

## XIII. APPENDIX

## TABLE OF CONTENTS

Table of contents .....	PAGE i
<u>State v. Savage</u> 2019-Ohio-4859(1st Dist. Nov. 27, 2019) .....	PAGE ii
<u>State v. Savage</u> , 2022-Ohio-4107 .....	PAGE iii
<u>Savage v. Warden</u> , Pickaway Corr. Inst., 2022 U.S. Dist. LEXIS 170728 .....	PAGE iv
<u>Savage v. Harris</u> 2023 U.S. App. LEXIS 15946. ....	PAGE v

**United States Court of Appeals for the Sixth Circuit**

**U.S. Mail Notice of Docket Activity**

The following transaction was filed on 06/23/2023.

**Case Name:** Eddie Savage v. Chae Harris

**Case Number:** 23-3067

**Docket Text:**

ORDER filed: the court DENIES Savage's COA application [6937746-2]. The court DENIES Savage's motion to proceed in forma pauperis [6937749-2] [6948316-2] as moot. Helene N. White, Circuit Judge.

**The following documents(s) are associated with this transaction:**

Document Description: Order

**Notice will be sent to:**

Mr. Eddie Savage  
Lebanon Correction Institution  
P.O. Box 56  
Lebanon, OH 45036-0056

**A copy of this notice will be issued to:**

Ms. Katherine Elizabeth Mullin  
Mr. Richard W. Nagel

No. 23-3067

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**FILED**

Jun 23, 2023

DEBORAH S. HUNT, Clerk

EDDIE SAVAGE, )  
Petitioner-Appellant, )  
v. )  
WARDEN CHAE HARRIS, )  
Respondent-Appellee. )

O R D E R

Before: WHITE, Circuit Judge.

Eddie Savage, a pro se Ohio prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Savage moves the court for a certificate of appealability (COA) and to proceed in forma pauperis on appeal. For the reasons that follow, the court denies Savage's COA application and denies as moot his motion to proceed in forma pauperis.

A state jury convicted Savage of aggravated robbery with a firearm specification. Evidence presented at trial showed that Savage and an accomplice entered a Boost Mobile store, displayed a gun to the clerk, and demanded the money from the cash register and the cell phones from the display case. Savage and his partner then led the clerk to the stock room, where Savage emptied a trash can and filled it with more cell phones. The clerk identified Savage as one of the robbers, and the police recovered Boost Mobile packaging from a truck rented by Savage. *See State v. Savage*, No. C-180413, 2019 WL 6353778, at \*1-4 (Ohio Ct. App. Nov. 27, 2019). The trial court sentenced Savage to a total term of 14 years of imprisonment, and the Ohio Court of Appeals affirmed. *See id.* at \*1.

Savage then filed a pro se motion for reconsideration under Ohio Rule of Appellate Procedure 26(A), claiming that the prosecution did not properly authenticate the photographs of

No. 23-3067

- 2 -

the Boost Mobile packaging. The Ohio Court of Appeals summarily denied the motion. *State v. Savage*, No. C-180413 (Ohio Ct. App. Jan. 30, 2020). The Ohio Supreme Court did not accept Savage's appeal for review, *State v. Savage*, 140 N.E.3d 743 (Ohio 2020) (table).

In November 2020, Savage filed a petition for post-conviction relief in the trial court, claiming that his attorney, the prosecutor, and a police detective had conspired to tamper with evidence and thus denied him a fair trial and the effective assistance counsel. Savage pointed out that during the trial the case detective identified photographs of "paperwork" that the police recovered from the rental truck and not photographs of "Boost Mobile packaging." Savage claimed this alleged discrepancy showed that someone replaced photos of the "paperwork" with photos of "Boost Mobile packaging." *State v. Savage*, No. C-220131, 2022 WL 17072856, at \*1 (Ohio Ct. App. Nov. 18, 2022. In other words, according to Savage, the photo exhibits that were submitted to the jury for its deliberations were not the photo exhibits that the trial court admitted into evidence. The trial court concluded that Savage's petition was untimely and dismissed it for lack of jurisdiction, and the Ohio Court of Appeals affirmed. *See id.* Savage did not appeal to the Ohio Supreme Court.

In January 2021, while that petition for post-conviction relief remained pending in the trial court, Savage filed this § 2254 action in the district court. Savage claimed that (1) the case detective planted false evidence in the rental truck and tampered with trial exhibits after the trial, (2) the state court of appeals denied him the right to appeal by dismissing his motion for reconsideration, and (3) his trial attorney conspired to influence the outcome of his trial by not objecting to the allegedly false evidence. The respondent answered, arguing that each of Savage's claims was unexhausted, procedurally defaulted, or both.

Savage filed a reply brief, which he also labeled as a request for a "stay in obeisance," that reiterated his theory that someone swapped the trial exhibits. The district court construed this pleading in part as a request to stay the habeas proceedings until the state courts had finished resolving Savage's petition for post-conviction relief.

No. 23-3067

- 3 -

A magistrate judge issued a series of reports that concluded that Savage's claims were either non-cognizable, unexhausted, or procedurally defaulted. The magistrate judge found that adopting the stay-and-abeyance procedure authorized by *Rhines v. Weber*, 544 U.S. 269 (2005), was inappropriate because the state courts would not consider his untimely petition for post-conviction relief. Accordingly, the magistrate judge recommended that the district court deny Savage's petition.

Over Savage's objections, the district court adopted the reports and the magistrate judge's recommendation to deny the petition. The court found that staying the proceedings was not appropriate because Savage's unexhausted claims were plainly meritless. Further, the court concluded that Savage's claims were procedurally defaulted, that he did not assert cause and prejudice to excuse the default, and that he had not shown that failure to review his claims would result in a fundamental miscarriage of justice. Accordingly, the court denied Savage's habeas petition and declined to issue a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies a claim on procedural grounds, the court may issue a COA only if the applicant shows "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). "[A] claim does not merit a certificate unless every independent reason to deny the claim is reasonably debatable." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020) (emphasis omitted).

In this case, reasonable jurists would not debate the district court's conclusion that Savage procedurally defaulted his first and third claims by raising them in his untimely petition for post-conviction relief. *See Stojetz v. Ishee*, 892 F.3d 175, 204-05 (6th Cir. 2018). Savage's second claim, which asserts that he was denied the right to appeal the Ohio Court of Appeals' denial of his Rule 26(A) motion for reconsideration, does not allege a constitutional violation. *See Goeke v. Branch*, 514 U.S. 115, 120 (1995) (per curiam) (stating that "due process does not require a

No. 23-3067

- 4 -

State to provide appellate process at all"); Ohio S.Ct.Prac.R. 5.01(A), 5.02(A)(2) (providing for discretionary review in non-capital felony cases). Consequently, this claim does not deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Moody*, 958 F.3d at 488 ("[A] court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect.").

Moreover, reasonable jurists would not debate whether Savage made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Each of Savage's claims was based on the purely conjectural and therefore frivolous premise that a swap of trial exhibits had occurred because the case detective testified that the subject photographs depicted "paperwork" instead of "Boost Mobile packaging." At worst, Savage identified some vagueness in the detective's authentication of the exhibits, and a state court's evidentiary rulings rarely rise to the level of a constitutional violation. *See Stewart v. Winn*, 967 F.3d 534, 538-39 (6th Cir. 2020); *Broom v. Mitchell*, 441 F.3d 392, 406 (6th Cir. 2006). Reasonable jurists would not debate whether the trial court's admission of the subject exhibits rendered Savage's trial fundamentally unfair. *See Broom*, 441 F.3d at 406.

Because Savage's claims lacked arguable merit, reasonable jurists would not debate the district court's procedural default analysis.<sup>1</sup> *See Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam). Nor would reasonable jurists debate the district court's conclusion that Savage failed to make a credible showing of actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995). Reasonable jurists therefore would not debate whether Savage's default was excusable under the miscarriage-of-justice exception. *See id.*

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<sup>1</sup> For the same reason, reasonable jurists would not debate whether the district court should have stayed the case pending the exhaustion of Savage's claims in state court. *See Rhines*, 544 U.S. at 277.

No. 23-3067

- 5 -

For these reasons, the court **DENIES** Savage's COA application. The court **DENIES** Savage's motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

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

EDDIE SAVAGE,

Petitioner, : Case No. 1:21-cv-33

- vs -

District Judge Douglas R. Cole  
Magistrate Judge Michael R. Merz

EMMA COLLINS, Warden,  
Pickaway Correctional Institution,

Respondent.

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**DECISION AND ORDER DENYING STAY;  
REPORT AND RECOMMENDATIONS**

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This habeas corpus case, brought *pro se* by Petitioner Eddie Savage under 28 U.S.C. § 2254, is before the Court for decision on the merits on the Petition (ECF No. 1), the State Court Record (ECF No. 5), the Return of Writ (ECF No. 6), and the Reply (ECF No. 7). The Reply is combined with a motion for “stay in obeisance” which the Magistrate Judge interprets as a motion for a stay of this case pending the outcome of pending state court litigation.

The Magistrate Judge reference in the case was recently transferred to the undersigned to help balance the Magistrate Judge workload in the District (ECF No. 8).

Respondent advises in the Return and Petitioner agrees in his Reply that Warden Collins is the proper party respondent in this case. The caption is ordered amended accordingly.

## **Factual Background**

On December 17, 2016, the Metro PCS store on Reading Road in Cincinnati was robbed at gunpoint. On December 26, 2016, the Metro PCS on Glenmore Road was similarly robbed. Finally, on January 5, 2017, the Boost Mobile Store on Glenway Road was robbed. Petitioner was indicted for all three robberies, but convicted at trial only of the third. *State v. Savage*, 2019-Ohio-4859 ¶¶ 2-6 (Ohio App. 1<sup>st</sup> Dist. Nov. 27, 2019).

## **Litigation History**

Petitioner was indicted by a Hamilton County grand jury on February 2, 2017, on three counts of aggravated robbery in violation of Ohio Revised Code § 2911.01(A)(1) and three counts of robbery in violation of Ohio Revised Code § 2911.01(A)(2), arising from three separate robberies of cellphone stores. (Indictment, State Court Record, ECF No. 5, Ex. 1). The aggravated robbery charges carried firearm specifications. *Id.* At a jury trial in June 2018, Savage was found guilty of one count each of robbery and aggravated robbery with the firearm specification for the Boost Mobile event, but acquitted on the other counts. The Common Pleas Court merged the robbery and aggravated robbery counts under Ohio Revised Code § 2941.25 and sentenced Savage to eleven years imprisonment, plus the mandatory three-year consecutive sentence on the specification, for a total of fourteen years (Judgment Entry, State Court Record, ECF No. 5, Ex. 5).

Savage appealed with new counsel, pleading the following Assignments of Error:

**First:** The trial court erred and erred and prejudiced the Defendant by imposing a more than minimum prison sentence which was not supported by the record.

**Second:** The trial court erred and prejudiced the defendant by joining three unrelated cases for trial together.

**Third:** A Defendant's right to a fair trial is violated when a prosecutor's misconduct is cumulative.

**Fourth:** The trial court erred and prejudiced the defendant by not surprising [sic] the evidence obtained in photo lineups.

(Appellant's Amended Brief, State Court Record, ECF No. 5, Ex. 7, PageID 47). The Ohio First District Court of Appeals affirmed the conviction and sentence. *State v. Savage*, 2019-Ohio-4859 (1<sup>st</sup> Dist. Nov. 27, 2019), appellate jurisdiction declined, 158 Ohio St. 3d 1424 (2020).

Although he was represented by counsel on direct appeal, Savage filed a *pro se* Motion for Reconsideration in the First District on December 23, 2019 (State Court Record, ECF No. 5, Ex. 10). The issues presented in this Motion are (1) that the evidence of Boost Mobile packaging or paperwork in Savage's rented truck was not relevant to prove his guilt and/or not properly authenticated, and the prosecutor committed misconduct related in presenting this evidence (*Id.* at PageID 98-102); (2) prosecutorial misconduct in forcing a co-defendant to invoke his privilege against self-incrimination in front of the jury (*Id.* at PageID 103-06); (3) prejudicial joinder of the charges involving robberies of three separate mobile phone stores (*Id.* at PageID 107-10). The First District summarily denied the Application, writing "The application is not well taken and is hereby denied." (Entry, ECF No. 5, Ex. 13). Although Savage appealed, the Supreme Court of Ohio declined to exercise appellate jurisdiction. (Entry, ECF No. 5, Ex. 17).

Proceeding *pro se*, Savage filed a motion on February 25, 2020, to request the trial court "to notice plan [sic] error under 52(B)<sup>1</sup>". In it he challenged the admissibility of State's Exhibits 17D and

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<sup>1</sup> Ohio R. Crim. P. 52(B) provides "Plain errors or defects affecting substantial rights may be noticed although they

17E on authenticity and relevance grounds (Motion, State Court Record, ECF No. 5, Exhibit 18, PageID 167-71). He then accused a police officer witness (Lampe) of misrepresenting the evidence, the prosecutor of tampering with the evidence, and his own attorney of providing ineffective assistance of trial counsel by not objecting to the evidence (*Id.* at PageID 172-76).

The State argued that the Rule 52(B) motion should be dismissed because Rule 52(B) does not provide a vehicle by which to challenge a conviction (Motion, ECF No. 5, Ex. 19, PageID 179). If the Motion were to be construed as a post-conviction petition, it should be dismissed as untimely. *Id.* Alternatively, it should be denied as barred by *res judicata*. *Id.* Judge Luebbers dismissed the motion as “not well taken”. (Entry, State Court Record, ECF No. 5, Ex. 20) and Savage did not appeal.

