APPENDIX

No. 23-3929

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK M. HILL,

Petitioner-Appellant,

v.

WARDEN KENNETH BLACK,

Respondent-Appellee.

ORDER

Before: WHITE, Circuit Judge.

Frederick M. Hill, a pro se Ohio prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Hill moves the court for a certificate of appealability (COA) and for leave to appeal in forma pauperis (IFP) and for appointment of counsel. For the following reasons, the court denies Hill's COA application and denies all other motions as moot.

Local police officers executed a search warrant on a commercial warehouse that Hill was renting and discovered an extensive marijuana growing operation and 62 kilograms of marijuana. Hill was not at the warehouse at the time. Later the same day, an off-duty deputy sheriff who was familiar with the investigation spotted Hill's truck and began tailing Hill in an unmarked police vehicle. Hill fired three shots at the deputy with a .380 caliber pistol and then fled. Hill was subsequently arrested, charged, and convicted in a state jury trial of felonious assault and various firearms and drug offenses and sentenced to a total term of 27 years of imprisonment. The Ohio Court of Appeals affirmed. *State v. Hill*, No. 2017CA00183, 2018 WL 4636196 (Ohio Ct. App. Sept. 24, 2018).

Hill then filed an Ohio Rule of Appellate Procedure 26(B) motion to reopen his direct appeal, claiming in relevant part that his appellate attorney performed ineffectively by not arguing that his second trial attorney performed ineffectively because he withdrew a motion to suppress

evidence seized from the warehouse that his first attorney had filed. According to Hill, officers developed probable cause for the search warrant by circumventing a chain-link fence that surrounded the warehouse and illegally intruding onto the curtilage of the warehouse. The Ohio Court of Appeals denied this claim because the officers detected the odor of marijuana in the warehouse under the constitutionally valid "knock and talk" procedure. *See Kentucky v. King*, 563 U.S. 452, 469 (2011). Further, the court found that the search warrant was not included in the record and reasoned that appellate counsel could not have performed ineffectively by not challenging the validity of a warrant that was not in the record.

The Ohio Supreme Court did not accept Hill's appeal for review. *State v. Hill*, 122 N.E.3d 216 (Ohio 2019) (table).

Next, Hill filed a delayed motion for a new trial in the trial court, claiming that his trial attorney rendered ineffective assistance by not challenging the validity of the search warrant. The trial court denied the motion, the Ohio Court of Appeals affirmed, *State v. Hill*, No. 2020CA00019, 2020 WL 4673902 (Ohio Ct. App. Aug. 11, 2020), and the Ohio Supreme Court did not accept Hill's appeal for review, *State v. Hill*, 216 N.E.3d 699 (Ohio 2023) (table).

In May 2020, Hill filed a § 2254 petition in the district court, claiming that his trial attorney performed ineffectively by not challenging the search of the warehouse (claim 1) and that his appellate counsel performed ineffectively by not advising him of potential post-conviction issues and the relevant procedures for post-conviction proceedings (claim 2).

A magistrate judge issued a report and recommendation that concluded that Hill procedurally defaulted both claims. Further, the magistrate judge concluded that Hill's default of claim 1 was not excused by the allegedly ineffective assistance of his appellate counsel. The magistrate judge found, however, that reasonable jurists could debate whether Hill's trial attorney performed ineffectively. And the magistrate judge further found that reasonable jurists could debate whether Hill's default of claim 1 should be excused due to appellate counsel's alleged ineffectiveness in failing to raise that claim on direct appeal. Accordingly, the magistrate judge recommended granting a COA on the issue of whether the ineffective assistance of appellate

counsel excused Hill's default of claim 1. Alternatively, the magistrate judge concluded that both claims failed on the merits. Hill objected to the magistrate judge's conclusion that his trial-counsel claim was meritless, but not to the conclusion that he procedurally defaulted this claim.

