not binding on the Court.

> By signing below I agree I have read this document, any questions I had have been answered, and I ask that the Court accept this plea.

Id. at PageID 41. By pleading guilty with an agreed sentence, Toliver avoided the possibility of the maximum sentence of seventeen years. He does not claim the prosecutor did not carry out his part of the plea bargain.

Toliver now says his plea was not intelligent because he did not understand what underlying facts needed to be proved to show a pattern of corrupt activity and what connection has to be shown to an "enterprise." But in open court in the plea agreement he said he did understand. Why should he be allowed to repudiate his plea agreement when he has already received its full benefit?

Toliver has not shown his guilty plea was unintelligent. His First Ground for Relief should therefore also be rejected on the merits.

Ground Two: Ineffective Assistance of Trial Counsel

In his Second Ground for Relief, Toliver claims his trial attorney told him "that his two fifth degree felony charges for two grams of cocaine was enough to show he engaged in a pattern of corrupt activity. If it wasn't for this misinterpretation of the law, by counsel, the defendant would not have plead guilty." (Petition, ECF No. 1, PageID 7-8).

This alleged advice of counsel does not appear in the record. Because a criminal defendant charged with a serious offenses is entitled to the effective assistance of counsel by the Sixth Amendment, a claim of ineffective assistance of trial counsel such as this one depending on evidence outside the appellate record can be raised in a petition for post-conviction relief under Ohio Revised Code § 2953.21. However, Petitioner made no such claim in his petition for post-

conviction relief (State Court Record 3, Ex. 16). The first time he raised the claim was in his first motion to withdraw his guilty plea where he asserted counsel did not explore a defense that "Ohio law rejects [holding] a sole proprietor to [be] an illicit enterprise." (State Court Record, ECF No. 3, Ex. 28, PageID 149, citing *State v. Agner*, 135 Ohio App3d 286 (1999)[3]). This claim is different from the one made in the Petition because it attacks the advice given on engaging in an enterprise, not what is required to show a pattern of corrupt activity. However broad or narrow the claim is, Toliver did not appeal from denial of the Motion to Withdraw.

Toliver's second Motion to Withdraw was filed November 12, 2019 (State Court Record, ECF No. 3, Ex. 32)[4]. It focuses only on the deficiencies of the Bill of Information. As to ineffective assistance of trial counsel it says only "counsel has to also be deemed ineffective for allowing an innocence [sic] man to go to prison." *Id.* at PageID 161. Neither of these motions is accompanied by any proffered evidence of what actual advice trial counsel gave Toliver.

Judge Lang found the second motion was moot because the first motion had already been decided and Toliver had not appealed (Decision, State Court Record, ECF No. 3, Ex. 33, PageID 162). Considering both motions together, the judge found no merit to the defective pleading claim because the Bill of Information was in the words of the statute. *Id.* Finally, he found the claims barred by *res judicata* because they could have been raised on direct appeal or on appeal from the May 28, 2019, decision, but no appeal was taken from either decision. *Id.* at PageID 163.

Petitioner suggest he should be given an evidentiary hearing to resolve disputed issues of fact (Traverse, ECF No. 9, PageID 317, relying on *Townsend v. Sain*, 372 U.S. 293, 313 (1963)).

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[3] Form of citation corrected to reflect current practice.

[4] This filing is captioned "Motion for Leave to Traverse Motion to Withdraw Plea, Instanter", presumably on the theory that it is a continuation of the prior filing because Toliver was denied his asserted due process right to file a "traverse" to the State's opposition to his first Motion to Withdraw. Toliver had already filed such a "traverse" on May 28, 2019, the same day Judge Lang had denied the first motion to withdraw. There is no such due process right.

Townsend interpreted the version of 28 U.S.C. § 2254 in place before Congress adopted the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"). Under AEDPA, no evidentiary hearing may be held in habeas unless the petitioner shows the factual determinations of the trial court are rebutted by clear and convincing evidence which is in the state court record. 28 U.S.C. § 2254(e); *Cullen v. Pinholster*, 563 U.S. 170 (2011).

Petitioner's Second Ground for Relief is procedurally defaulted and should be dismissed on that basis.

Ground Three: Miscarriage of Justice

In his Third Ground for Relief, Toliver asserts his conviction is a "grossly unfair outcome" because there was no evidence offered of his connection with an enterprise or the requisite pattern of corrupt activity.

To the extent Petitioner intends this as a claim of actual innocence, it is not cognizable in habeas corpus. *Herrera v. Collins*, 506 U.S. 390, 408-11 (1993). Moreover, the claim ignores the effect of a guilty plea. A guilty plea eliminates altogether any need to present evidence on the part of the State.

Petitioner continually argues there was no pattern of corrupt activity because the State could only prove two sales with aggregate proceeds of $180. On the contrary, the Information alleges, in addition to those sales, "Defendant did consistently traffic drugs in an illegal enterprise in Athens County, Ohio, for over ten (10) months, making dozens of sales of the felony of the fourth degree threshold." (State Court Record, ECF No. 3, Ex. 3, PageID 33). By pleading guilty, Toliver admitted the truth of that statement of fact as well as the two other buys.

Ground Three should therefore be dismissed.

Ground Four: Lack of Proof of Association with an Enterprise

In his Fourth Ground for Relief, Toliver repeats his claim there was never any proof that the was associated with any "enterprise" in the distribution of drugs, but rather that he acted as a lone dealer. When a defendant pleads guilty, he relieves the State of any burden of proving any facts. Habeas corpus is not an occasion for a defendant to essentially start over and demand that the State now prove its case.

Ground Four should be dismissed on the same basis as Ground Three.

Ground Five: Lack of Proof of Required Facts to Show a Pattern of Corrupt Activity

In his Fifth Ground for Relief, Toliver asserts the State did not prove predicate felonies sufficient to meet the threshold for a pattern of corrupt activity. As noted above, by pleading guilty to the Bill of Information, Toliver admitted the allegation in the Information that "Defendant did consistently traffic drugs in an illegal enterprise in Athens County, Ohio, for over ten (10) months, making dozens of sales of the felony of the fourth degree threshold." (State Court Record, ECF No. 3, Ex. 3, PageID 33). This admission is sufficient to provide the factual basis for conviction on the state RICO count.

Ground Five should be dismissed on the same basis as Ground Three.

Conclusion

Based on the foregoing analysis, the Magistrate Judge respectfully recommends the Petition be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

January 10, 2022.

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

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.