On November 24, 2020, Savage filed a petition for post-conviction relief under Ohio Revised Code § 2953.21 which he amended on December 15, 2020. *Id.* at Exs. 21 and 22. In the original Petition he makes claims about Exhibits 17D and 17E which are parallel to those made in the pending Petition in this Court. He also asserts that there was not probable cause to support the warrant for his arrest and the Hamilton County Municipal Court complaint does not confer subject matter jurisdiction, rendering his conviction void. In the Amended Petition he repeated these allegations and added that it was ineffective assistance of appellate counsel for his appellate attorney not to raise these claims (State Court Record, ECF No. 5, Ex. 22, PageID 220). He mentions that it was on February 5, 2020, that he was able to obtain from his trial attorney copies of Exhibits 17D and 17E which had been produced to his counsel in pre-trial discovery. *Id.* at PageID 223.

These petitions remained pending when the Return was filed on April 30, 2021.

On January 25, 2021, Savage filed his Petition in this Court, pleading the following grounds for relief:

**Ground One:** On January 27, 2017, police officer Mike Lampe jimmied Petitioner’s rented truck and created two falsehoods. The

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were not brought to the attention of the court.”

prosecution armed with both presented (1) at trial (non-material). After closing arguments exchanged the exhibits for those that depict alleged evidence.

**Ground Two:** Denied the right of appeal – on timely reconsideration. Petitioner alerted the district of the false evidence. [First] District court [of appeals] dismissed reconsideration as not well-taken.

**Ground Three:** Trial counsel conspired with those to corrupt the outcome of Petitioner's trial by knowing about the two falsehoods and failing to object or notify.

(Petition, ECF No. 1).

## Analysis

### Motion to Stay

In part, Petitioner's Reply asks for a stay of these proceedings, presumably until the Ohio courts complete their processing of his pending Petition for post-conviction relief under Ohio Revised Code § 2953.21. He filed that Petition in November 2020 and amended it the next month, but it has not yet been ruled on by the trial court, much less the First District and the Supreme Court of Ohio.

District courts have authority to grant stays in habeas corpus cases to permit exhaustion of state court remedies in consideration of the AEDPA's preference for state court initial resolution of claims. *Rhines v. Weber*, 544 U.S. 269 (2005). However, in recognizing that authority, the Supreme Court held:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims

first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). . . .

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

*Id.* at 277-278. "Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of federal proceedings." *Id.* It also directed district courts to place reasonable time limits on the petitioner's trip to state court and back.

In this case there is not good cause to enter a stay.

First of all, Savage's Petition and Amended Petition for post-conviction relief are untimely. Ohio Revised Code § 2953.21(A)(2) provides that a petition for post-conviction relief must be filed not later than 365 days after the transcript on appeal has been filed. Respondent reports that the transcript was filed October 18, 2018, (Return, ECF No. 6, PageID 283) and Petitioner does not dispute that report. Therefore, Savage's post-conviction petition was filed more than one year after the deadline.

Ohio Revised Code § 2953.21(A)(2) is not a mere statute of limitations. Rather, Ohio Revised Code § 2953.23 deprives the Common Pleas Court of jurisdiction to entertain an untimely post-conviction petition unless:

(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.

See **State v. Apanovitch**, 155 Ohio St. 3d 358, 2018-Ohio-4744, ¶¶ 35-42(Failure to satisfy Ohio Rev. Code §§ 2953.21, 2953.23(A) deprived trial court of subject matter jurisdiction to consider petition).

Petitioner does not rely on right any newly-recognized by the Supreme Court and made retroactive. The facts on which he relies – the asserted discrepancies between trial exhibits and copies of those exhibits provided to his attorney in pre-trial discovery – were known to his attorney before trial. In these circumstances, notice to the attorney was notice to the Petitioner who is the defendant's agent for these purposes. Even if one only looks to the date on which Savage alleges he received them personally – February 5, 2020 – there is no showing that he was prevented from seeing them earlier, indeed at any time after his attorney received them. Only by concocting an implausible and unsupported theory of conspiracy among his attorney, the police, and the prosecutor does he offer some explanation of why receipt by his attorney before trial “unavoidably prevented” him from seeing these exhibits until February 5, 2020. The Court notes also that he waited almost ten months after receiving the documents from his trial lawyer to seek relief.

Because the Hamilton County Court of Common Pleas lacks jurisdiction to entertain Savage's delayed post-conviction petitions, his alternative motion for a stay pending decision on those Petitions is DENIED.

### **Procedural Default**

Respondent asserts that all of Petitioner's habeas corpus claims are procedurally defaulted (Return of Writ, ECF No. 6, PageID 277).

In response to the procedural default defense, Petitioner argues:

Contrary to, the Respondent argument, the claims here are, and not limited to fabricated probable cause to arrest an innocent person, the use of false evidence, the use of perjury and conspiracy, tampering with the outcome of an official proceeding. All of which is contrary to federal law, where there is a fundamental miscarriage [sic] of justice, the federal courts have jurisdiction. These claims must agree with the principles thereof.

(Reply, ECF No. 7, PageID 291). Immediately following this argument, he accuses Respondent of relying on "procedural law" to arrest and convict an innocent person. *Id.* The Magistrate Judge reads the Reply to be asserting the "fundamental miscarriage of justice exception" to procedural default.

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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 2000), quoting *Gravley v. Mills*, 87 F.3d 779, 784-85 (6<sup>th</sup> 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. 2d 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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 2015), *Guilmette v. Howes*, 624 F.3d 286, 290 (6<sup>th</sup> Cir. 2010)(*en banc*); *Eley v. Bagley*, 604 F.3d 958, 965 (6<sup>th</sup> Cir. 2010); *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6<sup>th</sup> Cir. 1998), citing *Maupin v. Smith*, 785 F.2d 135, 138 (6<sup>th</sup> Cir. 1986); accord *Lott v. Coyle*, 261 F.3d 594, 601-02 (6<sup>th</sup> Cir. 2001); *Jacobs v. Mohr*, 265 F.3d 407, 417 (6<sup>th</sup> Cir. 2001).

First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.

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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 (6<sup>th</sup> Cir. 1986); accord, *Hartman v. Bagley*, 492 F.3d 347, 357 (6<sup>th</sup> Cir. 2007), quoting *Monzo v. Edwards*, 281 F.3d 568, 576 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 2015).

Savage has not attempted to show excusing cause and prejudice. Instead, he argues his procedural defaults should be excused because the failure of this Court to consider the merits of his claims would result in a miscarriage of justice. The Supreme Court has recognized a miscarriage of justice exception to the procedural default bar, but only for a person who can prove he or she is actually innocent. *Calderon v. Thompson*, 523 U.S. 538, 557-58 (1998) (holding that

"avoiding a miscarriage of justice as defined by our habeas corpus jurisprudence" requires "a strong showing of actual innocence"); see *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992).

Many persons convicted of serious crimes seek the benefit of the miscarriage of justice/actual innocence exception to procedural default, but the Supreme Court has adopted strict limitations on that exception. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995)." See also *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005). In *Souter*, the Sixth Circuit noted that the Supreme Court "counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" " *Id.*

Savage has presented no new evidence of the quality required by *Schlup*. He has presented no new eyewitness to say, for example, that the robber of the Boost Mobile store did not look at all like Savage. Nor has he presented any new scientific or physical evidence at all.

Because Savage has presented no satisfactory new evidence of actual innocence, the Court must analyze each ground for relief under the *Maupin v. Smith* standard outlined above.

### **Ground One**

In his First Ground for Relief, read broadly, Savage is alleging that the police created false evidence from the truck Savage had rented and the State used it at trial. These claims were available to be raised on direct appeal, but were not. They are well beyond the scope of the Assignments of Error raised in that proceeding. To the extent that Petitioner is claiming that he

received ineffective assistance of trial counsel when his attorney did not make appropriate objections, that claim could also have been raised on direct appeal but was not.

Under Ohio law, claims which could have been raised on direct appeal but were not are barred from later consideration by the Ohio criminal law doctrine of *res judicata*. 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 (6<sup>th</sup> Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6<sup>th</sup> Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6<sup>th</sup> Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6<sup>th</sup> Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160-61 (6<sup>th</sup> Cir. 1994)(citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001). “[P]resentation of competent, relevant, and material evidence **dehors** the record may defeat the application of *res judicata*.” *State v. Lawson*, 103 Ohio App. 3d 307 (12<sup>th</sup> Dist. 1995).

The Ohio courts have consistently enforced the rule. *State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Ishmail*, 67 Ohio St. 2d 16 (1981). The First District's denial of Petitioner's Motion for Reconsideration, although summary, must be taken as a denial on the basis of *res judicata*. *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

To the extent Savage is asserting these claims were not raised on direct appeal because of the ineffective assistance of appellate counsel, the appropriate mechanism for raising that claim under Ohio law is by application for reopening the direct appeal under Ohio R. App. P. 26(B). *State v. Murnahan*, 63 Ohio St. 3d 60 (1992). Savage has never filed a 26(B) application and the ninety days after appellate judgment during which such an application must be filed has long since expired.

Petitioner's First Ground for Relief is barred by his procedural defaults in presenting it to the Ohio courts and should be dismissed on that basis.

## **Ground Two: Denial of Right to Appeal**

In his Second Ground for Relief, Savage appears to be claiming that he was denied his right to appeal when the First District did not consider his claim that the State had presented false evidence on his motion for reconsideration.

Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1 (2010); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982), *Barclay v. Florida*, 463 U.S. 939 (1983). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); see also *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 160 (1825)(Marshall C. J.); *Bickham v. Winn*, 888 F.3d 248 (6<sup>th</sup> Cir. Apr. 23, 2018)(Thapar, J. concurring).

There is no federal constitutional right to appeal criminal verdicts for error review. *McKane v. Durston*, 153 U.S. 684 (1894), cited as still good law in *Lopez v. Wilson*, 426 F.3d 339, 355 (6<sup>th</sup> Cir. 2005); *Halbert v. Michigan*, 545 U.S. 605 (2005). "Due process does not require a State to provide appellate process at all." *Goeke v. Branch*, 514 U.S. 115, 120 (1995).

It follows logically that if a State is not required by the Constitution to provide **any** appellate process, it is certainly not required to allow a defendant to get what amounts to a second appeal by presenting claims omitted from a first appeal by way of a motion for reconsideration. As Respondent points out in the Return, Ohio does not in fact allow introduction of entirely new assignments of error by way of motions for reconsideration.

Ground Two should be dismissed because it does not state a claim upon which relief can be granted in habeas corpus, that is, a violation of the federal Constitution.

### **Ground Three: Ineffective Assistance of Trial Counsel**

In his Third Ground for Relief, Petitioner asserts he received ineffective assistance of trial counsel when his trial attorney did not object to the “false” evidence regarding Exhibits 17D and 17E.

The Court declines to consider Petitioner’s allegation that his attorney conspired with the police and the prosecutor to ignore this problem. Petitioner has never presented this conspiracy theory to any Ohio court. His inference of conspiracy from the fact that counsel did not object is wholly speculative. To put it simply, the fact that a person has not done something is insufficient in itself to prove that person has conspired with someone else not to do that thing.

Petitioner first presented this claim of ineffective assistance of trial counsel to the state court in his Rule 52(B) motion. As Respondent points out, Rule 52(B) does not create a procedure for making post-conviction challenges to a conviction. If the challenge can be decided on direct appeal, it must be raised in that forum or be barred by *res judicata*. *State v. Perry, supra*. If, on the other hand, it must be proved by facts outside the appellate record, it must be brought in a petition for post-conviction relief under Ohio Revised Code § 2953.21. Savage did not raise this claim on direct appeal and his post-conviction petition was filed more than a year late.

Petitioner’s Third Ground for Relief should therefore be dismissed as procedurally

defaulted.

### **Conclusion**

On the basis of the foregoing analysis, the Magistrate Judge respectfully recommends that the Petition herein 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*.

June 17, 2021.

*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. #

### **NOTICE REGARDING RECORD CITATIONS#**

The attention of all parties is called to S. D. Ohio Civ. R. 7.2(b)(5) which provides:

**(5) Pinpoint Citations.** Except for Social Security cases, which must comply with S.D. Ohio Civ. R. 8.1(d), all filings in this Court that reference a prior filing must provide pinpoint citations to the PageID number in the prior filing being referenced, along with a brief title and the docket number (ECF No. \_\_\_\_ or Doc. No. \_\_\_\_ ) of the document referenced.

The Court's electronic filing system inserts in all filings hyperlinks to the place in the record which has been cited following this Rule. However, as with most computer systems, the CM/ECF program cannot read pinpoint citations which do not follow the Rule precisely. For example, the first pinpoint citation in ODRC's Reply reads "Plaintiff argues that he could not bring this action until "administrative remedies as (sic) are exhausted (sic)." (Doc. 80, PageId# 987)." The correct citation would have been Doc. No. 80, PageID 987." Because Defendant added the "#" symbol, the program failed to inset a hyperlink. Use of this software is mandated by the Judicial Conference of the United States and cannot be locally modified. **The parties are cautioned to comply precisely with S. D. Ohio Civ. R. 7.2(b)(5) in any further filings.**

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

EDDIE SAVAGE,

Petitioner, : Case No. 1:21-cv-33

- vs -

District Judge Douglas R. Cole  
Magistrate Judge Michael R. Merz

EMMA COLLINS, Warden,  
Pickaway Correctional Institution,

Respondent.

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**SUPPLEMENTAL REPORT AND RECOMMENDATIONS**

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This habeas corpus case, brought *pro se* by Petitioner Eddie Savage under 28 U.S.C. § 2254, is before the Court on Petitioner's Objections (ECF No. 10) to the Magistrate Judge's Denial of Stay and Report and Recommendations (the "Report," ECF No. 9). District Judge Cole has recommitted the case to the Magistrate Judge for reconsideration in light of the Objections (Order, ECF No. 11).

**Denial of Stay**

Petitioner sought a stay of these habeas corpus proceedings pending the outcome of proceedings in the Hamilton County Court of Common Pleas on his "Delayed Post-Conviction 2953.21" and "Amended Delayed Post-Conviction 2953.21" (State Court Record, ECF Nos. 21

and 22). These pleadings were filed on November 24, 2020, and December 15, 2020, respectively, and they remained pending as of the date the Return of Writ was filed, April 30, 2021.

