APPENDIX A

No. 23-3728

FILED
Feb 1, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN A. BEATTY,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

ORDER

Before: WHITE, Circuit Judge.

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

Beatty pleaded guilty to aggravated burglary, assault on a peace officer, vandalism, possession of criminal tools, and escape. The trial court sentenced Beatty to 11 to 12 1/2 years of imprisonment, and the Ohio Supreme Court affirmed. *See In re Cases Held for State v. Hacker & State v. Simmons*, ___N.E.3d___, 2023 WL 7028390 (Ohio Oct. 26, 2023); *State v. Beatty*, No. 2022-1024 (Ohio Oct. 26, 2023).

In April 2021, Beatty filed an Ohio Rule of Appellate Procedure 26(B) motion to reopen his direct appeal, claiming that his appellate counsel performed ineffectively by not challenging the validity of his guilty plea and the trial court's subject-matter jurisdiction over his prosecution. The Ohio Court of Appeals denied the motion because Beatty did not show that the outcome of his appeal would have been different had appellate counsel raised these two claims. *State v. Beatty*, No. CT2020-0015 (Ohio Ct. App. May 26, 2021).

In July 2022, Beatty filed a § 2254 petition in the district court, claiming that he received ineffective assistance of appellate counsel, his guilty plea to the aggravated-burglary charge was invalid, and the trial court lacked subject-matter jurisdiction over his prosecution. The district court adopted a magistrate judge's report and recommendation that concluded that Beatty's ineffective-assistance claim was meritless and that Beatty procedurally defaulted his other two claims. Accordingly, the court denied Beatty's petition and declined to issue a COA.

Beatty filed a timely notice of appeal and now moves this court for a COA.

Under the Antiterrorism and Effective Death Penalty Act, a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). So, if the state courts adjudicated the petitioner's claim on the merits, the relevant question is whether the district court's application of § 2254(d) to that claim is debatable by jurists of reason. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

When a district court denies a habeas 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 petitioner is not entitled to a COA "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).

Beatty's first claim is that his appellate counsel performed ineffectively by not challenging the validity of his guilty plea to the aggravated-burglary charge and the trial court's subject-matter jurisdiction.

To prevail on an ineffective-assistance-of-counsel claim, the movant must demonstrate both constitutionally deficient performance by his counsel and a reasonable probability that the result of the proceedings would have been different absent counsel's alleged errors. *Strickland v.*

Washington, 466 U.S. 668, 688, 694 (1984). When a prisoner claims that his appellate attorney performed ineffectively, he must demonstrate that the claim that counsel omitted "was clearly stronger than issues that counsel did present" and a reasonable probability that, but for counsel's failure to raise the omitted claim, he would have prevailed. *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013) (quoting *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009)).

Beatty's aggravated-burglary charge stemmed from an incident in which he entered a Walmart store and loaded up a shopping cart with high-priced items. Because he had no apparent means to pay for the items, Beatty was detained on suspicion of shop-lifting. While officers were attempting to verify his identity, Beatty bowled over a deputy sheriff and fled the store. The deputy suffered a broken ankle in the fall. *See State v. Beatty*, No. CT2020-0015, 2021 WL 463642, at *1 (Ohio Ct. App. Feb. 8, 2021), *vacated on other grounds, In re Cases Held for the Decision in State v. Maddox*, 193 N.E.3d 553 (Ohio 2022) (mem.). Beatty was charged with aggravated burglary because the store had previously placed him on a "no trespass" list and he caused physical injury to the deputy during the incident.

In his motion to reopen, Beatty first claimed that his appellate attorney should have argued that his guilty plea was invalid because the Walmart store was not a "residence" or "occupied structure" under the aggravated-burglary statute, Ohio Revised Code § 2911.11(A)(1). The Ohio Court of Appeals denied this claim because Beatty's guilty plea removed the issue of his factual guilt from the case, and thus the result of his appeal would not have changed had counsel raised this issue on direct appeal. Additionally, the court noted that Beatty was a trespasser because the store had placed him on a "no trespass" list and therefore, although the store was open to the public, it was not open to Beatty. The district court concluded that this decision was not contrary to or an unreasonable application of *Strickland*.