The district court adopted the report and recommendation in part. The court concluded that Hill had forfeited review of the magistrate judge's conclusion that he procedurally defaulted his claims by not objecting to that part of the report and recommendation. The court thus concluded that the only issue preserved for its review was the magistrate judge's conclusion that Hill's attorney did not perform ineffectively by failing to file a motion to suppress. The court then concluded that Hill's attorney did not render ineffective assistance because Hill had not shown that no competent attorney would have concluded that a motion to suppress would have failed under the facts of the case. Further, the court found that reasonable jurists would not debate this conclusion. Accordingly, the court did not adopt the magistrate judge's recommendation to grant Hill a COA on claim 1. In summary, the district court adopted the report and recommendation in part, denied Hill's petition, and declined to grant Hill a COA.

Hill now seeks a COA as to whether (1) the ineffective assistance of his appellate counsel excuses his procedural default of claim 1, and (2) the Fourth Amendment protected the curtilage of his warehouse.

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). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), 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). Where 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. *Miller-El*, 537 U.S. at 336.

When a district court denies a habeas petition on procedural grounds, this 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).

Even if Hill did not procedurally default claim 1, reasonable jurists would not debate whether it is arguably meritorious. *See Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam); *see also Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020) ("[A] court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect.").

To establish ineffective assistance when trial counsel fails to file a motion to suppress, the petitioner must demonstrate that "the meritorious nature of the motion [was] so plain that 'no competent attorney would think a motion to suppress would have failed.'" *Hendrix v. Palmer*, 893 F.3d 906, 922 (6th Cir. 2018) (quoting *Premo v. Moore*, 562 U.S. 115, 124 (2011)). The petitioner also must show that counsel lacked a reasonable strategic rationale for not filing the motion. *Id.*

The Fourth Amendment protects the curtilage of a home. *United States v. May-Shaw*, 955 F.3d 563, 569 (6th Cir. 2020). The curtilage is "the area 'immediately surrounding and associated with the home'" and therefore is considered a "part of the home itself for Fourth Amendment purposes." *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). A police officer's warrantless physical intrusion into the curtilage to gather evidence violates the Fourth Amendment. *See id.* at 11-12.

Yet, "areas that adjoin a commercial building but are accessible to the public do not receive curtilage-like protection." *United States v. Mathis*, 738 F.3d 719, 730 (6th Cir. 2013) (quoting *United States v. Elkins*, 300 F.3d 638, 653 (6th Cir. 2002)). Consequently, in *Elkins* we held that

police officers did not violate the Fourth Amendment when they "walked down a path next to a commercial building and peered through an opening in the building to see marijuana plants inside." *Id.* (citing *Elkins*, 300 F.3d at 654).

In this case, the allegedly unconstitutional search involved a warehouse Hill was renting. *See Hill*, 2018 WL 4636196, at *1. Hill does not claim that he lived in the warehouse or that he used the warehouse for "intimate activities" that are usually associated with a home. *Oliver*, 466 U.S. at 179. Consequently, the area surrounding the building was not entitled to "curtilage-like" protection. *See Mathis*, 738 F.3d at 730. The investigating detective reported that he and another officer approached the warehouse from the north side, which was "completely open." Moreover, Hill admits that the chain-link fence did not enclose the rear of the warehouse. Based on these facts, a competent attorney could have reasonably concluded that the warehouse was accessible to the public through the rear of the property, and therefore that the officers were lawfully at the place where they smelled marijuana in the warehouse. *Cf. United States v. Dunn*, 480 U.S. 294, 304 (1987) ("It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn.").

Accordingly, a competent attorney could have reasonably determined that a motion to suppress would not have been successful.[1] Therefore, a reasonable jurist could not conclude that Hill's ineffective-assistance claim has debatable merit.

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[1] Reasonable jurists would not debate whether a motion to suppress would have fared better under Ohio law. With certain exceptions that are not relevant here, *cf. State v. Brown*, 39 N.E.3d 496, 451 (Ohio 2015); *State v. Brown*, 792 N.E.2d 175, 179 (Ohio 2003), the search and seizure provisions of Section 14, Article I, of the Ohio Constitution are coextensive with the federal Fourth Amendment, *see State v. Robinette*, 685 N.E.2d 762, 767 (Ohio 1997); *State v. Geraldo*, 429 N.E.2d 141, 145 (Ohio 1981). And similar to federal law, Ohio does not recognize the concept of "business curtilage." *See State v. Trammel*, No. 17196, 1999 WL 22884, at *3 (Ohio Ct. App. Jan. 22, 1999) ("[U]sing 'curtilage in connection with commercial premises is somewhat of a misnomer since the term typically is associated with the yard or enclosed space surrounding a dwelling house."). Instead, the relevant inquiry is whether the owner had a reasonable expectation of privacy in the area surrounding the commercial premises. *See id.* at *4. And here, Hill did not have a reasonable expectation of privacy in the area surrounding his warehouse because it was