The Report denied a stay, applying the standard adopted in *Rhines v. Weber*, 544 U.S. 269 (2005). The Magistrate Judge reasoned that both pleadings were untimely under Ohio Revised Code § 2953.21 and therefore the Common Pleas Court lacked jurisdiction to consider them on the merits (Report, ECF No. 9, PageID 303). Neither party has reported to the Court any action on those pleadings as of the date of this Supplemental Report.

Petitioner objects that:

Contrary to the Magistrates misapprehension - petitioner filed an affidavit within the amended Delayed post-conviction alerting the courts that when trial counsel came to meet with the Petitioner before trial, he presented the same depiction of the 17D and 17E that was published at trial (key on driver seat, 3-8x11 papers on the floor board of the truck). See Page #235 - That counsel handing over the same boost depiction as the court record 17D and 17E was just merely an attempted [sic] to conceal the conspiracy.

(Objections, ECF No. 10, PageID 325). The referenced page of the record, PageID 235, is labeled by Petitioner as an affidavit of trial counsel Kip Guinan admitting that he presented the false evidence to Savage before trial and that he conspired with Police Officer Lampke and Prosecutor Mary Polston to corrupt the outcome of the trial. However even on its face it is clear this document is not an affidavit of attorney Guinan because it plainly bears Petitioner's signature above the notary's jurat. This is simply not proof that the evidence was tampered with or falsified, much less of any conspiracy among police, prosecution, and defense trial attorney.

Regarding the Report's conclusion that Petitioner's Delayed and Amended Delayed post-conviction petitions were untimely, Savage says in the body of the Amended Delayed Petition:

Until February 5, 2020, where Petitioner was able to obtain copies of said exhibits, Petitioner presumed that Exhibits 17D and 17E

were the same as depicted at trial. "The key on the driver seat and some paperwork on the floor board", upon receiving the copies of exhibits 17D and 17E, the Petitioner realized that exhibits at trial were different from those delivered to the jury for deliberation. (See Exhibits 8, 9, 10 and 11).

(Amended Delayed Petition, State Court Record, ECF No. 5, PageID 223.) There is in fact nothing attached to the Amended Delayed Petition which is labeled Exhibit 8, 9, 10, or 11; the first labeled exhibit is Exhibit 16. *Id.* at PageID 236.

As further ground for a stay, Petitioner avers "On 9-10-2020, Petitioner filed a State habeas corpus with Pickaway Coounty [sic]. The petition dehords [sic] the respondent furnished record and therefore deprives the Magistrate recommendation from a meaningful review." (Objections, ECF No. 10, PageID 326). Petitioner did not include this Petition in his Motion for Stay and does not present it now. Without the content of that Petition, the Court cannot judge whether it merits a stay under *Rhines*.

Petitioner advises that his currently pending petitions under Ohio Revised Code § 2953.21 present claims that the Hamilton County Court of Common Pleas lacked subject matter jurisdiction to try him because the affidavit underlying the arrest warrant did not contain probable cause (Objections, ECF No. 10, PageID 327). But lack of probable cause supporting an arrest warrant would not prevent a common pleas court from having subject matter jurisdiction. Ohio common pleas courts are courts of general jurisdiction. *State ex rel. Winnefeld v. Court of Common Pleas of Butler County*, 159 Ohio St. 225 (1953); *State ex rel Miller v. Court of Common Pleas of Lake County*, 151 Ohio St. 397 (1949). Only the Hamilton County Common Pleas Court would have subject matter jurisdiction to try a felony case arising within that county. The grand jury returned an indictment upon its finding of probable cause and an arrest warrant was issued on that finding (Indictment, State Court Record, ECF No. 10, Ex. 1). That is sufficient to establish subject matter

jurisdiction.

### **Procedural Default**

The Report concluded all of Petitioner's Grounds for Relief were procedurally defaulted. The Magistrate Judge read Petitioner's response to that defense as claiming he was actually innocent and rejected that claim because the "new evidence" on which Savage relies does not meet the demanding standards for such evidence prescribed by the Supreme Court in *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Savage objects that the Report "fail[s] to test the false exhibits against the critical physical evidence prong of *Schlup* [sic]." (Objections, ECF No. 10, PageID 328). But Savage has not presented "new" evidence to this Court. Instead he claims, as best the Magistrate Judge understands it, that exhibits 17D and 17E as sent to the jury room are not the same exhibits 17D and 17E that were admitted in evidence, a fact he claims he discovered in some undisclosed way on February 5, 2020, and which he first presented in his "Motion to Request the Court to Notice Plan [sic] Error under [Rule] 52(B)" (State Court Record, ECF No. 5, Ex. 18).

The State defended against that Motion by arguing that Ohio R. Crim. P. 52(B) is not a vehicle for post-conviction relief (State Court Record, ECF No. 5, Ex. 19, PageID 180). Such relief can be obtained through a petition under Ohio Revised Code § 2953.21, but Savage's motion was untimely. *Id.* More importantly, because "[t]he photographs he discusses in the motion were admitted during the trial," the issue is barred by *res judicata* because it could have been raised on direct appeal. *Id.* Judge Luebbers found the motion was not well taken (State Court Record ECF No. 5, Ex. 20) and Savage did not appeal, leaving her finding that the motion was not well taken

unchallenged.

Whatever Petitioner has presented to the state courts that he claims is new evidence, he has presented no new evidence to this Court that satisfies *Schlup*. Thus he has not overcome his procedural default in presenting this claim on direct appeal.

The Report noted that under Ohio law claims of ineffective assistance of appellate counsel must be made by way of an application to reopen the appeal under Ohio R. App. P. 26(B); Savage has never made such an application and the time for doing so has passed. On this basis the Report found any claims of ineffective assistance of appellate counsel to be procedurally defaulted.

Petitioner objects that his Delayed Petition and Amended Delayed Petition depend on facts outside the record (Objections, ECF No. 10, PageID 330). However, the Supreme Court of Ohjio has plainly and consistently held that claims of ineffective assistance of appellate counsel cannot be brought under Ohio Revised Code § 2953.21. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

## **Conclusion**

The Magistrate Judge remains persuaded that all of Petitioner's Grounds for Relief are barred by procedural default and again respectfully recommends that 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*.

August 3, 2021.

*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  
WESTERN DIVISION AT CINCINNATI**

EDDIE SAVAGE,

Petitioner, : Case No. 1:21-cv-33

- vs -

District Judge Douglas R. Cole  
Magistrate Judge Michael R. Merz

EMMA COLLINS, Warden,  
Pickaway Correctional Institution,

Respondent.

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**SECOND SUPPLEMENTAL REPORT AND RECOMMENDATIONS**

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This habeas corpus case, brought *pro se* by Petitioner Eddie Savage under 28 U.S.C. § 2254, is before the Court on “Petitioner[‘]s de novo review of the magistrate[‘]s Supplement[al] Recommendations: Petitioner request for Evidentiary Hearing.” (ECF No. 13, 14). District Judge Cole has interpreted this filing as objections to the Magistrate Judge’s Supplemental Report and Recommendations (ECF No. 12) and has recommitted the case pursuant to Fed.R.Civ.P. 72(b)(3) for further analysis and recommendations (ECF No. 15).

**Litigation History**

On December 17, 2016, the Metro PCS store on Reading Road in Cincinnati was robbed at gunpoint. On December 26, 2016, the Metro PCS store on Glenmore Road was similarly robbed. Finally, on January 5, 2017, the Boost Mobile store on Glenway Road was robbed, again at

gunpoint. Petitioner was indicted for all three robberies, but convicted at trial only of the third. Represented by new counsel, Savage appealed to the Ohio First District Court of Appeals, which affirmed the trial court **State v. Savage**, 2019-Ohio-4859 (Ohio App. 1<sup>st</sup> Dist. Nov. 27, 2019), appellate jurisdiction declined, 158 Ohio St.3d 1424 (Mar 03, 2020).

On December 23, 2019, a month after the appellate decision, Savage filed a **pro se** motion for reconsideration in the First District, arguing, *inter alia*, that the evidence of Boost Mobile packaging or paperwork in the truck rented by him and found by police 150 yards from his residence was not relevant to prove his guilt and/or not properly authenticated, and the prosecutor committed misconduct in presenting this evidence (State Court Record, ECF No. 5, Ex. 10, PageID 98-102). Savage's theory is that the Boost mobile packaging found in the truck is not relevant:

The Boost packaging the prosecution alleges that was found in the truck would be just boost packaging that could be from any boost mobile or could be packaging for anything etc, unless a witness with first hand knowledge testifies that the packaging in fact was or could have been stolen from the robbery in question then the state is not permitted to use those packaging as guilt against the accused because the packages do not make it more probable that savage committed any crime, just at best that those where in the truck which is irrelevant to weather [sic] he robbed the store in question or not.

*Id.* at PageID 100-101.

The portion of the First District's Opinion on which Savage sought reconsideration was a single paragraph:

{29} Finally, Savage claims that the prosecutor misstated the evidence in opening and closing by telling the jurors that Boost packaging was found in the truck that Savage rented. However, the state submitted two photographs into evidence that showed Boost packaging in the truck. Thus, the prosecutor's remarks were accurate representations of the evidence.

(Opinion, State Court Record, ECF No. 5, PageID 93).

Savage's appellate attorney had raised this question as part of the Third Assignment of

Error, claiming cumulative prosecutorial misconduct. The entire argument on this point reads:

**Cumulative Prosecutor Misconduct**

The state claimed during opening argument T.P. 3023 and closing argument T.P. 914 that there was evidence on counts 5&6 found in the recovered FI50, thus creating the false impression of evidence. The Defendant also submits that the cumulative effect of the prosecutor's misconduct deprived defendant of a fair trial.

(Appellant's Brief, State Court Record, ECF No. 5, Ex. 7, PageID 61).

On January 30, 2020, the First District denied the motion for reconsideration summarily (Entry, ECF No. 5, Ex. 13)<sup>1</sup>.

Savage then returned to the trial court on February 25, 2020, and asked it to notice plain error under Ohio R. Crim. P. 52(B). He challenged the admissibility of State's Exhibits 17D and 17E, again on authenticity and relevance grounds, accused a police officer witness (Lampe) of misrepresenting the evidence, the prosecutor of tampering with the evidence, and his own attorney of providing ineffective assistance by not objecting to the evidence (Motion, State Court Record, ECF No. 5, Exhibit 18, PageID 167-76). The trial judge denied the motion summarily and Savage did not appeal.

However, on December 15, 2020, Savage filed an Amended Delayed Post-Conviction Petition under Ohio Revised Code § 2953.21 (State Court Record, ECF No. 5, Ex. 22). In it he again raises his claim that Trial Exhibits 17D and 17E are irrelevant and/or not properly authenticated. *Id.* As of the time the Return of Writ was filed (April 30, 2021) the Common Pleas Court had not acted on this Delayed Petition and neither party has advised the Court of any action taken on it since then.

On January 7, 2021, Savage filed his Petition for Writ of Habeas Corpus in this Court, pleading:

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<sup>1</sup> In the meantime Savage had also pursued a *pro se* appeal to the Supreme Court of Ohio making the same relevance and authentication claims (Memorandum in Support of Jurisdiction, State Court Record, ECF No. 5, Ex. 15). That court declined jurisdiction. *Id.* at Ex. 17.

**Ground One:** On January 27, 2017, police officer Mike Lampe jimmied Petitioner's rented truck and created two falsehoods. The prosecution armed with both presented (1) at trial (non-material). After closing arguments exchanged the exhibits for those that depict alleged evidence.

**Ground Two:** Denied the right of appeal – on timely reconsideration. Petitioner alerted the district of the false evidence. [First] District court [of appeals] dismissed reconsideration as not well-taken.

**Ground Three:** Trial counsel conspired with those to corrupt the outcome of Petitioner's trial by knowing about the two falsehoods and failing to object or notify.

(Petition, ECF No. 1).

The Warden asserted a procedural default defense as to all claims. Savage responded with a “fundamental miscarriage of justice” claim, but presented no new evidence of actual innocence. The Magistrate Judge’s original Report concluded Grounds One and Three were barred by procedural default and Ground Two failed to state a claim upon which habeas corpus relief could be granted because there is no federal constitutional right to compel a state appellate court to reconsider its decision (ECF No. 9).

Savage objected, Judge Cole recommitted the case, and the Magistrate Judge again concluded all the pleaded Grounds for Relief were procedurally defaulted, as well as whatever claims Savage was making that he received ineffective assistance of appellate counsel to excuse any procedural default (ECF No. 12). Savage has again objected and the case has again been recommitted.

## Petitioner's Latest Objections

### Objection to Procedural Default

In objecting to the Magistrate Judge's conclusion that his claims are procedurally defaulted, Savage asserts:

The magistrate contends that the exhibits 17D 17E were admitted at trial but the magistrate dose [sic] not rely on any facts- for example- the testimony of the proponent (Mike Lampe) attesting at trial that states exhibits 17D17E are boost mobile packaging and are from the crime in question- And that he found those exhibits inside savage's rented truck during his search of the truck. For that reason, petitioner contends that the magistrate assertion that the boost mobile packaging exhibits were admitted at trial are wholly speculative.

(Objections, ECF No. 14, PageID 355).