Federal habeas courts are bound by a state court's interpretation of state law. *Thomas v. Stephenson*, 898 F.3d 693, 700 n.1 (6th Cir. 2018) (citing *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005)). And here, in view of the Ohio Court of Appeals' determination that the aggravated-burglary statute applied because Beatty was a trespasser in the Walmart store,

reasonable jurists would not debate whether the state court unreasonably determined that appellate counsel's failure to raise this claim did not prejudice Beatty. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Beatty next claimed that his appellate attorney should have argued that the trial court lacked jurisdiction over his prosecution because he was not brought to trial within the time limit for incarcerated persons under Ohio Revised Code § 2941.401. The Ohio Court of Appeals concluded that this alleged error did not prejudice Beatty because he did not submit a request for a final disposition of his case, as § 2941.401 requires for the time limit to apply. The district court concluded that this decision was not contrary to or unreasonable application of *Strickland*. In view of the state court's binding determination that § 2941.401 did not apply to Beatty, reasonable jurists would not debate the district court's resolution of this claim.

Beatty's second and third claims are the substantive claims that underly his ineffective-assistance-of-appellate-counsel claim. The district court concluded that Beatty procedurally defaulted these two claims by not raising them in his direct appeal to the Ohio Court of Appeals. Additionally, the court concluded that ineffective assistance of appellate counsel did not excuse Beatty's default because the claims were meritless.

Federal habeas courts typically may not review procedurally defaulted claims. 28 U.S.C. § 2254(b)(1)(A); *Martin v. Mitchell*, 280 F.3d 594, 603 (6th Cir. 2002). If a state prisoner defaulted his federal claim "in state court pursuant to an independent and adequate state procedural rule," federal habeas review is barred unless he can demonstrate cause and actual prejudice for the default or a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *modified on other grounds by Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

In Ohio, a prisoner must raise issues that are based on the original trial record in his direct appeal; if he fails to raise such an issue on direct appeal, it will be barred by res judicata in post-conviction proceedings. *See State v. Spaulding*, 119 N.E.3d 859, 868 (Ohio Ct. App. 2018). Ohio's doctrine of res judicata is an adequate and independent state ground for denying relief. *Coleman v. Mitchell*, 268 F.3d 417, 427-29 (6th Cir. 2001).

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No. 23-3728

JOHN A. BEATTY,

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v.

JAY FORSHEY, Warden,

Respondent-Appellee.

Before: WHITE, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by John A. Beatty for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John A. Beatty,

Petitioner,

v.

Warden Noble Correctional Institution,

Respondent.

Case No. 2:22-cv-2241

Judge Michael H. Watson

Magistrate Judge Merz

OPINION AND ORDER

John A. Beatty ("Petitioner") objects to aspects of the Report and Recommendations ("R&R") issued by the Magistrate Judge in this habeas corpus case. Obj., ECF Nos. 20 & 23. For the following reasons, the Court **OVERRULES** Petitioner's objections.

I. BACKGROUND

In January 2019, Petitioner was indicted on seven counts, including a count of aggravated burglary and a count of assaulting a peace officer ("Case 1"). State Record, ECF No. 10 at PAGEID # 106–08. While Case 1 was pending, the state court committed Petitioner for a competency evaluation. *Id.* at PAGEID # 120–21. Petitioner tried to escape the commitment and was indicted for that attempt ("Case 2"). *Id.* at PAGEID # 126–27.

Later, Plaintiff pleaded guilty to one count of aggravated burglary, one count of assaulting a peace officer, one count of vandalism, one count of

possession of criminal tools, and one count of escape. *Id.* at PAGEID # 149–55. The state court imposed an aggregate sentence for all counts of conviction in Cases 1 and 2 of eleven to twelve-and-a-half years' imprisonment. *Id.* at PAGEID # 150.

Petitioner appealed both cases to the Fifth District Court of Appeals, which affirmed the trial court. *Id.* at PAGEID # 157, 257–79. Petitioner then appealed issues related to only Case 2 to the Supreme Court of Ohio, which accepted his appeal and remanded to the Fifth District for reconsideration in light of an intervening Supreme Court of Ohio ruling. *Id.* at PAGEID # 281–315. In July 2022, the Fifth District again affirmed Petitioner's convictions and sentences. *Id.* at PAGEID # 384–90. And Petitioner again sought review by the Supreme Court of Ohio, which accepted his appeal. Nov. 8, 2022 Docket Entry, Supreme Court of Ohio Case No. 2022-1024, available at https://www.supremecourt.ohio.gov/clerk/ecms/#/caseinfo/2022/1024.