For these reasons, the court **DENIES** Hill's COA application and **DENIES** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

accessible to the public. *See State v. Paxton*, 615 N.E.2d 1086, 1094 (Ohio Ct. App. 1992); *State v. Taylor*, 401 N.E.2d 459, 462 (Ohio Ct. App. 1978).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3929

FREDERICK M. HILL,

Petitioner-Appellant,

v.

WARDEN KENNETH BLACK,

Respondent-Appellee.

Before: WHITE, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Frederick M. Hill 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, Clerk

No. 23-3929

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK M. HILL,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
WARDEN KENNETH BLACK,	)	
	)	
Respondent-Appellee.	)	

Before: NORRIS, MOORE, and BLOOMEKATZ, Circuit Judges.

Frederick M. Hill petitions for rehearing en banc of this court's order entered on May 30, 2024, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FREDERICK M. HILL,	)	**CASE NO. 5:19-cv-1640**
	)	
Petitioner,	)	**JUDGE CHRISTOPHER A. BOYKO**
	)	
vs.	)	
	)	
WARDEN HAROLD MAY,	)	**OPINION AND ORDER**
	)	
Respondent.	)	

CHRISTOPHER A. BOYKO, J.:

On April 5, 2023 the assigned Magistrate Judge issued a Report and Recommendation ("R&R") (ECF # 27) recommending the Court dismiss and deny Petitioner's Writ of Habeas Corpus under 28 U.S.C. § 2254. (ECF # 1.) The Magistrate Judge also recommended that a certificate of appealability issue on Ground One of the Petition, but not on Ground Two. (ECF # 27.) Respondent objected to the Magistrate Judge's recommendation regarding certificates of appealability (ECF #28) to which Petitioner replied. (ECF # 32.) Petitioner also filed objections to the R&R (ECF # 33) to which Respondent replied. (ECF # 34.)

For the reasons that follow, the R&R is **ACCEPTED IN PART** and **REJECTED IN PART**. Petitioner's Writ of Habeas Corpus under 28 U.S.C. § 2254 is **DISMISSED.**

STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1)(C), "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See also Powell v. United States,* 37 F.3d 1499 (Table), 1994 WL

532926, at *1 (6th Cir. Sept. 30, 1994) ("Any report and recommendation by a magistrate judge that is dispositive of a claim or defense of a party shall be subject to de novo review by the district court in light of specific objections filed by any party."); Fed. R. Civ. P. 72(b)(3) ("[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock,* 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004). After review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

MAGISTRATE JUDGE'S FINDINGS AND PARTIES' OBJECTIONS

The R&R sets forth a lengthy, thorough and detailed factual and procedural history of the case, which the Court adopts in full here. In synopsis, Petitioner is an Ohio inmate currently serving a 27-year term of imprisonment for: (1) one first-degree felony count of Felonious Assault with three Firearm Specifications; (2) one second-degree felony count of Possession of Marijuana; (3) one second-degree felony count of Illegal Cultivation of Marijuana; (4) one third-degree felony count of Discharge of a Firearm near a Prohibited Premises; and (5) one fourth-degree felony count of Improperly Handling a Firearm in a Motor Vehicle.

Petitioner's imprisonment is a result of an investigation into a marijuana grow operation located in a commercial warehouse in Canton, Ohio. The electric bill for the warehouse was in the name of Price is Right Auto Sales, LLC, which was registered in the name of Petitioner. During the investigation, Detective Gambs of the Canton Police Department's Special Investigations Unit and another detective knocked on the doors at the property on April 12, 2017. No one answered. Detective Gambs testified that upon approaching the door on the southwest

side, he could detect the smell of growing marijuana. After obtaining a search warrant for the property, the detectives discovered a marijuana grow operation in the warehouse and collected a total of seventeen trash bags of marijuana totaling more than 62,000 grams.