This is an argument on the merits, not on procedural default. Whatever items were marked as trial exhibits 17D and 17E either were or were not the same items sent to the jury. If they were not, that claim should have been raised as an assignment of error on direct appeal. Because it was not, it is procedurally defaulted as a matter of *res judicata* under *State v. Perry*, 10 Ohio St. 2d 175 (1967), repeatedly held by the Sixth Circuit to be an adequate and independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6<sup>th</sup> Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6<sup>th</sup> Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6<sup>th</sup> Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6<sup>th</sup> Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160-61 (6<sup>th</sup> Cir. 1994)(citation omitted). Ineffective assistance of appellate counsel can excuse failure to raise an issue on direct appeal, but that ineffective assistance of appellate counsel claim must first be raised in the state courts in the manner those courts have chosen for presenting such claims. *Edwards v. Carpenter*, 529 U.S. 446 (2000), In Ohio the sole method for presenting such claims is an application for reopening the

appeal under Ohio R. App. P. 26(B), which Savage has never filed.

The Objections do not attempt to rebut the Magistrate Judge's finding that Savage has presented no new evidence of actual innocence to excuse his procedural defaults. Instead Savage seems to argue that it is the Magistrate Judge's task to point to evidence in the record showing the relevance and/or authenticity of these exhibits. But that goes to the merits of the claim which this Court is barred from considering. *Davila v. Davis*, 137 S. Ct. 2058 (2017).

Moreover, if the Court did reach the merits of Savage's claims of irrelevance or lack of authenticity, it would have to dismiss them for failure to state a claim upon which habeas corpus relief can be granted. Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1 (2010); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982), *Barclay v. Florida*, 463 U.S. 939 (1983). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); see also *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 160 (1825)(Marshall C. J.); *Bickham v. Wnn*, 888 F.3d 248 (6<sup>th</sup> Cir. Apr. 23, 2018)(Thapar, J. concurring). Whether a particular piece of evidence is relevant or has been properly authenticated is a question of state evidence law, not federal constitutional law.

Finally, it appears to the Magistrate Judge that the substance of Savage's argument is that the Boost Mobile packaging, whether in its original form or in photographic form, has not been closely enough associated with the Boost Mobile robbery to be relevant or material to his guilt. The Magistrate Judge disagrees. The packaging is, of course, circumstantial, not direct, evidence. The packaging cannot take the witness stand and testify that it was taken in the Boost Mobile robbery.

Nor is there any eyewitness who can testify that he or she saw Savage take this particular packaging from the store. But circumstantial evidence is not required to be conclusive in order to be relevant and material. There was direct testimony that the robbers took objects in Boost Mobile packaging during the robbery. There was also direct testimony that this particular packaging was found on the floor of a truck Savage had rented, in close proximity to the time of the robbery and in close proximity to his residence. Although the entire trial transcript has not been filed, Savage himself has included pages from the transcript showing that the investigating detective recovered a sim card during a search of Savage's home which Boost Mobile identified as part of their inventory (Delayed Post-Conviction Petition, State Court Record, ECF No. 5, Ex. 22, PageID 246-47).

Savage argues the Boost Mobile packaging is not conclusive. That is true, but a single piece of circumstantial evidence, with the exception of DNA analysis, is rarely conclusive. This packaging is part of a chain of evidence pointing to Savage as the perpetrator of the crime. If there were innocent explanations of why there was Boost Mobile packaging on the floor of the truck Savage rented, he did not present them at trial.

Savage complains that neither the Magistrate Judge nor the State can prove that Exhibits 17D and 17E were admitted at trial. However, the Court of Appeals found that they were in ¶ 29 quoted above, disambiguating "packaging" and "photographs of packaging." That finding is being on this Court unless Savage disproves it by clear and convincing evidence. 28 U.S.C. § 2254(e).

Having decided that Exhibits 17D and 17E are improper, Savage has constructed an elaborate additional theory: inadmissible is equivalent to false. With that step taken, he then accuses the prosecutor of presenting known false testimony as in *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Even if the evidence was inadmissible, presenting inadmissible evidence is not the same as presenting false testimony. Savage goes on to construct a claim that his own attorney conspired

with the prosecutor to present this “false” testimony. There is not a scrap of evidence to support this claim.

Savage’s current Objections do not respond at all to the procedural default analysis previously offered and they are unpersuasive on the merits.

### **Objection to Motion to Stay**

As noted above, Savage has a pending amended delayed petition for post-conviction relief in the Hamilton County Court of Common Pleas. In his Petition Savage sought a stay of these proceedings pending the outcome of that action (Petition, ECF No. 1, PageID 15). The Magistrate Judge denied a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), because that filing had been made more than a year after the deadline for doing so and the Ohio trial courts do not have jurisdiction over late petitions (Report, ECF No. 9, PageID 303). Savage relied on the completely implausible conspiracy theory involving his trial attorney to excuse his delay.

Savage objected to the denial of a stay in his original Objections, but made no response to the subject matter jurisdiction analysis, instead relying on his conspiracy theory (ECF No. 10, PageID 325). In fact he relied on false affidavits he himself prepared to prove the conspiracy. As further grounds for a stay, he claimed he had filed for state habeas corpus, but provided no proof. He also asserted he had raised in the Amended Delayed Petition a claim that the trial court had lacked subject matter jurisdiction to try the case. The Magistrate Judge concluded that neither of these pending actions provided a basis for a stay.

Petitioner now objects:

Petitioner redirect [sic] the magistrate's attention to (Doc 5 PAIG ID 252) Which is state exhibit 17D boost depiction, (Doc 5 PAGE ID

253) which is States exhibit 17E close up of boost packaging, which was obtained from the courts. (Doc 5 PAIG 254) is a pretrial exhibit of exhibit 17E which is close up of boost depiction, the photographs do not depict the exhibits sticker obtained from trial attorney 2-5-2020. (Doc 5 PAIG ID 255) is a pretrial boost depiction exhibit of 17D the photographs do not depict the exhibits sticker obtained from trial attorney 2-5-2020.

(Objections, ECF No. 14, PageID 360). The pages in question are part of the State Court Record as filed by the Warden, presumably created by scanning into .pdf format as required by the Court's filing system those portions of the record maintained by the Hamilton County Clerk of Courts. That is to say, PageID 252, 253, 254, and 255 are digital copies by the Attorney General of those pages as filed by Savage as exhibits to his Amended Delayed Petition for Post-Conviction Relief.

Upon examination of those pages as they appear as part of the State Court Record in this case, the Magistrate Judge can see that PageID 252 and 253 contain scans of exhibit stickers with respectively 17D and 17E; PageID 254 and 255 do not contain scans of exhibit stickers. Savage avers he obtained PageID 254 and 255 from his trial attorney on February 5, 2020, and seems to say they are in the form his attorney obtained them in pretrial discovery, whereas he claims he obtained PageID 252 and 253 "from the courts." *Id.*

As a litigant, Savage is prepared to elevate lack of authentication by the State to prosecutorial misconduct by presenting false evidence, allegedly in conspiracy with his trial attorney. But he has presented no authentication at all for his claims about where these four pages came from. He gives the Court only his own unsworn word without any corroboration.

The Hamilton County Court of Common Pleas has immediate physical access to the complete state court record from the files of its Clerk. It can examine the physical trial exhibits and the trial transcript to determine what exhibits were admitted at trial, whether any of them were labeled 17D or 17E, check what the records show as to what exhibits were delivered to the jury,

and determine whether there is any evidence of conspiracy or whether, in fact, the First District's ¶ 29 is correct. If it does so, it has authority to construe the Amended Delayed Petition for Post-Conviction Relief as a motion for leave to file a delayed motion for new trial which has no absolute time limit under Ohio law and decide whether Savage exercised due diligence in waiting from February until November, 2020, to file. *State v. Schlee*, 117 Ohio St. 3d 153 (2008). But in the Magistrate Judge's judgment, such an outcome is so unlikely that it does not merit a stay of these proceedings.

**Objection to subject matter jurisdiction**

Savage's pending post-conviction proceedings contain a claim that the Hamilton County Court of Common Pleas lacked subject matter jurisdiction to try him because the affidavit underlying the arrest warrant did not contain probable cause. The Magistrate Judge rejected this claim as a basis for a stay because such a defect in the arrest warrant would not deprive the Common Pleas Court of jurisdiction for trial. Savage objects, relying on *Jackson v. City of Cleveland*, 925 F.3d 793 (6<sup>th</sup> Cir. 2019), but *Jackson* does not support his position. That case was an action under 42 U.S.C. § 1983 for malicious prosecution. In such a case, the Sixth Circuit held that a grand jury indictment showed there was probable cause for police officers to make arrests, thereby defeating a malicious prosecution claim, unless

- (1) [A] law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly ma[de] false statements (such as in affidavits or investigative reports) or falsifie[d] or fabricate[d] evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, [we]re material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions d[id] not consist solely of grand-jury testimony or preparation for that testimony (where

preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury).

**Jackson**, 925 F. 3d at 821, quoting **King v. Harwood**, 852 F.3d 568, 587–88 (6th Cir. 2017).

**Jackson** has nothing to do with the subject matter jurisdiction of an Ohio Common Pleas court to try a felony case on the basis of an indictment returned by a grand jury in the relevant county. It is instead about a civil action for malicious prosecution.

The affidavit to which Savage refers is an affidavit in support of an arrest warrant apparently filed in the Hamilton County Municipal Court. The document thus identified by Savage appears at PageID 236 and does not bear a time stamp nor a signature of the affiant, so it has not been authenticated by Petitioner. More importantly, the arrest warrant upon which the Common Pleas Court obtained personal (not subject matter) jurisdiction over Savage is the warrant issued at the request of the prosecutor upon the return of an indictment by the grand jury (State Court Record, ECF No. 5, Ex. 1).

Savage has not shown the Common Pleas court lacked subject matter jurisdiction to try this case. In recognizing our authority to stay habeas cases pending exhaustion, the Supreme Court held:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2).

**Rhines**, 544 U.S. at 277. The fact that Savage has a meritless claim of lack of subject matter jurisdiction pending in the Common Pleas Court is not good grounds to delay resolution of this habeas corpus case until the Common Pleas Court tells him his claim is meritless.

### **Objections too [sic] Ground two**

As noted above, when Savage lost his direct appeal, he filed *pro se* a motion for reconsideration in the First District, raising his claims about Exhibits 176D and 17E for the first time. His Second Ground for Relief claims that the First District's summary denial of reconsideration denied him his right to appeal.

The original Report recommended dismissal of this claim because it was procedurally defaulted and because there is no federal constitutional right to appeal a state criminal conviction, much less to obtain reconsideration of a denial of such an appeal (Report, ECF No. 9, PageID 310). Although Ground Two was not discussed in the Supplemental Report, Savage has now objected to its dismissal. Inserting his false evidence claim from Ground One, he contends that the false evidence enabled the First District to improperly affirm his conviction "and that for such an error no issues would have to had been raised on direct appeal" (Objections, ECF No. 14, PageID 364).

Savage's "false evidence" claim is that exhibits went to the jury which had not been admitted in evidence and/or were irrelevant and/or were not authenticated. He gives no reason at all why such a claim would not have to have been raised on direct appeal or otherwise forfeited. He cites no authority for the proposition that such an omitted issue can be raised on a motion for reconsideration. He makes no response to the State's claim that, even if his argument could be considered on reconsideration, it was untimely.<sup>2</sup>

Savage's Ground Two should therefore be dismissed as procedurally defaulted (untimely)

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<sup>2</sup> Ohio R. App. P. 26(A)(1)(a) requires that a motion for reconsideration be filed within ten days of the appellate judgment. The judgment was filed and served November 27, 2019, but Savage did not file his Application for Reconsideration until December 23, 2019, sixteen days after it was due on December 7, 2019. Because the First District denied the Application without discussion, we infer it enforced this time limit, which was raised by the State. See Memorandum in Opposition, State Court Record, ECF No. 5, Ex. 11, PageID 115.

and without merit (no constitutional right to appellate reconsideration).

### **Petition for Evidentiary Hearing**

Savage includes in his Objections a Petition for an Evidentiary Hearing. He contends he is entitled to a hearing

because the magistrate raised a genuine issue (**without supporting facts** (emphasis sic)) as to whether or not the exhibits where [sic] present at trial. Petitioner petition this honor [sic] court for an evidentiary hearing to test the validity of exhibits 17D 17E as to whether or not reasonable mind could conclude that the exhibits where [sic] not presented at trial and therefore the use of those exhibits by the jury to determine guilt was the use of false evidence.

(Objections, ECF No. 14, PageID 364, relying on *Schriro v. Landigan*, 550 U.S.465 (2007).

On the contrary, it is Savage who has made the claim that exhibits 17D and 17E as provided to the jury were not present at the trial. The finding of the First District in ¶ 29 of its opinion rejects this argument as a basis for relief by finding there was no prosecutorial misconduct in the prosecutor's reference to these exhibits. This Court is bound by that factual finding in the absence of clear and convincing evidence that it is untrue. 28 U.S.C. § 2254(e).

In *Schriro* the Supreme Court held it was not an abuse of discretion to deny an evidentiary hearing in a habeas case when the facts sought to be shown at such a hearing would have been insufficient for granting relief. Since *Schriro*, the Court has considerably narrowed the standard for granting an evidentiary hearing. In *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388 (2011), the Supreme Court held that a federal court's review of a state court decision under 28 U.S.C. § 2254(d)(1) is strictly limited to "review of the state court record," and that evidence acquired through use of an evidentiary hearing may not be considered. *Id.* at 1399. *Pinholster* has been strictly enforced by the Sixth Circuit to the point of disallowing consideration of the results of an

evidentiary hearing even when stipulated to by the State. *Pinholster* precludes an evidentiary hearing in this case.

### **Conclusion**

Having reviewed the case in light of Petitioner's most recent Objections, the Magistrate Judge again respectfully recommends that 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*.

November 17, 2021.

*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. #

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

EDDIE SAVAGE,

Petitioner,

v.

Case No. 1:21-cv-33  
JUDGE DOUGLAS R. COLE  
Magistrate Judge Merz

WARDEN, PICKAWAY  
CORRECTIONAL INSTITUTION,

Respondent.

**OPINION AND ORDER**

This cause comes before the Court on three separate Reports and Recommendations (“R&Rs”) that Magistrate Judge Merz filed in this matter, along with his Orders directed at various non-dispositive motions that Petitioner Eddie Savage has filed along the way.