In the meantime, Petitioner moved to withdraw his guilty plea in both cases and applied to reopen his direct appeal as to Case 1. State Record, ECF No. 10 at PAGEID # 317–19, 323–52. In the application to reopen the direct appeal, Petitioner argued ineffective assistance of appellate counsel. *Id.* at PAGEID # 323–52. Both the motion and the application were denied. *Id.* at PAGEID # 321, 358–362. Petitioner appealed the denial of the application to reopen the appeal to the Supreme Court of Ohio, which declined to accept that appeal. *Id.* at PAGEID # 364–82.

Petitioner then filed this habeas petition, in which he raises three grounds for relief related to Case 1: (1) ineffective assistance of appellate counsel ("Ground One"); (2) Petitioner's plea of guilty to the aggravated robbery offense was invalid ("Ground Two"); and (3) the state court lacked jurisdiction over his case ("Ground Three"). Pet., ECF No. 6.

II. REPORT AND RECOMMENDATION

Pursuant to the Court's General Orders, Magistrate Judge Merz issued an R&R on Petitioner's Petition. R&R, ECF No. 19. The R&R recommends dismissing Ground One because Petitioner did not show his appellate counsel ignored any arguments stronger than the ones appellate counsel did make and dismissing Grounds Two and Three as procedurally defaulted or, in the alternative, without merit. *Id.* Petitioner timely objected to various portions of the R&R, ECF No. 20, and the Court recommitted the matter to the Magistrate Judge for further consideration, ECF No. 21. The Magistrate Judge then issued a Supplemental R&R, which still recommended dismissing all three Grounds. Supp. R&R, ECF No. 22. Petitioner has timely objected to the Supplemental R&R. ECF No. 23.

III. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 72(b), the Court determines de novo those portions of the R&R that were properly objected to.

IV. ANALYSIS

A. Ground One

Petitioner argues his appellate counsel was ineffective. Pet., EF No. 6. Specifically, he argues that his appellate counsel did not raise the following arguments in Petitioner's direct appeal: (1) the trial court improperly expanded the meaning of "occupied structure" for purposes of the aggravated burglary statute; and (2) the trial court lacked jurisdiction over Petitioner's case because it was brought outside the statute of limitations. Reply 2–3, ECF No. 12.

Both R&Rs conclude that Ground One lacks merit and recommend dismissal of the same. R&Rs, ECF Nos. 19 & 22. Petitioner objects, arguing that the Magistrate Judge used the wrong legal standard for the ineffective assistance of counsel claim. Obj., ECF No. 23.

Petitioner argued ineffective assistance of appellate counsel in his application to reopen the direct appeal. State Record, ECF No. 10 at PAGEID # 323–52. The Fifth District denied the application, reasoning as follows:

> In *Strickland v. Washington*, the United States Supreme Court held in order to establish a claim for ineffective assistance of counsel, the appellant must show counsel's performance fell below an objective standard of reasonable representation, and but for counsel's error, the result of the proceedings would have been different.
>
> * * *
>
> Appellant argues his appellate counsel was ineffective in failing to raise on appeal he could not be convicted of aggravated burglary on his plea of guilty because the alleged victim was Walmart, which is a business open to the public.
>
> * * *

> A guilty plea constitutes "an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." . . . Because Appellant entered a guilty plea to aggravated burglary, all issues of factual guilt are removed from the instant case, and Appellant has not demonstrated a reasonable probability of a change in the outcome had counsel raised this issue on direct appeal. Further, the record in this case demonstrates Appellant had been placed on a "no trespass" list at the Walmart in question, and therefore could be found to be a trespasser when he entered the store. While Walmart was "open" to the general public, it was not "open" to him.
>
> Appellant's first claim of ineffective assistance of appellate counsel is overruled.
>
> Appellant argues his trial counsel was ineffective in failing to raise a claim he was not brought to trial within 180 days pursuant to R.C. 2941.401 . . .
>
> * * *
>
> The triggering event for the 180 day time limitation set forth in this statute is the prisoner's delivery of a request for final disposition. Appellant did not make such a request in either of the trial court cases underlying this appeal, and thus R.C. 2941.401 does not apply in the instant case. Appellant has therefore not demonstrated a reasonable probability of a change in the outcome had counsel raised this issue on direct appeal.
>
> Appellant's second claim of ineffective assistance of appellate counsel is overruled.

State Record, ECF No. 10 at PAGEID # 359–62 (internal citations omitted).