Deputy Sheriff Blanc of the Stark County Sheriff's Department regularly frequented a gym next to the warehouse and informed Detective Gambs that he had previously seen an orange Dodge Ram parked in front of the warehouse. On the day the search warrant was executed, Blanc went to the gym after work, leaving around 10:45 p.m. At that time, he noticed the orange Dodge Ram parked near the southwest corner of the building. He texted Detective Gambs that he had seen the Dodge Ram at the building and was going to conduct surveillance. Deputy Blanc parked in a parking lot a quarter mile away so that he could observe the Dodge Ram. Deputy Blanc testified that the Dodge Ram drove right past him and stopped. A white male then exited the Dodge Ram holding a firearm.

Deputy Blanc testified that he was not able to reach his firearm and decided to drive away from the area. He testified that the Dodge Ram started following him and eventually pulled up beside him. Blanc testified that he slammed on his brakes and heard three gunshots coming from the Dodge Ram as it went past him.

Petitioner was indicted for the criminal conduct above and plead not guilty. During the pretrial phase, Petitioner, through counsel, filed a preliminary Motion to Suppress Evidence obtained from searches performed of the warehouse and his residence. The trial court did not rule on Petitioner's Motion to Suppress. Instead, on July 10, 2017, the trial court granted the motion of Petitioner's counsel to withdraw. Respondent asserts that Petitioner's new counsel withdrew the Motion to Suppress at an August 7, 2017 hearing. Petitioner does not dispute the assertion.

The decision to not pursue the Motion to Suppress is the central issue in this matter. Petitioner filed a Motion for Leave to File Delayed Motion for New Trial pursuant to Ohio Criminal Rule on the basis that he had newly discovered evidence (from his trial counsel) including: (1) three photographs purportedly showing that the warehouse was completely encircled by a chain-link fence, contrary to the testimony of Detective Gambs; and (2) a "case report" containing information used to obtain the search warrant, which stated that the detective went around the fence, and that the back part of the property was not fenced in. Petitioner argues this discovery should have been used to challenge the search warrant (the basis for his ineffective assistance of trial counsel claim) and that because his appellate counsel also knew about these documents, his appellate counsel was ineffective for not informing Petitioner that he could potentially challenge his conviction collaterally. The trial court denied his motion, finding that it was untimely, but also that the newly discovered evidence would not change the outcome.

Petitioner raises two Grounds for Relief in his habeas corpus petition: (1) ineffective assistance of trial counsel, and (2) ineffective assistance of appellate counsel.

Against this backdrop, the Magistrate Judge recited applicable habeas corpus law and applied the facts to the law to conclude: (1) the Court has jurisdiction over the § 2254 petition, (2) Petitioner's ineffective assistance of trial counsel claim is both procedurally defaulted and fails on the merits, and (3) Petitioner's ineffective assistance of appellate counsel claim is both procedurally defaulted and fails on the merits.[1]

When considering the merits of Petitioner's ineffective assistance of trial counsel claim, the Magistrate Judge concluded that there were sufficient questions about the details of the

[1] For the sake of brevity, this Order and Opinion only includes the facts and detail necessary to resolve the objections. The Report and Recommendation is laudably thorough in its analysis of the issues.

property and the status of the law that Petitioner sought to apply that she could not conclude "the meritorious nature of the motion is so plain that no competent attorney would think a motion to suppress would have failed." Specifically, the Magistrate Judge points to the complicating factor that the neither the search warrant nor the affidavit in support are part of the record such that Petitioner can conclusively state that Detective Gambs "lied" in the affidavit. The matter is made further murkier by Petitioner's own admission that only three quarters of the property was enclosed by a chain-link fence and that there was an opening at the "far back of the property" against a set of railroad tracks. The Magistrate Judge further questioned Petitioner's attempt to extend established United States Supreme Court rulings to the "business curtilage" of the warehouse.