The Magistrate Judge filed his first R&R on June 17, 2021. (“R&R,” Doc. 9). There, the Magistrate Judge recommends that the Court dismiss Savage’s Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. 1) with prejudice. The Magistrate Judge combined with the R&R a decision denying Savage’s then-pending Motion for Stay of Proceedings. (Doc. 7). Savage timely filed Objections to the R&R (“Pet. Objs. to R&R,” Doc. 10), including an objection to the denial of the stay.

The Court then returned this matter to the Magistrate Judge pursuant to Fed. R. Civ. P. 72(b)(3) for further analysis. (See Doc. 11). That led to a Supplemental Report and Recommendations (“Supp. R&R,” Doc. 12) filed August 4, 2021, which again recommended dismissing Savage’s Petition with prejudice. Savage again timely

filed Objections to the Supplemental R&R, and moved for an evidentiary hearing. (“Pet. Objs. to Supp. R&R,” Doc. 13).

Once again, given Savage’s supplemental objections, the Court returned the matter to the Magistrate Judge pursuant to Fed. R. Civ. P. 72(b)(3) for further analysis. (*See* Doc. 15). In response, the Magistrate Judge issued a Second Supplemental R&R (“2d Supp. R&R,” Doc. 16) on November 17, 2021, again recommending that the Court dismiss the Petition with prejudice. He also combined with that R&R an Order denying the motion for an evidentiary hearing. Savage thereafter filed another set of Objections (“Pet. Objs. to 2d Supp. R&R,” Doc. 17) on December 6, 2021.

A few weeks later, on December 30, 2021, Savage moved for a prospective extension of time to respond to any future court filings. (*See* Doc. 18). The Magistrate Judge denied that Motion that same day (*see* Doc. 20), and Savage objected to the denial of the Motion on January 10, 2022 (Doc. 21).

Accordingly, the three R&Rs and the Magistrate Judge’s Orders denying Savage’s various Motions are now before the Court. For the reasons set forth more fully below, the Court **OVERRULES** Savage’s Objections (Docs. 10, 14, 17) to the R&R (Doc. 9), the Supplemental R&R (Doc. 12), and the Second Supplemental R&R (Doc. 16). As a result, the Court **ADOPTS** the R&R (Doc. 9), the Supplemental R&R (Doc. 12), and the Second Supplemental R&R (Doc. 16) and **DISMISSES** Savage’s Habeas Petition (Doc. 1) **WITH PREJUDICE**. Because the Court finds that reasonable jurists would not disagree with this conclusion, the Court **DENIES**

Savage a certificate of appealability. Further, the Court **CERTIFIES** that any appeal of this Opinion would be objectively frivolous.

Additionally, the Court **OVERRULES** Savage's objections to the Magistrate Judge's Orders denying Savage's Motion for Stay of Proceedings (Doc. 10) and Motion for Evidentiary Hearing (Doc. 13). Finally, the Court **DENIES AS MOOT** Savage's Motion for Extension of Time (Doc. 18) **WITHOUT PREJUDICE**, and **OVERRULES** Savage's objection to the denial (Doc. 21).

## PROCEDURAL HISTORY

### A. State Court Proceedings

On February 2, 2017, a Hamilton County Grand Jury indicted Savage on three counts of aggravated robbery in violation of Ohio Revised Code § 2911.01(A)(1) and three counts of robbery in violation of Ohio Revised Code § 2911.019(A)(2). (Request for Issuance of Warrant, Doc. 5, #29–33<sup>1</sup>). The charges arose from robberies that occurred at two Metro PCS cell phone stores and one Boost Mobile cell phone store, all taking place between December 17, 2016, and January 5, 2017. *State v. Savage*, No. C-180413, 2019 WL 6353778, at \*1–2 (Ohio Ct. App. Nov. 27, 2019). In June 2018, a jury acquitted Savage of the two robberies at the Metro PCS stores but convicted him of robbing the Boost Mobile store. *Id.* at \*1–2. Savage received a total sentence of 14 years on July 3, 2018. (J. Entry, Doc. 5, #41–43).

Assisted by new counsel, Savage appealed his conviction on July 11, 2018. (Notice of Appeal, Doc. 5, #44). Savage asserted four Assignments of Error:

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<sup>1</sup> Refers to PAGEID #.

**First:** The trial court erred and prejudiced the Defendant by imposing a more than minimum prison sentence which was not supported by the record.

**Second:** The trial court erred and prejudiced the defendant by joining three unrelated cases for trial together.

**Third:** A Defendant's right to a fair trial is violated when a prosecutor's misconduct is cumulative.

**Fourth:** The trial court erred and prejudiced the defendant by not suppressing [sic] the evidence obtained in photo lineups.

(Am. Brief of Appellant, Doc. 5, #45–63). On November 27, 2019, the Ohio First District Court of Appeals overruled all of Savage's Assignments of Error and affirmed the trial court's judgment. *Savage*, 2019 WL 6353778, at \*5. Of some note to the instant Petition, relating to the appeals court's resolution of the third assignment of error, the court rejected Savage's contention that the prosecutor improperly referenced, in their opening and closing statements, photos of Boost Mobile packaging recovered from a vehicle Savage was renting. *Id.* at \*4. In particular, contrary to Savage's argument on appeal, the appeals court found the trial court had admitted the photos of the packaging into evidence during the trial, and thus it was not misconduct for the prosecutor to reference them in opening and closing. *Id.*

Savage, now proceeding *pro se*, filed a Motion for Reconsideration in the First District Court of Appeals on December 23, 2019. (Appl. for Recons., Doc. 5, #97–113). Savage's Motion principally argued that the prosecution erred in "creating [a] false impression of [the] evidence," by discussing the images of Boost Mobile packaging. (*Id.* at #98). Savage next contended that the trial court committed prejudicial error by allowing the prosecution to call a co-defendant as a witness, who then invoked his

privilege against self-incrimination on the stand. (*Id.* at #103–06). Finally, Savage re-raised his objection to the joinder of the three robberies into one trial. (*Id.* at #107–10). The First District Court of Appeals summarily denied the Motion for Reconsideration on January 30, 2020, stating in full: “The application is not well taken and is hereby denied.” (Entry Denying Appl. for Recons., Doc. 5, #131).

On January 6, 2020, Savage appealed to the Supreme Court of Ohio, (Notice of Appeal, Doc. 5, #132), and on March 3, 2020, the Court declined to exercise jurisdiction. *State v. Savage*, 140 N.E.3d 743 (Ohio 2020).

Savage, again proceeding *pro se*, then returned to the Hamilton County Court of Common Pleas, where, on February 25, 2020, he moved that court to “notice [plain] error under [Ohio Criminal Rule] 52(B).” (Rule 52(B) Mot., Doc. 5, #165). There, for the first time, Savage alleged that the trial court had improperly admitted the two exhibits, Exhibit 17D and 17E, which were photographs depicting Boost Mobile packaging apparently situated in the passenger-side footwell of a vehicle Savage had rented. (*Id.* at #169). Specifically, Savage alleged the two photographs were both irrelevant and unauthenticated. (*Id.*).

Moreover, Savage raised another new argument. Based on new copies he had obtained of the two photos on February 20, 2020, he argued that the Exhibits 17D and 17E that were included in the trial court record (depicting papers bearing reference to Boost Mobile) were not the Exhibits 17D and 17E that had been submitted during the evidentiary portion of the trial. (*Id.* at #172–73). Rather, he claims that, sometime after the trial, but before the exhibits went to the jury for

deliberations, someone swapped out the Exhibits 17D and 17E used at trial—which he claims did not depict Boost Mobile packaging—for the Exhibits 17D and 17E that are now in the trial court record—which do show such packaging. (*Id.*).

The State responded, arguing that an Ohio Rule 52(B) motion was an improper vehicle to challenge a conviction, and requesting the court dismiss the Motion. (Mot. to Dismiss, Doc. 5, #179–83). In addition, the State contended that even if the Motion were construed as a motion for postconviction relief, it would be considered untimely under state law. (*Id.* at #180).

The Hamilton County Court of Common Pleas summarily dismissed the Ohio Rule 52(B) Motion on October 21, 2020. (Entry Dismissing Def.’s Mot., Doc. 5, #184).

On November 24, 2020, Savage filed a Petition for “Delayed Postconviction” Relief in the Hamilton County Court of Common Pleas under Ohio Revised Code § 2953.21. (Delayed Postconviction, Doc. 5, #185–216). Thereafter, he filed an amended Petition for Postconviction Relief on December 15, 2020. (Am. Delayed Postconviction, Doc. 5, #217–65). Read broadly, these Petitions principally advance five arguments: (1) the prosecution and police falsified Exhibits 17D and 17E; (2) no probable cause supported Savage’s arrest; (3) the Hamilton County Court of Common Pleas lacked subject matter jurisdiction to try him; (4) Savage received ineffective assistance of trial counsel; and (5) Savage received ineffective assistance of appellate counsel. (*Id.* at #217–65). The Petition remains pending as of the time of this Opinion.

## B. Savage's Habeas Petition

Savage initiated the instant habeas proceedings on January 15, 2021. (Petition for Writ, Doc. 1). In his Petition, Savage raised three grounds for relief, all of which relate, in one way or another, to his claim that Exhibits 17D and 17E were swapped out during trial:

**Ground One:** On January 27, 2017, police officer Mike Lampe jimmied Petitioner's rented truck and created two falsehoods. The prosecution armed with both presented (1) at trial (non-material). After closing arguments exchanged the exhibits for those that depict alleged evidence.

**Ground Two:** Denied the right of appeal – on timely reconsideration. Petitioner alerted the district of the false evidence. [First] District court [of Appeals] dismissed reconsideration as not well-taken.

**Ground Three:** Trial counsel conspired with those to corrupt the outcome of Petitioner's trial by knowing about the two falsehoods and failing to object or notify.

(*Id.* at #7–10).

Savage's first ground explicitly raised the issue of the alleged swap. Expanding in his Reply, Savage argued that, before and during trial, Exhibits 17D and 17E contained what he refers to as irrelevant and unauthenticated “paperwork.” (Doc. 7, #293–94). Then, after the close of evidence, Savage alleged the “prosecution switched [Exhibits 17D and 17E] so that the jury would deliberate” with photographic evidence of the Boost Mobile materials. (*Id.*). Savage claimed he only learned of this plot on February 5, 2020, when he received the Boost Mobile images with evidence stickers on them. (*Id.* at #294).

In his second ground, Savage alleged he was denied the right of appeal by Ohio's First District Court of Appeals, apparently when that court declined to

consider Savage’s claims about the falsity of Exhibits 17D and 17E. (Petition for Writ, Doc. 1, #8). Although the initial Petition for habeas relief asserts this ground, neither in that Petition, nor in his Reply, did Savage provide any further explanation as to how the District Court denied his “right to appeal.” (See Reply, Doc. 7). Rather, his Reply merely alleged that the state appellate court wrongly decided his motion. (*Id.* at #292–93).

His third ground restated his concerns about Exhibits 17D and 17E, but with a new twist. Specifically, Savage contended he received ineffective assistance of counsel when his trial counsel joined the “conspiracy” to switch out the two photographs. (*Id.* at #293–94). Savage argued that any competent trial counsel would have noticed the evidence had changed, and so counsel’s failure to object necessarily shows that they participated in the plot. (*Id.*).

Finally, Savage included in his Reply a Motion for “Stay in Obiesance,” which the Court construes as a Motion to Stay the instant habeas proceedings while the pending amended delayed postconviction petition can be heard by the state courts. (*Id.* at #287).

### C. The R&R’s Analysis

Following Savage’s Petition and Reply, the Magistrate Judge issued an R&R recommending that the Court dismiss Savage’s Petition with prejudice. (R&R, Doc. 9, #312). The R&R found that each of Savage’s contentions was procedurally defaulted and barred from consideration. (*Id.*).

The R&R began by recommending this Court deny the first ground as procedurally defaulted. The R&R noted that under Ohio law, the doctrine of *res judicata* bars later consideration of claims that a defendant could have, but did not, raise on direct appeal. (R&R, Doc. 9, #309). Because Savage did not raise the contention on direct appeal that Exhibits 17D and 17E were “swapped” at trial, the R&R reasoned that these claims were procedurally defaulted. (*Id.*). Indeed, the R&R noted that *res judicata* likely prompted the appellate court’s summary denial of Savage’s Motion for Reconsideration. (*Id.*). In addition, the R&R preemptively noted that Savage could not escape this procedural default by claiming ineffective assistance of appellate counsel, as Ohio law requires Savage to raise that issue by way of a Rule 26(B) motion, which he never did. (*Id.*).

Next, the R&R concluded that Savage’s second ground did not give rise to a right to relief, as there is no constitutional “right to appeal.” (*Id.* at #310). As the right does not exist, the R&R reasoned that the Ohio appellate court could not have violated Savage’s (nonexistent) constitutional right to an appeal by rejecting his Motion for Reconsideration. (*Id.*).

Finally, the R&R concluded that the third ground also did not warrant habeas relief. (*Id.* at #311). The R&R “declined to consider” Savage’s contention that his trial counsel joined a conspiracy with police and prosecution to violate his rights. (*Id.*). Moreover, the R&R noted that Savage raised no claim on direct appeal of ineffective assistance, and Savage’s Petition for Postconviction Relief under Ohio Revised Code § 2953.21 “was filed more than a year late.” (*Id.*).

The Magistrate Judge also denied Savage's Motion to Stay proceedings. (*Id.* at #303). Although a court may stay habeas proceedings to allow state proceedings to play out, this relief is "available only in limited circumstances" where there is good cause for failing to exhaust state remedies and the unexhausted claims are not "plainly meritless." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). The Magistrate Judge found that, because each ground was procedurally defaulted in state court, a stay is unwarranted. (R&R, Doc. 9, # 303).