As correctly outlined in the R&R, an ineffective assistance of appellate counsel claim is considered under *Strickland v. Washington*, 466 U.S. 668 (1984). *McGowan v. Burgess*, No. 23-1011, 2023 WL 4339296, at *3 (6th Cir. June 9, 2023). The "*Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary

process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing *Strickland*, 466 U.S. at 690). Further, under AEDPA,

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential" . . . and when the two apply in tandem, review is "doubly" so[.] The *Strickland* standard is a general one, so the range of reasonable applications is substantial. . . . Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id. (internal citations omitted).

Specifically for claims of ineffective assistance of appellate counsel, "the *Strickland* performance standard does not require an attorney to raise every non-frivolous issue on appeal." *McGowan*, 2023 WL 4339296, at *3 (internal quotation marks and citation omitted). Instead, "a petitioner must show that the omitted claim was stronger than the issues actually raised." *Id.* (internal quotation marks and citation omitted).

Petitioner's objections related to Ground One fail. Petitioner does not explain how the Fifth District's consideration of his ineffective assistance of counsel claim was unreasonable. Objs., ECF No. 20 & 23. Petitioner likewise offers nothing beyond conclusory statements for why his proposed arguments were "clearly stronger than issues that counsel did present." *McGowan*, 2023 WL 4339296, at *3 (internal quotation marks and citation omitted). Neither does the Court see how the proposed arguments would be stronger. Indeed, the Fifth

District essentially found that it would not have granted relief on these "omitted" assignments of error. State Record, ECF No. 10 at PAGEID # 359–62. In sum, Petitioner has not shown that the state court unreasonably concluded that Petitioner's appellate counsel was not ineffective.

Accordingly, Petitioner's objections to the R&R as to Ground One are overruled.

B. Grounds Two and Three

In Ground Two, Petitioner asserts that his guilty plea was invalid. Pet., ECF No. 6. In Ground Three, Petitioner argues the state trial court lacked jurisdiction over his case because the case schedule violated Petitioner's rights under one of Ohio's speedy trial statutory provisions. *Id.* Both R&Rs conclude that Grounds Two and Three are procedurally defaulted. R&Rs, ECF Nos. 19 & 22. In the alternative, the R&Rs conclude that Grounds Two and Three fail on the merits. *Id.* Petitioner objects. Objs., ECF Nos. 20 &. 23. Petitioner does not address the R&R's conclusion on procedural default, but he argues the Grounds have merit. *Id.*

A claim is procedurally defaulted if a "a habeas petitioner fails to obtain consideration of a claim by a state court," either because of "the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim[.]" *Broom v. Mitchell*, 441 F.3d 392, 401 (6th Cir. 2006) (citation omitted). Procedurally defaulted claims are "not

suitable for consideration by a federal court on habeas review[.]" *McGowan*, 2023 WL 4339296, at *3.

Here, Grounds Two and Three are procedurally defaulted. On his direct appeal to the Fifth District, Petitioner argued that he did not knowingly, intelligently, and voluntarily enter his plea, but he did not raise arguments about the statutory definition of "occupied structure." State Record, ECF No. 10 at PAGEID # 166–200. Petitioner did not appeal any speedy trial or jurisdictional issues to the Fifth District. *Id.* Petitioner similarly did not appeal any issues related to his guilty plea or the timeliness of his case to the Supreme Court of Ohio. *Id.* at PAGEID # 284–301. In his application to reopen the direct appeal, Petitioner argued only ineffective assistance of counsel. *Id.* at PAGEID # 322–52. Thus, Petitioner failed to raise Grounds Two and Three "before the state courts while state-court remedies [were] still available." *Broom*, 441 F.3d at 401 (citation omitted). As a result, Ground two are procedurally defaulted.

To the extent that Petitioner argues that he presented Grounds Two and Three in his application to reopen the direct appeal, that argument fails. True, in the application to reopen the direct appeal, Petitioner argued that his appellate counsel was ineffective for failing to raise the issues underlying Grounds Two and Three. That, however, did not save these grounds now.

To properly exhaust a claim (and, in so exhausting, avoid procedural default), a petitioner "must 'fairly present' the claim in each appropriate state court thereby alerting that court to the federal nature of the claim." *McKay v.*

Genovese, No. 22-5136, 2022 WL 19409797, at *3 (6th Cir. Aug. 8, 2022) (cleaned up). A claim is "fairly presented" when "the petitioner presented both the factual and legal basis for his claim to the state courts." *Maze v. Lester*, 564 F. App'x 172, 178 (6th Cir. 2014) (quotation marks and citations omitted). In other words, to "avoid a procedural default, the petitioner's federal habeas petition must be based on the same theory presented in state court and cannot be based on a wholly separate or distinct theory." *Carter v. Mitchell*, 693 F.3d 555, 568 (6th Cir. 2012) (citation omitted).