However, the Magistrate Judge found cause to issue a certificate of appealability with regard to Petitioner's Ground One because jurists of good reason could debate whether trial counsel was constitutionally ineffective in withdrawing Petitioner's Motion to Suppress Evidence obtained from the search of the warehouse in light of the limitations on "knock and talks" established by the United States Supreme Court and the undisputed evidence that the warehouse was, at a minimum, surrounded by a fence at three sides such that the detectives had to go around to gain access to the building. The Magistrate Judge also found that jurists of reason could debate whether Mr. Hill's appellate counsel was constitutionally ineffective—thereby excusing Mr. Hill's procedural default of Ground One—in failing to raise the suppression issue on direct appeal despite Petitioner's attempts to do so pro se. The Magistrate Judge found no basis to issue a certificate of appealability with regard to Ground Two.

Petitioner objected to the Magistrate Judge's finding that he has not established that the "meritorious nature of the motion was so plain that no competent attorney would think a motion

to suppress would have failed." In support, Petitioner reiterated the factual history of the Motion to Suppress, adding in that trial counsel was unreasonable in failing to move to unseal the affidavit and search warrant. Further, Petitioner cites *State v. Lewis,* 2011-Ohio-199, Fifth App. Dist. Stark No. 2010 CA 00024 for the proposition he was entitled to examine the affidavit under the Fourth Amendment in order to attack the validity of the search warrant. He next argues that the limitations on "knock and talk" techniques of law enforcement related to residences and established in *Florida v. Jardines*, 569 US 1, (2013) should apply to the "business curtilage" of the warehouse. Petitioner argues these cases, and others, support a finding that the Motion to Suppress is clearly meritorious to the extent that no competent attorney would think it would have failed.

Respondent filed its response to Petitioner's objections arguing at the outset that Petitioner's failure to object to any of the other conclusions of the Magistrate Judge waives review of those matters. He also argues that Petitioner's lone objection does not demonstrate error in law or fact, but merely demonstrates disagreement with the Magistrate Judge's conclusion, which is an improper basis for objection. In response to the merits, Respondent cites *United States v. Mathis,* 738 F.3d 719, 730 (6th Cir. 2013) for the proposition that neither the Sixth Circuit nor the United States Supreme Court has recognized Fourth Amendment protections for business curtilage.

The parties also each filed objections related to the Magistrate Judge's recommendation regarding issuing a certificate of appealability. Respondent argues no certificate of appealability should issue because his ineffective assistance of trial counsel claim is indisputably procedurally defaulted and established precedent does not permit a petitioner to resurrect a procedurally defaulted ineffective assistance of trial counsel claim by invocation of an ineffective assistance

of appellate counsel claim. He further argues nothing in the record permits the Court to excuse Petitioner's procedural faults, and it is not debatable that Petitioner has failed to state a valid claim of a denial of a constitutional right.

Petitioner responds that because he can demonstrate cause for his state court default and prejudice therefrom, his procedural defaults are excused. For cause, Petitioner reiterates the procedural history of the case and for prejudice cites two Ohio state cases: *State v. Trammel,* C.A. Case No. 17196, 1999 Ohio App. LEXIS 120 (Ct. App. Jan. 22, 1999) and *State v. Paxton* (1992), 83 Ohio App. 3d 818, 615 N.E.2d 1086, for the proposition that Fourth Amendment protections extend to the areas surrounding a business and would apply to this matter.

ANALYSIS

As an initial matter, the Court agrees with the Respondent that all matters not objected to are waived for review as long as the parties were properly informed of the consequences of failing to object. *Miller v. Currie,* 50 F.3d 373, 380 (6th Cir. 1995); *see Thomas v. Arn,* 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). The Court finds the parties were so properly informed. Accordingly, the only issues before the Court are whether Petitioner has established the meritorious nature of the Motion to Suppress such that no competent attorney would think it would fail and whether a certificate of appealability should issue.[2]

For the following reasons, the Court finds that Petitioner has not established that the Motion to Suppress was so meritorious that no competent attorney would think it would fail.