#### **D. Savage's Objections To The R&R**

Savage filed his Objections to the first R&R on July 2, 2021. (Pet. Obj. to R&R, Doc. 10). Savage objected that the R&R had not offered sufficient reasoning to refute his allegation that the exhibits were "swapped" between trial and jury deliberations. (*Id.* at #326).

Then, Savage alleged, for the first time, that he filed a state habeas corpus petition in Pickaway County on September 10, 2020.<sup>2</sup> (*Id.*). Savage believed that the Magistrate Judge's failure to consider this petition "deprive[d] the Magistrate recommendation from a meaningful review." (*Id.*).

Savage next raised, also for the first time in federal court, a contention that the warrant application preceding his arrest was deficient for lack of probable cause. (*Id.* at #327). He argued that, because the warrant lacked probable cause, the

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<sup>2</sup> To the Court's knowledge, no such petition exists within the record. As is discussed below however, the Court ultimately finds that the existence of a state habeas petition would not alter the Court's holding.

Hamilton County Court of Common Pleas lacked subject matter jurisdiction to try him. (*Id.*).

Turning to the issue of procedural default, Savage alleged he was “unavoidably prevented” from discovering the “swap” of evidence before February 5, 2020. (*Id.* at #328). Under Ohio law, an untimely postconviction petition for relief will not be procedurally barred if the evidence was unavoidably prevented from being discovered by the defendant. Ohio Rev. Code § 2953.23(A)(1)(a). Savage argued that he could not have known the jury deliberated with the Boost Mobile images because the exhibits depicted “paperwork” at trial and then were swapped outside his presence. (Pet. Obj. to R&R, Doc. 10, #329–30). Savage then seemingly argued, again for the first time, that he did not need to raise an Ohio Rule of Appellate Procedure 26(B) motion for ineffective assistance of appellate counsel because he was attempting to supplement the record with new evidence. (*Id.* at #330).

Finally, Savage revived his claim that he was denied his right to an appeal when the First District Court of Appeals did not accept his contention that the Boost Mobile images were falsified. (*Id.* at #331).

In response to these objections, the Court returned the matter to the Magistrate Judge with instructions to file a Supplemental R&R. (Doc. 11).

#### **E. The Supplemental R&R**

The Magistrate Judge subsequently issued a Supplemental R&R, maintaining his recommendation the Court dismiss the Petition with prejudice and refuting the Objections Savage raised. (Supp. R&R, Doc. 12). The Supplemental R&R reiterated

that Savage had procedurally defaulted all claims, and that Savage failed to carry his burden of showing otherwise. (*Id.* at #338).

Next, the Supplemental R&R quickly rejected Savage's other contentions. First, it noted that the record contained no state habeas petition, and that Savage had not included evidence of one in his Objection. (*Id.* at #336). Then, the Supplemental R&R disagreed with Savage's argument that the trial court lacked subject matter jurisdiction, noting that County Courts of Common Pleas in Ohio possess general jurisdiction. (*Id.*). Lastly, the Supplemental R&R recognized that Savage had failed to submit new evidence in the record to support his conspiracy theory and evade procedural default. (*Id.* at #337–38).

#### **F. Savage's Objections To The Supplemental R&R**

In response to the Supplemental R&R, Savage filed a second set of Objections. (Pet. Objs. to Supp. R&R, Doc. 13). Savage's renewed Objections largely reiterated many of the points previously made.

Savage argued that his state Petition for Postconviction Relief was not untimely because he had no means of seasonably discovering that Exhibits 17D and 17E had been falsified. (*Id.* at #356). Savage continued by again asserting that these exhibits were irrelevant and unauthenticated, and that the State could not show that 17D and 17E were admitted at trial (as the record currently reflects). (*Id.* at #358). Savage reargued his claim that there was not probable cause to support his arrest, which allegedly deprived the trial court of subject matter jurisdiction to try him. (*Id.* at #361–62). He reiterated his claim that the First District Court of Appeals violated

his right to appeal by relying on allegedly false evidence. (*Id.* at #362–64). Finally, Savage moved for an evidentiary hearing to test his theory that Exhibits 17D and 17E were not admitted in trial. (*Id.* at #364–65).

In response to these new objections, the Court again returned the matter to the Magistrate Judge with instructions to file a Second Supplemental R&R. (Doc. 15).

#### **G. The Second Supplemental R&R**

In the Second Supplemental R&R, the Magistrate Judge once again asserted his recommendation that Savage’s Petition be dismissed with prejudice. (2d Supp. R&R, Doc. 16, #382). The Second Supplemental R&R concluded Savage’s contentions about the probity and admissibility of Exhibits 17D and 17E were arguments “on the merits, not on procedural default.” (*Id.* at #373). Moreover, it found no cause to grant the stay of proceedings in light of Savage’s procedural default and found no evidence that made it likely Savage would prevail on the merits. (*Id.* at #376–78). The Second Supplemental R&R also refused Savage’s subject matter jurisdiction contention as meritless, and again rejected Savage’s claim concerning a right to appeal. (*Id.* at #378–81). Finally, the Magistrate Judge denied Savage’s request for an evidentiary hearing. (*Id.* at #381).

#### **H. Savage’s Objections To The Second Supplemental R&R**

Savage thereafter filed another set of Objections. (Pet. Objs. to 2d Supp. R&R, Doc. 17). By and large, Savage used these renewed Objections to reiterate his contentions raised in the prior Objections. Specifically, Savage argued that he was unavoidably prevented from uncovering evidence of the conspiracy sooner, (*id.* at

#388), that the Second Supplemental R&R never entertained his claim that the exhibits were not relevant or properly authenticated, (*id.* at #390), that the record shows evidence of “swapped” exhibits, (*id.* at #391–92), and that the Court of Common Pleas lacked subject matter jurisdiction because there was no probable cause to support this arrest. (*Id.* at #394). Perhaps the only novel objection Savage presented was that the state courts had a fair opportunity to adjudicate his claims because the First District Court of Appeals could have noticed these errors on its own motion *sua sponte*. (*Id.* at #395).

### **I. Savage’s Motion For Extension Of Time**

Savage then moved for a prospective grant of additional time to respond to any future filings in the case. (Doc. 18). The Magistrate Judge denied this motion. (Doc. 20). Savage objected to the denial of his motion. (Doc. 21).

#### **LEGAL STANDARD**

Under Fed. R. Civ. P. 72(b)(3), district courts review an R&R de novo after a party files a timely objection. This review, however, applies only to “any portion to which a proper objection was made.” *Richards v. Colvin*, No. 2:12-cv-748, 2013 WL 5487045, at \*1 (S.D. Ohio Sept. 30, 2013). In response to such an objection, “[t]he district court ‘may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.’” *Id.* (quoting Fed. R. Civ. P. 72(b)(3)). By contrast, if a party makes only a general objection, that “has the same effect[] as would a failure to object.” *Howard v. Sec’y of Health & Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991); *Boyd v. United States*, No.

1:16-cv-802, 2017 WL 680634, at \*1 (S.D. Ohio Feb. 21, 2017). That is, a litigant must identify each issue in the R&R to which he or she objects with sufficient clarity that the Court can identify it, or else that issue is deemed waived. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995) (“The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious.”).

That being said, here, as noted, the petitioner is proceeding pro se. A pro se litigant’s pleadings are to be construed liberally and are subject to less stringent standards than formal pleadings filed by attorneys. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Franklin v. Rose*, 765 F.2d 82, 84–85 (6th Cir. 1985). At the same time, pro se litigants still must comply with the procedural rules that govern civil cases. *McNeil v. United States*, 508 U.S. 106, 113 (1993).

As to those unobjected portions of the R&Rs, the Court has an obligation to review the recommendation. The advisory committee notes to Federal Rule of Civil Procedure 72(b) suggest that the Court still must “satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *See Redmon v. Noel*, No. 1:21-CV-445, 2021 WL 4771259, at \*1 (S.D. Ohio Oct. 13, 2021) (citing cases).

Here, in addition to the matters covered in the R&Rs, the Magistrate Judge’s Orders also include rulings on various non-dispositive motions. As to such rulings, the Court “must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law.” Fed. R. Civ. P. 72(a).

## LAW AND ANALYSIS

Review here involves questions of both timing and substance. All agree that the claims Savage seeks to press here in habeas—basically relating to his claim of switched exhibits—are currently pending before a state court. As exhaustion is a fundamental aspect of habeas, the question arises as to whether the Court should stay this proceeding pending the outcome of that state court action. Indeed, Savage moved for just such a stay. But the Magistrate Judge denied that request. That is the question of timing.

The reason the Magistrate Judge denied the request for a stay, though, requires a detour through the merits. According to the Magistrate Judge, the habeas claims are plainly meritless, and thus, under Supreme Court precedent, the federal court should deny the stay and dispose of the claims on the merits, rather than awaiting the outcome of the state court proceedings. *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). That is the question of substance.

Savage offers objections to the Magistrate Judge’s determinations on both fronts, and he separately seeks an evidentiary hearing to substantiate his switched-evidence allegations. Having reviewed the R&Rs, Orders on the various Motions, and Savage’s various Objections to each of them, though, the Court concludes that the Magistrate Judge was correct, both as to issues of timing and substance. Because Savage’s claims are plainly meritless, the Magistrate Judge correctly denied the stay, and properly dismissed the habeas petition on the merits. Nor is there any need for an evidentiary hearing. Accordingly, as further described below, the Court affirms the Magistrate Judge’s approach on all fronts.

#### **A. The Magistrate Correctly Rejected Savage’s Request For A Stay.**

Habeas has an exhaustion requirement, under which defendants in state custody must first present their claims for relief to state court, before asserting them in a federal habeas petition. 28 U.S.C. § 2254(b)(1). That requirement is not mere makeweight. Rather, it serves important comity interests by allowing state courts the first crack at correcting any constitutional issues that may have arisen in state court proceedings. *See Ex parte Royall*, 117 U.S. 241, 252 (1886) (describing the historical basis for requiring state court exhaustion). Here, Savage is currently pressing his switched-evidence claims in state court. Accordingly, Savage has requested a “Stay in Obiesance,” which the Magistrate Judge interpreted as a motion to stay Savage’s federal court proceedings pending completion of that state court action.

The Magistrate Judge rejected Savage’s request, finding that “there is not good cause to enter a stay” because Savage’s unexhausted state court claims are meritless. (R&R, Doc. 9, #303). As support for that result, the Magistrate Judge relied on *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). There, the Supreme Court held a federal court may grant a stay of habeas proceedings to allow state court exhaustion only if both (1) a petitioner has “good cause” for their failure to exhaust, *and* (2) the petitioner’s unexhausted claims are not “plainly meritless.” *Id.* at 277. Here, the Magistrate Judge determined that Savage’s unexhausted claims are plainly meritless, and accordingly no stay is warranted.

In his Objections, Savage argues that the claims are not in fact meritless. But, as explained immediately below, the Court disagrees. That is so on two fronts. First, he has procedurally defaulted the claims that he seeks to press here, meaning that

they are not cognizable in habeas. Second, even if he had not done so, the claims would fail on the merits. For both of those reasons, the Court concludes that the Magistrate Judge did not commit clear error or act contrary to law in denying Savage's request for a stay. Accordingly, this Court **AFFIRMS** the Magistrate Judge's Order **DENYING** that Motion.

**B. The Magistrate Judge Correctly Determined That Savage's Claims Are Both Procedurally Defaulted and Meritless.**

As for the R&Rs themselves, Savage has separately objected to the R&R, the Supplemental R&R, and the Second Supplemental R&R, each of which recommend dismissing his habeas petition with prejudice. Basically, the R&Rs find both that Savage's claims (1) are procedurally defaulted, and (2) otherwise fail on the merits. Read expansively, Savage presents four basic objections to those conclusions. As to the former, he first argues that he did not procedurally default his claims because, under Ohio law, he was unavoidably prevented from finding the necessary evidence in a timely manner. Second, he argues that, in any event, he falls within the fundamental miscarriage of justice exception to the rule that precludes habeas review of procedurally defaulted claims. Third, he argues the trial court lacked subject matter jurisdiction to try him and so his conviction is void *ab initio*. Finally, Savage claims that the Magistrate Judge was wrong to conclude that the claims fail on the merits.

For the reasons stated more fully below, the Court finds each of the four arguments unavailing. Moreover, as to those portions of the R&Rs to which Savage has not lodged objections, the Court has reviewed the R&Rs and determined that they

do not contain “clear error on [their] face.” Fed. R. Civ. P. 72(b) (advisory committee notes). Accordingly, the Court **OVERRULES** Savage’s Objections to the R&R (Doc. 10), Objections to the Supplemental R&R (Doc. 13), and Objections to the Second Supplemental R&R (Doc. 17).

**1. Savage Has Procedurally Defaulted His Claims Under Ohio Law.**

Savage first contends that his delay in presenting his allegations of evidence swapping and falsification can be excused under Ohio law because he was unavoidably prevented from receiving the necessary evidence sooner. (Pet. Objs. to Supp. R&R, Doc. 13, #344). By Savage’s account, he had no means of detecting the switch in the evidence at the time of trial, (Pet. Objs. to R&R, Doc. 10, #330), and discovering that alleged wrongdoing “took due diligence.” (Pet. Objs. to Supp. R&R, Doc. 13, #344). The Court is unpersuaded.

Under Ohio law, a petitioner must file for postconviction relief within 365 days after the transcript of the proceedings has been filed for appeal. Ohio Rev. Code § 2953.21(A)(2). An Ohio court cannot entertain an untimely petition for postconviction relief unless “petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief” or there has been intervening U.S. Supreme Court precedent that retroactively gives the petitioner a claim to relief. Ohio Rev. Code § 2953.23(A)(1)(a). Moreover, the petitioner must also demonstrate by “clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense” in question. *Id.* § 2953.23(A)(1)(b).