Here, Petitioner did not present the issues underlying Grounds Two and Three with the "same theory" he pursues in his habeas petition. True, many facts Petitioner points to in Grounds Two and Three were encompassed by the application to reopen the direct appeal. However, it is "not enough that all the facts necessary to support the federal claim were before the state courts." *Maze*, 564 F. App'x at 178 (quotation marks and citations omitted). In sum, because Petitioner failed to "present the same claim under the same theory to the state and federal courts," his claim is procedurally defaulted. *Id.* at 179 (quotation marks and citations omitted).

A court may excuse procedural default if the petitioner shows "cause and prejudice." *Rogers v. Mays*, 69 F.4th 381, 395 (6th Cir. 2023). Relevant here, "counsel's unconstitutional ineffectiveness in failing properly to preserve a claim for review in state court will suffice as "cause" to excuse a procedural default of

the unpreserved claim." *Henderson v. Mays*, No. 12-5028, 2023 WL 3347496, at *16 (6th Cir. May 10, 2023) (cleaned up).

As discussed above, Petitioner alleges his appellate counsel was ineffective. However, as also discussed above, that argument has no merit. When a petitioner advances a meritless claim of ineffective assistance of appellate counsel, that alleged ineffective assistance cannot be cause and prejudice to excuse procedural default. *See McCray v. Horton*, No. 21-1685, 2022 WL 16645278, at *4 (6th Cir. May 31, 2022) (explaining that the petitioner could not show cause and prejudice based on ineffective assistance of appellant counsel where the petitioner could not show his appellate counsel omitted meritorious arguments). Thus, to the extent that Petitioner argues his procedural default is excusable, such arguments fail.

In sum, Grounds Two and Three must be dismissed as procedurally defaulted.

V. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1).

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists

could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes 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. *Id.*

The Court is not persuaded that reasonable jurists would debate the dismissal of this action. The Court therefore **DECLINES** to issue a certificate of appealability.

VI. CONCLUSION

For these reasons, Petitioner's objections are **OVERRULED**. Both R&Rs are **ADOPTED**. The Clerk is **DIRECTED** to enter judgment for Respondent and close the case.

IT IS SO ORDERED.

Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

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

JOHN A. BEATTY,

Petitioner, : Case No. 2:22-cv-2241

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

WARDEN, Noble Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This habeas corpus case, brought *pro se* by Petitioner John Beatty pursuant to 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. 10), the Return of Writ (ECF No. 11), and the Petitioner's Reply (ECF No. 12). Over Petitioner's opposition (ECF No. 17), Respondent was permitted to file a response to the Reply (ECF No. 15).

The Magistrate Judge reference in this case was recently transferred to the undersigned to help balance the Magistrate Judge workload in the District (ECF No. 18).

Litigation History

On January 23, 2019, a Muskingum County Grand Jury indicted Beatty on one count of aggravated burglary (Count 1), one count of aggravated robbery (Count 2), one count of felonious

assault on a peace officer (Count 3), one count of failure to comply with order or signal of police officer (Count 4), two counts of vandalism (Counts 5 and 6), and one count of possession of criminal tools, including the forfeiture specification (Count 7) in case number CR2019-0035. (Indictment, State Court Record, ECF No. 10, Exhibit 1). Beatty was committed on his counsel's motion, for a competency evaluation. He was then indicted for an escape during that commitment. *Id.* at Ex. 7.

On February 19, 2020, Beatty withdrew his original plea of not guilty and entered a plea of guilty to Count One-aggravated burglary, Count Three-assault on a peace officer as amended from felonious assault, Count Five-vandalism and Count Seven-possession of criminal tools in case number CR2019-0035. *Id.* at Exhibit 11. The parties agreed to recommend eleven years in prison, restitution in the amount of $11,019.86, and forfeiture of the 1997 Toyota Tacoma that was seized in this matter. *Id.*

After sentence, Beatty appealed to the Ohio Fifth District Court of Appeals, which affirmed. *State v. Beatty*, 2021-Ohio-355 (Ohio App. 5th Dist. Feb. 8, 12021). The Supreme Court of Ohio accepted Beatty's appeal, but held briefing pending a decision in *State v. Maddox. State v. Beatty,* 163 Ohio St.3d 1439 (2021). On April 27, 2022, the Ohio Supreme Court reversed and remanded to the Court of Appeals for proceedings consistent with its decision in *Maddox*.

On April 26, 2021, Beatty moved to reopen his direct appeal under Ohio R. App. P. 26(B) (State Court Record, ECF No. 10, Ex. 29). The Fifth District denied the Application. *Id.* at Ex. 31. The Supreme Court of Ohio declined to accept appellate jurisdiction. *State v. Beatty,* 164 Ohio St.3d 1432 (2021).

Upon remand from the Supreme Court of Ohio on direct appeal, the Fifth District determined that application of the Reagan Tokes Act did not violate Beatty's constitutional rights. *State v. Beatty,* 2022 Ohio 2394 (Ohio App. 5th Dist. Jul. 8, 2022). Beatty, *pro se*, filed an appeal of the July 8, 2022, Judgment Entry to the Ohio Supreme Court under Case No. 22-1024. On November 8, 2022, that court

accepted the appeal and held it for decision in two other cases. Magistrate Judge Jolson raised a concern that the pendency of that case might make Beatty's claims unexhausted (ECF No. 2). However both Petitioner and Respondent have clarified that the claims raised in that case are not presented in this habeas corpus case (ECF Nos. 3, 11).

Beatty filed his habeas corpus Petition by depositing it in the prison mail system on May 12, 2022. He pleads the following grounds for relief:

> **Ground One**: Ineffective Assistance of Appellate Counsel
>
> **Supporting Facts**: It is recognized that the strength of this claim is dependent upon the merits of the ancillary claims appellate counsel failed to raise. Appellate counsel had a duty to me to protect my substantive interests and rights. However, appellate counsel failed at this duty by allowing an unlawful conviction to go unchallenged and allowing the state's inefficient enforcement of the law to go unchallenged. Both of these subclaims were overruled pursuant to the state appellate court's enlargement of a definite and precise statute. *Bouie v. City of Columbus[sic],* 378 U.S. 347, 353 (1964).
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> **Ground Two:** Guilty Plea to Aggravated Burglary was invalid because it came to less than all the elements of offense.
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> **Supporting Facts:** A guilty plea is an admission of all the elements of a formal criminal charge. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). In order for a plea to be valid, factual guilt must be established. *Menna v. New York*, 423 U.S. 61, 62 at fn. 2. Albeit Ohio does not require oral presentation of factual basis supporting plea, a defendant becomes victim to "selective enforcement of criminal laws when elements are not supported by facts". *Oyler v. Boles,* 368 U.S. 448, 456 (1962). The facts of CR2019-0035 establish that I was charged and convicted of aggravated burglary to a Walmart store. This was affirmed even though a Walmart store does not meet the legal definition of an "occupied structure". *State v. Calderwood,* 194 Ohio App.3d 438, 2011-Ohio-2913,¶15 (The relevant inquiry in determining whether a structure is occupied concerns the residential purpose of the dwelling, rather than presence or absence of an occupant); *State v Johnson*, 188 Ohio App.3d 438, 2010-Ohio-3345, ¶18 (structure must be dedicated or intended for residential use); *State v. Green*, 18 Ohio App.3d 69 (1984) and *State v. Bock,* 16 Ohio App.3d 146 (1984) (whether permanently or temporarily occupied) and *State v. Wilson*, 58 Ohio St.2d 52, 58-59 (1979) (A structure must be occupied as a permanent

or temporary habitation, as aggravated burglary is designed to protect homes, not businesses). A Walmart store fails on each touchstone.

The state appellate court enlarged O.R.C. §2911.11(A) to include an open business as an "occupied" structure, based upon a civil notice to me. Consequently, the course of proceedings, or mode of conviction, offends the canons of decency and fairness. *Rochin v. California,* 342 U.S. 165, 169 (1952).