Applying that standard here, the Court finds that Savage's allegations concerning Exhibits 17D and 17E are procedurally defaulted in state court. The State reports Savage's transcript was filed for appeal on October 18, 2018. (Resp., Doc. 6, #283). Neither Savage nor the state court record contradict this report. (R&R, Doc. 9, #303). Savage filed his first complaint about the inauthenticity of these exhibits in his delayed Postconviction Petition for Relief on November 24, 2020. (Delayed Postconviction, Doc. 5, #185, 196). Savage filed his postconviction petition over one year late. Even assuming these claims were not available on direct appeal, they remain untimely as raised in a postconviction petition. *See State v. Apanovitch*, 121 N.E.3d 351, 360 (Ohio 2018) ("[A] petitioner's failure to satisfy [Ohio Revised Code § 2953's statutory filing deadline] deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition.").

The Court also finds that Savage has failed to articulate any excuse for the delay. Savage objects that he was "unavoidably prevented" from bringing his claim sooner. He claims he had no means of learning of this conspiracy until February 5, 2020, when his trial counsel "hand[ed] over" the Boost Mobile depictions of Exhibits 17D and 17E. (Pet. Objs. to R&R, Doc. 10, #325). But even assuming Savage could unearth some prejudicial error in the record, he never articulates what prevented him from finding such an error sooner. Put plainly, if Savage is correct and the trial record does not match the evidence presented at trial, Savage should have discovered this by examining the trial transcript in the year following his conviction.

In response, Savage attempts to shift the burden to the Magistrate Judge, asking why the Magistrate Judge “does not explain how the false exhibits could have been discovered any earlier.” (Pet. Obj. to 2d Supp. R&R, Doc. 17, #388). But the Magistrate Judge does not bear the burden here; Savage must demonstrate how he was unavoidably prevented from finding this evidence sooner. He has not.

Savage’s citation to *State v. Penland* does not bolster his case. (*Id.* at #388). In *Penland*, a petitioner filed an untimely § 2953 petition for postconviction relief predicated on newly discovered evidence. *State v. Penland*, No. C-190323, 2020 Ohio App. LEXIS 1368, at \*4 (Ohio App. Ct. Apr. 8, 2020). After the common pleas court denied his petition, the petitioner appealed. *Id.* at \*2. He argued that, after the trial, he learned of alleged *Brady* evidence helpful to his case, claiming this entitled him to postconviction relief. *Id.* But the First District Court of Appeals affirmed the trial court, finding that the “new” evidence was not actually new at all; it had been included in discovery and at trial. *Id.* at \*3–4. Because the petitioner had access to the evidence, the appellate court found he was not unavoidably prevented from discovering it, even if he did not actually learn of it himself until later. *Id.* Thus, the untimely petition could not be heard.

Savage argues that his claim in the instant Petition differs from *Penland*. In particular, Savage says that he could not have learned of the “switch in exhibits” before or during trial. (Pet. Obj. to 2d Supp. R&R, Doc. 17, #388). The Court disagrees. Much as in *Penland*, Savage could have timely found the alleged evidence of wrongdoing through inspection of the record. And just as in *Penland*, his failure to

inspect the record in a timely manner does not mean he was “unavoidably prevented” from finding it sooner. While the cases differ in that Savage would only have had access to the alleged wrongdoing after the trial, the record still contains all the evidence that went to the jury. Savage could have examined this record anytime within the year after his trial concluded, and then filed his postconviction petition before the statutory deadline.

Perhaps recognizing he failed to press his claim within the time allotted under Ohio law, Savage separately contends that the state courts could have addressed his concerns *sua sponte*, meaning the state court had a fair chance to pass on his claims. (*Id.* at #395). Based on this, he asks this Court to treat his claim as both (1) not procedurally defaulted (presumably because it was tacitly “presented” through the appellate court’s ability to raise the claim *sua sponte*), and (2) exhausted in state court, and thus available in habeas. But this misconceives the purpose of the related doctrines of procedural default and exhaustion. The doctrines are designed to offer state courts a “fair opportunity” to consider a claim before a federal court will intervene. *See Ortiz v. Wolfe*, 466 F. App’x 465, 467 (6th Cir. 2012); *Harris v. Rees*, 794 F.2d 1168, 1174 (6th Cir. 1986) (noting that the “question really is whether [state] courts had a fair opportunity to consider appellee’s claim”). For that to occur, a party necessarily must *raise* the principal arguments to the state court. A petitioner cannot evade these requirements by shifting the burden of raising and articulating claims to the state courts themselves. The Court will hold Savage to the requirement that he, and not the state courts, present his claims for habeas relief. And his failure to do so

in a timely fashion means that he has procedurally defaulted those claims under state law. That procedural default serves as an adequate and independent state ground that prevents him from now pressing the claims in habeas.

Moreover, Savage's other claims about the violation of his "right to appeal" (Ground Two) and the ineffectiveness of his trial counsel (Ground Three) are likewise procedurally defaulted. First, this habeas petition represents Savage's first attempt to claim his "right to appeal" has been violated. He has not even attempted exhaustion in the state system. Any effort to do so now would be untimely, and thus procedurally defaulted. And, as the Supplemental R&R points out, to the extent that Savage may seek to recharacterize his claim as sounding in ineffective assistance of appellate counsel, he needed to raise that issue through an Ohio Rule of Appellate Procedure 26(B) motion in state court. (Doc. 12, #338). He has not done so, and cannot do so now. *See Griffin v. Andrews*, No. 2:99-cv-1127, 2006 WL 2422590, at \*1 (S.D. Ohio Aug. 22, 2006). As for ineffective assistance of trial counsel, Savage first raised that claim in his Postconviction Petition on February 25, 2020. (Delayed Postconviction, Doc. 5, #185, 196). As demonstrated above, this petition was untimely under state law. Like his other claims raised in the postconviction petition, Savage's claim for ineffective assistance of trial counsel is also procedurally defaulted.

The Court notes some uncertainty among the parties about the existence of a state habeas petition in connection with the procedural default issue. The State briefly refers to a state habeas petition. (Resp., Doc. 6, #277, 281). Savage also references filing a state habeas petition on September 10, 2020, which he claims is

“dehors” the record that the Magistrate Judge’s R&Rs considered. (Pet. Objs. to R&R, Doc. 10, #326). And, because the Magistrate Judge has not yet considered that petition, Savage believes that “deprives the Magistrate recommendation from a meaningful review” (*id.*), which the Court understands as an argument that the Court should not defer to the R&R because the R&R did not consider that filing. The problem is that the record furnished to this Court includes no state habeas petition. (See Doc. 5). And the Magistrate Judge likewise did not find a state habeas petition within the record. (Supp. R&R, Doc. 12, #336). But even putting that aside, the contents of such a petition could do nothing to remedy the timing issues discussed above. In short, whether that petition exists or not, Savage’s Postconviction Petition under Ohio Revised Code § 2953 remains untimely.

Therefore, under Ohio law, each of Savage’s claims is procedurally defaulted.

**2. The Court Denies Savage’s Objection That His Claim Must Be Heard On The Merits To Avoid A Fundamental Miscarriage Of Justice.**

Savage next objects that, even in light of any potential state court procedural default, this Court should hear the merits of his claim to avoid a fundamental miscarriage of justice. (Pet. Objs. to Supp. R&R, Doc. 13, #344).

Even where a habeas petitioner has procedurally defaulted his claim, a federal court may still hear the claim in habeas if “the prisoner can demonstrate cause for the default and actual prejudice … or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Green v. Turner*, No. 14-4254, 2016 WL 11782550, at \*1 (6th Cir. 2016 May 9, 2016) (quoting *Coleman v. Thompson*,

501 U.S. 722, 750 (1991)). But “[t]he ‘fundamental miscarriage of justice’ part of this test is subject to a further restriction—it “applies only where there is a colorable claim of actual innocence.” *Floyd v. Alexander*, 148 F.3d 615, 618 (6th Cir. 1998). “To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The exception is “rare,” and is only applicable “in the extraordinary case.” *Id.* at 321. It applies where “in the light of the new evidence … no reasonable juror would have found the defendant guilty.” *Id.* at 329.

Savage fails to make the necessary showings to take advantage of this exception to procedural default. As best the Court can tell, Savage is not seeking to meet the cause and prejudice standard, but rather relies only on the fundamental miscarriage of justice exception. His problem, though, is that he has not raised any new evidence, let alone new evidence tending to prove his actual innocence. Absent such evidence, the Court finds Savage’s objection is not well taken.

Savage contends that the existing record, when properly analyzed, supports his argument by demonstrating an inconsistency in the exhibits. He notes, for example, that some versions of Exhibits 17D and 17E have exhibit stickers on them, while others do not. (Am. Delayed Postconviction, Doc. 5, #252–55). So what? The contents of the photographs with and without the stickers are the same, and thus lend no credence to his claim that the trial versions of the photographs were different

from those that went to the jury. Nor does Savage advance his cause by noting that the witness who identified the photographs at trial referred to “paperwork” in the car footwell rather than “Boost Mobile packaging.” (Pet. Obj. to R&R, Doc. 10, #329). Presumably, Savage would have the Court conclude that this description means that the witness must have been reviewing photographs different from the ones now included within the record, depicting Boost Mobile materials. But the Court is not convinced. Having reviewed the allegedly “falsified” 17D and 17E, the Court concludes that the description the witness provided of the photographs at trial is consistent with the appearance of those exhibits now, and thus does not support a claim that the exhibits were swapped.

But even briefly assuming Savage has uncovered an inconsistency in the record,<sup>3</sup> this revelation does not constitute new evidence. Nor does it meet the high burden of showing a fundamental miscarriage of justice. All Savage can factually demonstrate is that he received copies of the Boost Mobile packaging with “exhibit” stickers on them. (Pet. Obj. to Supp. R&R, Doc. 13, #346). He uses this fact to argue that the existence of analogous images in the record without exhibit stickers somehow uncovers fraud. (*Id.*). Yet in all likelihood, Savage has uncovered a mere clerical error. And any attempt to extrapolate from such a slender reed to prove Savage’s actual innocence requires an unsupported theory based on an overarching conspiracy

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<sup>3</sup> In weighing this argument, the Court takes Savage at his word that he has uncovered an inconsistency. Yet it should be noted that the First District Court of Appeals found these images of Boost Mobile packaging did indeed enter the trial as evidence in support of Savage’s conviction. *State v. Savage*, No. C-180413, 2019 WL 6353778, at \*4 (Ohio Ct. App. Nov. 27, 2019). This too seriously undermines Savage’s telling of the facts.

involving the police, prosecution, and his own counsel. The Court finds Savage has failed even to plausibly allege a fundamental miscarriage of justice.

Moreover, the Court will not credit the “affidavits” Savage filed alongside his delayed postconviction petition. Apparently recognizing his chief weakness—lack of facts—Savage presents affidavits “from” the prosecution, the police, and his own trial counsel “admitting” to falsification of evidence, “corrupting the outcome” of his trial, illegal conspiracy, and other wrongdoing. (Am. Delayed Postconviction, Doc. 5, #233–35). But in fact, it is Savage *himself* who provides the “testimony” in the affidavits, which amounts to nothing more than him repeating his allegations of a conspiracy. While perhaps creative, these affidavits add nothing, and they deserve no more than passing reference, and rejection, by this Court.

Finally, in his second set of objections, Savage cites to this Court’s 2012 decision in *Bies v. Bagley*, No. 1:00-cv-682, 2012 U.S. Dist. LEXIS 49897 (S.D. Ohio Apr. 10, 2012). Savage cites *Bies* for the proposition that the State cannot seek to enforce a procedural bar to habeas review when the State itself has caused the default by withholding evidence. (Pet. Objs. to Supp. R&R, Doc. 13, #341–42). But importantly, *Bies* concerns the withholding of exculpatory *Brady* evidence, itself a constitutional violation. 2012 U.S. Dist. LEXIS 49897, at \*34–57. Beyond the fact that there is no proof here any evidence was ever withheld, Savage does not raise any *Brady* claims. Therefore, *Bies* is inapplicable to the instant case.

In sum, the Court finds that Savage has failed to overcome his procedural default by showing it would a fundamental miscarriage of justice.

**3. The Court Denies Savage's Objection That The Trial Court Lacked Subject Matter Jurisdiction To Hear His Case.**

After arguing he complied with habeas's exhaustion requirements, Savage seemingly proceeds to argue in the alternative that his conviction is void ab initio because the Hamilton County Court of Common Pleas lacked subject matter jurisdiction to convict him. (Pet. Objs. to Supp. R&R, Doc. 13, #347; Pet. Objs. to 2d Supp. R&R, Doc. 17, #394). In essence, Savage objects that the warrant obtained to authorize his arrest and the search of his rented truck lacked probable cause. (Pet. Objs. to Supp. R&R, Doc. 13, #347). By his understanding, this deprives the Hamilton County court of subject matter jurisdiction over his criminal case. (*Id.*). That argument fails for multiple reasons.

To start, Savage failed to argue this claim in his Habeas Petition. To be sure, he raised this contention in his November 2020 Postconviction Petition in state court, but the instant Habeas Petition fails to assert this ground for relief. (Am. Delayed Postconviction, Doc. 5, #224; Reply, Doc. 7). Indeed, Savage first raised this argument to the federal court in his Objections. (Pet. Objs. to R&R, Doc. 10, #327; Pet. Objs. to Supp. R&R, Doc. 13, #347). As a result, the Magistrate Judge could not respond to Savage's subject matter jurisdiction argument until the Supplemental R&R. (Doc. 12, #336–37). Savage's failure to raise this claim in his Petition precludes the Court from relying on it as a basis for habeas relief. *See Biggs v. Coleman*, No. 5:11CV00292, 2014 WL 185893, at \*5 (N.D. Ohio Jan. 15, 2014) (collecting cases).