Ground Three: A state court is without jurisdiction to convict and punish where the demands of a statute of limitations is not met. (sic)

Supporting Facts: It is a well-known tenet, in Ohio, that the time which an incarcerated defendant must be brought to trial is governed by O.R.C. §2941.401, not O.R.C. §2945.71 et seq. The Legislature has obligated the state to notify an accused person, in writing, who is incarcerated of the right to demand speedy disposition of any pending information, indictment or complaint and the source and contents of such. An inmate's AWARENESS OF ANY pending indictment and rights does not satisfy the notification requirements of O.R.C. §2941.401. By permitting avoidance of this initial duty, the purpose of O.R.C. §2941.401. By permitting avoidance of this initial duty, the purpose of O.R.C. §2941.401 would be circumvented and the state would be relieved of its legal burden to try cases within time constraints imposed by law. *State v. Dillon,* 144 Ohio St.3d 154, 2007-Ohio-3617, ¶23.

Stated differently, the Ohio [G]eneral Assembly, in its wisdom, has elected to obligate the state with the initial duty to notify thee (sic) incarcerated accused of his right to make demand for speedy disposition of pending information, indictment or complaint. It would nullify the entire purpose of O.R.C. §2941.401 if failure to give notice of right would operate to relieve the state of its legal burden to try cases within rule. *State v. Fitch* (5th Dist. 1987), 37 Ohio App.3d 139, 162. This is the rationale of the very state appellate court I was before. Yet, these same principles and tenets didn't apply to me. It has also been ruled that absent advice from the prosecution, time limits must be viewed as commencing upon first triggering event. *State v. Brown* (1998), 131 Ohio App.3d 387, 492, citing *State v. Martin* (1984), 16 Ohio App. 3d 172; *Fitch, supra.*

Consequently, the state appellate court enlarged its previous interpretation of O.R.C. §2941.401 and denied me due process and equal protection of the law. *Bouie, supra.* O.R.C. §2841.401 [sic] is considered a criminal statute of limitations and was designed to

> discourage this type of inefficient or dilatory law enforcement. *United States v. Marion,* 404 U.S. 307, 322 (1971), quoting *United States v. Ewell,* 383 U.S. 116, 122 (1966).

(Petition, ECF No. 6, PageID 86-93).

Analysis

Ground One: Ineffective Assistance of Appellate Counsel

In his First Ground for Relief, Beatty claims he received ineffective assistance of appellate counsel when his appellate attorney did not plead as assignments of error (1) that the trial court had improperly expanded the meaning of the phrase "occupied structure" in the aggravated burglary statute to include an open and occupied Walmart store and (2) that he had not been brought to trial within the time required by Ohio Revised Code § 2941.401. These are the claims of ineffective assistance of appellate counsel Beatty made in his 26(B) Application and Respondent reads the Petition here as raising the same claims. Beatty validates this reading by noting that his appellate attorney did not claim there was no jurisdiction to convict him because a Walmart store is not an occupied structure (Reply, ECF No. 12, PageID 470).

The governing standard for ineffective assistance of trial counsel was adopted by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. In other words, to establish ineffective assistance, a defendant must show both deficient performance and prejudice. *Berghuis v. Thompkins,* 560 U.S. 370, 389 (2010), *citing Knowles v. Mirzayance,* 556 U.S.111 (2009).

With respect to the first prong of the *Strickland* test, the Supreme Court has commanded:

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel=s challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainwright*, 477 U.S. 168 (1986); *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). *See generally* Annotation, 26 ALR Fed 218.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel both at trial and on direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Penson v. Ohio*, 488 U.S. 75 (1988); *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008).

The *Strickland* test applies to appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Burger v. Kemp,* 483 U.S. 776 (1987). To evaluate a claim of ineffective assistance of appellate counsel, then, the court must assess the strength of the claim that counsel failed to raise. *Henness v. Bagley*, 644 F.3d 308 (6th Cir. 2011), *citing Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008). Counsel's failure to raise an issue on appeal amounts to ineffective assistance only if a reasonable probability exists that inclusion of the issue would have changed the result of the appeal. *Id., citing Wilson.*

When a state court decides on the merits a federal constitutional claim later presented to a federal habeas court, the federal court must defer to the state court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785 (2011); *Brown v. Payton,* 544 U.S. 133, 140 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94 (2002); *Williams (Terry) v. Taylor,* 529 U.S. 362, 379 (2000). Deference is also due under 28 U.S.C. § 2254(d)(2) unless the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Respondent asserts the Ohio Court of Appeals decision of Beatty's 26(B) Application is an objectively reasonable decision of the ineffective assistance of appellate counsel claim. Beatty's Reply makes no direct response to this assertion, merely claiming that it is contrary to *Smith v. Robbins* 528 U.S. 259, 288 (2000), and asserting without any analysis that the assignments of error he proposed are "clearly stronger" than those counsel did present (Reply, ECF No. 12, PageID 470).

Beatty's argument is not persuasive. As the Fifth District's decision on the 26(B) Application points out Beatty, pleaded guilty which amounts to, among other things, admitting the

underlying facts, including that the Walmart store was an occupied structure. One does not make an admission of that sort while reserving the power to claim after sentence that the admission was counterfactual. When Beatty moved to withdraw his guilty plea, he made no mention of this issue (State Court Record, ECF No. 10, Ex. 27).

When Betty moved to reopen his appeal, he claimed and was required to show how his ineffective assistance of appellate counsel claim about Walmart's not being an occupied structure was stronger than the claims actually made. He makes no effort to do so, so he cannot make the comparison required by *Strickland.*

Beatty's sole citation to authority is to *Bouie v. City of Columbia*, 378 U.S. 347 (1964)[1]. In that case, the Supreme Court struck down as unconstitutional a new judicial construction of a trespass statute which applied it to persons who failed to leave a store after notice, as opposed to the prior construction, in which it applied only to those who received notice prior to entry. In *Bouie*, the South Carolina Supreme Court had, by a new interpretation of the trespass statute which it applied retrospectively, made criminal conduct which was innocent when it was done: remaining in a place of public accommodation after being asked to leave when one had had no notice before entering the store that one was unwanted. By contrast, Beatty had already been notified that Walmart did not want him on the premises and entered anyway.

In sum, Beatty has made no showing – indeed nothing more than a conclusory claim – that his occupied structure argument is stronger than the arguments his appellate counsel made. Therefore the Fifth District's decision on this issue is entitled to deference under 28 U.S.C. § 2254(d) and Beatty's First Ground for Relief should be denied.

[1] *Bouie* involved a lunch counter sit-in by African-American students in protest of racial segregation of public accommodations.

Ground Two: Invalid Guilty Plea

In his Second Ground for Relief, Beatty makes a direct claim that his guilty plea is invalid because it was to fewer than all the elements of aggravated burglary. Here he challenges the conviction directly as opposed to challenging his appellate counsel's manner of dealing with it. He repeats here the arguments about why the Walmart store is not an occupied structure.

From one perspective, this claim is barred by Beatty's failure to raise it on direct appeal. He offers no excusing cause and prejudice except, perhaps implicitly, his claim that appellate counsel was ineffective in failing to raise it. But to rely on ineffective assistance of appellate counsel as excusing cause and prejudice, one must first present that claim to the state courts. *Edwards v. Carpenter*, 529 U.S. 446 (2000). Beatty has done so, but the Fifth District found the claim to be without merit and the Magistrate Judge has concluded that decision is entitled to deference. *Supra*, Ground One.

From another perspective, if the Court were to reach the merits, the claim would be without merit on the same basis as given under Ground One. Ground Two should therefore be dismissed.

Ground Three: Failure to Try Within the Statute of Limitations

In his Third Ground for Relief, Beatty claims he was not brought to trial within the statute of limitations set forth in Ohio Revised Code § 2949.401. Respondent asserts this claim is barred by procedural default. Because it was apparent on the face of the direct appeal record, it could have been raised on direct appeal. When it was not, it became barred by *res judicata* as stated in Ohio's doctrine of *res judicata* in criminal cases, enunciated in *State v. Perry,* 10 Ohio St. 2d 175

(1967), which is an adequate and independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent,* 17 F.3d 155, 160-61 (6th Cir. 1994)(citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001). Any effort to excuse that procedural default with proof of ineffective assistance of appellate counsel is thwarted by Beatty's failure to establish that defense in his 26(B) Application. *Edwards v. Carpenter*, 529 U.S. 446 (2000).

Even if the Court were able to reach the merit of this claim, Beatty would not prevail. The triggering event for running of the 180-day time limit on trial is the delivery of a demand for trial by the prisoner. The Fifth District found Beatty had never delivered such a demand and Ohio Revised Code § 2949.401 therefore did not apply to him (Judgment Entry, State Court Record, ECF No. 10, Ex. 31, PageID 362). The question of interpretation of an Ohio statute is a question of Ohio law on which this Court is bound by the holdings of the Ohio courts. *Bradshaw v. Richey*, 546 U.S. 74 (2005). Therefore Ground Three is without merit and should be dismissed.

Conclusion

Based on the foregoing analysis, the Magistrate Judge 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*.

April 4, 2023.

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. #

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