In any event, even assuming Savage could show his arrest lacked probable cause (which the Court doubts), this does not deprive the Hamilton County Court of

Common Pleas of subject matter jurisdiction to hear his prosecution for robbery. The Hamilton County Court of Common Pleas enjoys “original jurisdiction of all crimes and offenses” within the jurisdiction of Hamilton County, “except in cases of minor offenses,” for which “the exclusive jurisdiction … is vested in courts inferior to the court of common pleas.” *See* Ohio Rev. Code §§ 2931.02, 2931.03. The existence of probable cause has no impact whatsoever on the trial court’s subject matter jurisdiction. Indeed, as the Supplemental R&R rightly pointed out, no other court besides the Hamilton County Court of Common Pleas *could* have heard this case. (Doc. 12, #336).

Therefore, the Court finds that Savage has failed show that the Hamilton County Court of Common Pleas lacked subject matter jurisdiction to try him.

**4. The Court Denies Savage’s Objection That He Would Otherwise Prevail On The Merits Of His Claims.**

Finally, many of Savage’s Objections can be categorized as invitations for the Court to rule on the merits of his claim. For the reasons already stated, the Court has determined that Savage procedurally defaulted every claim before this Court. But even assuming Savage had not procedurally defaulted them, each claim would still fail on the merits.

**a. Savage Fails To Show That Exhibits 17D And 17E Were Falsified.**

In his first ground, Savage asserts his principal complaint—the prosecution, police, and his own defense counsel worked together to place false evidence before the jury to obtain Savage’s conviction. (Petition for Writ, Doc. 1, #7). In Savage’s telling,

the Boost Mobile packaging photos labeled 17D and 17E, (Am. Delayed Postconviction, Doc. 5, #252–53), never appeared at trial. (Pet. Objs. to Supp. R&R, Doc. 13, #342–44). Instead, Savage believes the prosecution at trial submitted Exhibits 17D and 17E as “non material paperwork,” (Reply, Doc. 7, #293), before switching them out for the Boost Mobile depictions. (Pet. Objs. to R&R, Doc. 10, #326). Therefore, there was no opportunity for the prosecution to authenticate them, and the pictures could not be relevant to his conviction. (*Id.*). Savage objects to what he calls the “swap” of Exhibits 17D and 17E, and the conspiracy of various trial actors to accomplish that swap. To Savage, these errors all represent grounds for habeas relief. Considered on the merits, the Court finds Savage’s first ground still fails.

As a threshold matter, Savage’s complaints about authenticity and relevance are not cognizable under federal habeas review. It is hornbook law that federal habeas relief cannot be granted for state court violations of purely state law. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Only “custody in violation of the Constitution or laws or treaties of the United States” warrants relief. 28 U.S.C. § 2241(c)(3). Ohio’s laws govern what evidence is relevant in Ohio court and how that evidence is authenticated. Ohio Evid. R. 401; Ohio Evid. R. 901. Indeed, few bodies of law fit more squarely in the province of state, and not federal, law. See *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). A state evidentiary rule will only raise federal constitutional Due Process concerns if the rule “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 201–02 (1977).

Measured against that standard, Savage’s arguments concerning authentication and relevance do not cut it as a basis for habeas review (although, of course, an intentional swap of exhibits would, which the Court addresses below). (Pet. Obs. to Supp. R&R, Doc. 13, #344–46). In objecting to the Supplemental R&R, Savage cites to Ohio Evidence Rule 901 and Federal Rule of Evidence 901 concerning authentication; Savage fails to cite to any authority concerning relevance. (*Id.* at #343). In so doing, Savage fails to identify any applicable federal constitutional principle or law implicated by the Ohio evidence rules. To the extent that Savage meant to allege that the State’s treatment of Exhibits 17D and 17E was so deficient that it violated the Fourteenth Amendment’s Due Process Clause, he did not properly raise nor brief this argument. *See Johnston v. Hildebrand*, 40 F.4th 740, 749 (6th Cir. 2022) (“We need not consider this argument because ‘[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[.]’”). The Court will not manufacture Savage’s case for him.

As for the alleged swap itself, the Court need not long dwell on Savage’s theory of a conspiracy between the police, prosecution, and his own trial counsel. To borrow a line from Carl Sagan, extraordinary claims require extraordinary evidence. Yet, here, as discussed above, the Court sees no evidence, in the record or otherwise, that provides any plausible support for Savage’s “swap” or conspiracy theories. And as the Second Supplemental R&R notes, the First District Court of Appeals found as a matter of fact that the Boost Mobile packaging *did* indeed appear at trial. (2d Supp. R&R, Doc. 16, #375); *State v. Savage*, No. C-180413, 2019 WL 6353778, at \*4 (Ohio

Ct. App. Nov. 27, 2019). Savage asks the Court to blindly credit his fantastic and unsupported allegations while disregarding the Ohio appeals court's holding. As another court put it, “[t]he main problem with Petitioner's argument is that it presumes facts not in the record and disregards facts that are in the record.” *United States v. Winans*, No. 15-11382, 2017 WL 1354138, \*7 (E.D. Mich. Apr. 13, 2017). The Court declines Savage's invitation to delve into unsubstantiated and non-plausibly alleged theories of official wrongdoing.

**b. The Constitution Does Not Provide Savage A Right To Appeal.**

In his second ground, Savage argues that he was denied his “right to appeal.” (Petition for Writ, Doc. 1, #8). Specifically, Savage argues that the Ohio appeals court violated his rights when it denied his motion for reconsideration after he alleged Exhibits 17D and 17E were falsified. (Reply, Doc. 7, #292–93). The R&R rejected this argument, noting that the federal Constitution guarantees no “right to appeal,” making Savage's contention not cognizable under federal habeas review. (Doc. 9, #310). In his objections, Savage tweaks the point a bit by arguing that the appeals court violated the Constitution by sustaining his conviction based on what he believes is “false evidence.” (Doc. 13, 348–49). Either way, the claim fails.

To start, the R&R is correct that the Constitution does not guarantee a defendant a right to an appeal at all. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894) (“The Federal Constitution imposes on the States no obligation to provide appellate review of criminal

convictions.”). Thus, allegedly “denying” that right cannot provide a basis for habeas relief.

On the false evidence front, Savage quotes *Napue v. Illinois*, 360 U.S. 264 (1959), which he says stands for the proposition that an appellate court cannot affirm a conviction based on knowingly false evidence. (Pet. Objs. to Supp. R&R, Doc. 13, #349–50). More specifically, he observes that *Napue* holds:

[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must still fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.

(*Id.* at #350) (emphasis omitted) (citations omitted) (quoting *Napue*, 360 U.S. at 269). So far, so good. To Savage’s credit, he accurately notes that an appellate court cannot affirm a conviction based on false testimony without violating the Due Process Clause, although one could quibble with his characterization of this as a “right to appeal” issue.

The problem, though, is that the Sixth Circuit uses a three-part test to determine if the use of false testimony violates the Due Process Clause of the Fourteenth Amendment:

In order to establish prosecutorial misconduct or denial of due process, the defendants must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.

*Brooks v. Tennessee*, 626 F.3d 878, 894–95 (6th Cir. 2010) (quoting *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998)) (internal quotation marks omitted). Here, the Court finds that Savage cannot satisfy the first prong—actual falsity. As noted several

times already, Savage has not carried his burden to show that Exhibits 17D and 17E were falsified. Therefore, the First District Court of Appeals did not violate Savage's constitutional rights when it affirmed his conviction.

**c. Savage's Ineffective Assistance Of Counsel Claim Falls Short.**

Finally, Savage's third ground alleges he was denied effective assistance of counsel. (Petition for Writ, Doc. 1, #10). He contends that his trial counsel joined a conspiracy to convict him, evidenced by counsel's failure to object at trial to the depictions of the Boost Mobile packaging and by counsel's "handing over" "falsif[ied]" copies of Exhibits 17D and 17E post-trial. (Pet. Objs. to R&R, Doc. 10, #325; Reply, Doc. 7, #291–92).

As already noted, the R&R correctly concludes that Savage has procedurally defaulted this ground by failing to present it in state court. But even putting that aside, Savage has not properly raised a claim for ineffective assistance of counsel in this Court either. Savage has never, in either his Reply or his Objections, briefed the merits of his ineffective assistance claim. Therefore, it is deemed waived. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997).

Moreover, to the extent that Savage is claiming that his counsel erroneously failed to object to certain exhibits at trial, such evidentiary issues rarely rise to the level of a constitutional violation. *William v. Burt*, 949 F.3d 966, 975 (6th Cir. 2020) ("Absent other indicators, counsel's failure to object could fairly be described as a judgment call by counsel, something that rarely amounts to constitutionally ineffective assistance."); *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984)

(“[C]ounsel is strongly presumed to have rendered adequate assistance.”). Of course, if Savage’s counsel had in fact joined a conspiracy against him, that would be a constitutional violation. U.S. CONST. amend. VI. But at the risk of belaboring the point, Savage has utterly failed to raise any evidence plausibly suggesting that happened here.

In sum, the Court finds that, even if it were inclined to reach the merits of Savage’s arguments, he would not be entitled to habeas relief.

**C. The Magistrate Correctly Rejected Savage’s Motion For An Evidentiary Hearing.**

Perhaps sensing the factual deficiencies in his Petition, Savage separately moved for an evidentiary hearing in his second set of objections. (Pet. Obj. to Supp. R&R, Doc. 13, #350–51). At such an evidentiary hearing, Savage hopes to “test the validity of exhibits 17D and 17E” and bring to light evidence he believes will demonstrate the images of Boost Mobile packaging never appeared trial. (*Id.* at #350). The Second Supplemental R&R included a decision rejecting this Motion, noting “that a federal court’s review of a state court decision under 28 U.S.C. § 2254(d)(1) is strictly limited to ‘review of the state court record,’ and that evidence acquired through use of an evidentiary hearing may not be considered.” (2d Supp. R&R, Doc. 16, #381) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)). This Court agrees.

“[D]istrict courts are precluded from conducting evidentiary hearings to supplement existing state court records when a state court has issued a decision on the merits with respect to the claim at issue.” *Ballinger v. Prelesnik*, 709 F.3d 558, 561 (6th Cir. 2013). A district court may grant an evidentiary hearing as a remedy

once a federal-law error has been found, but not to determine “whether a state court’s adjudication of a claim involved an unreasonable federal-law error.” *Harris v. Haeberlin*, 752 F.3d 1054, 1057 (6th Cir. 2014) (quoting *Pinholster*, 563 U.S. at 184–85).

Here, the Court agrees with the Second Supplemental R&R that granting an evidentiary hearing would be improper. While no state court has directly tested Savage’s conspiracy theory, the First District Court of Appeals ruled on direct appeal that images of Boost Mobile packaging properly appeared at trial. *State v. Savage*, No. C-180413, 2019 WL 6353778, at \*4 (Ohio Ct. App. Nov. 27, 2019). An evidentiary hearing aimed at poking holes in the trial record simply gives Savage the opportunity to “supplement existing state court records” previously ruled on by the state courts. *Ballinger*, 709 F.3d at 561. That, the Court cannot allow.

The Court concludes that the Magistrate Judge did not commit clear error or act contrary to law in denying Savage’s request for an evidentiary hearing. Accordingly, the Court **OVERRULES** Savage’s objections to the Magistrate Judge’s Order denying Savage’s motion for an evidentiary hearing.

**D. The Magistrate Correctly Rejected Savage’s Motion For An Extension Of Time.**

Finally, after filing his most recent round of Objections, Savage moved for a prospective extension of time applicable to all future filings in this case. (Doc. 18, #400). The Magistrate Judge summarily denied this motion (Doc. 20), and Savage objected to this denial. (Doc. 21, #406–47). The Court agrees with the Magistrate Judge. With Savage’s Petition dismissed, there are no anticipated motions, responses,

or other filings for him to make at this time. This makes the Motion for Extension of Time premature. If at some point in the future, Savage needs to request additional time for a filing, he may make that request at that time.

The Court concludes that the Magistrate Judge did not commit clear error or act contrary to law in denying Savage's prospective request for an extension of time. Accordingly, the Court **OVERRULES** Savage's objection.

### **CONCLUSION**

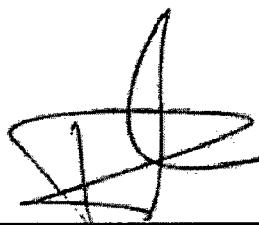
For the reasons set forth above, the Court **OVERRULES** Savage's Objections (Doc. 10) to the R&R (Doc. 9), Objections (Doc. 13) to the Supplemental R&R (Doc. 12), and Objections (Doc. 17) to the Second Supplemental R&R (Doc. 16). Accordingly, the Court **ADOPTS** the R&R (Doc. 9), Supplemental R&R (Doc. 12), and Second Supplemental R&R (Doc. 16) and **DISMISSES** Savage's Habeas Petition (Doc. 1) **WITH PREJUDICE**. The Court **DIRECTS** the Clerk to enter judgment and **TERMINATE** this matter on the Court's docket. Because the Court finds that reasonable jurists would not disagree with this conclusion, the Court **DENIES** Savage a certificate of appealability. Further, the Court **CERTIFIES** that any appeal of this Opinion would be objectively frivolous and should not be permitted to proceed in forma pauperis.

Further, the Court **OVERRULES** Savage's objections to the Magistrate Judge's Orders on his Motion for Stay of Proceedings (Doc. 10) and Motion for Evidentiary Hearing (Doc. 13). The Court further **OVERRULES** Savage's objections

(Doc. 21) to the Magistrate Judge's Order (Doc. 20) on his Motion for Extension of Time (Doc. 18), meaning the Motion is **DISMISSED WITHOUT PREJUDICE**.

**SO ORDERED.**

September 19, 2022  
DATE



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DOUGLAS R. COLE  
UNITED STATES DISTRICT JUDGE

**Additional material  
from this filing is  
available in the  
Clerk's Office.**