An ineffective assistance of counsel claim can flow from a failure to file a plainly meritorious motion to suppress. *Kimmelman v. Morrison,* 477 U.S. 365, 375, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). But "the failure to file a [meritorious] suppression motion does

[2] The Court is not required to address uncontested issues in a report and recommendation. *Javaherpour v. United States,* 315 F. App'x 505, 510 (6th Cir. 2009).

not constitute per se ineffective assistance of counsel." *Id.* at 384. For such a failure to constitute deficient performance, the meritorious nature of the motion must be so plain that "no competent attorney would think a motion to suppress would have failed." *Premo v. Moore,* 562 U.S. 115, 124, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

The Magistrate Judge found that uncertainty in the record and Petitioner's own sworn affidavit created evidentiary questions that precluded an unequivocal finding that the Motion to Suppress would have been successful. The Magistrate Judge further found that application of the law cited by Petitioner was not so clear that it would plainly support Petitioner's argument. Petitioner did not specifically address either of these conclusions in his objection, but instead pointed to cases Petitioner contends is "blackletter law" on the matter. The Court disagrees with Petitioner that the cases cited unequivocally establish that his Motion to Suppress would have been meritorious, nor do they demonstrate clear error of law or fact by the Magistrate Judge.

Specifically, *State v. Lewis,* 2011-Ohio-199, Fifth App. Dist. Stark No. 2010 CA 00024 states that Petitioner had a Fourth Amendment right to examine the affidavit in support of the search warrant. That argument is not at issue here. The issue is whether the Motion to Suppress would have been meritorious. Petitioner makes a logical leap, unsupported by the record, that had the affidavit been unsealed it would have revealed malfeasance by law enforcement and thereby clearly established the meritoriousness of the Motion to Suppress. The Court cannot rely on speculation; it is limited to the state court record before it, *Cullen v. Pinholster,* 563 U.S. 170, 181, 131 S. Ct. 1388, 1398 (2011), which does not include any evidence Detective Gambs ever acted improperly.

Petitioner also argues that he had a reasonable expectation of privacy in the business curtilage of the warehouse such that Detective Gambs initiation of a "knock and talk" was so

obviously constitutionally improper that the Motion to Suppress would have been clearly meritorious. The Court disagrees. As an initial matter, Respondent is correct that neither the Sixth Circuit nor the United States Supreme Court has recognized Fourth Amendment protections for business curtilage. *See United States v. Mathis,* 738 F.3d 719, 730 (6th Cir. 2013). Accordingly, it is an open question as to whether the area Detective Gambs entered into to "knock and talk" was foreclosed to law enforcement. That question is further complicated by the fact that the record contains an admission that the property was not completely enclosed. Petitioner does not address these specific issues. Accordingly, the Court agrees with the Magistrate Judge that between the uncertainty in the record and the uncertainty whether the law applies in the manner Petitioner would like, Petitioner has only potential arguments in support of suppression, but potential is far from meeting the requirement to demonstrate that no competent attorney would think the motion would have failed. Accordingly, Petitioner's objection to the Magistrate Judge's finding that Petitioner's ineffective assistance of trial counsel claim fails on the merits is overruled.

In the absence of a meritorious objection, the Court **ACCEPTS** and **ADOPTS** the Report and Recommendation and finds that Petitioner's ineffective assistance of trial counsel claim is both procedurally defaulted and fails on the merits, and Petitioner's ineffective assistance of appellate counsel claim is both procedurally defaulted and fails on the merits.

Petitioner's Writ of Habeas Corpus is **DISMISSED.**

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When the district court has denied a petition on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The Magistrate Judge recommended the Court issue a certificate of appealability on the basis that jurists of reason could debate whether trial counsel was constitutionally ineffective in withdrawing Petitioner's Motion to Suppress evidence obtained from the search of the warehouse. She also recommended, based on the foregoing, that jurists of reason could debate whether Petitioner's appellate counsel was constitutionally ineffective—thereby excusing Petitioner's procedural default of ground one—in failing to raise the suppression issue on direct appeal despite Petitioner's attempts to do so pro se.

The Court disagrees. Petitioner's constitutional claim is dubious at best. Whether Petitioner had a constitutionally protected expectation in the privacy of the curtilage of the warehouse that was violated by Detective Gambs "knock and talk" is, to be generous, unclear. The Court cannot conclude based on current law that Petitioner had an established Fourth Amendment privacy right in the business curtilage of his warehouse that was not completely enclosed by a fence. Further, even assuming, *arguendo,* that there is a constitutionally protected right to privacy in the business curtilage, applying the facts in the record, the Court cannot conclude that right was violated by Detective Gambs "knock and talk." Further, the above analysis then must be again filtered through the requirements to show ineffective assistance of trial counsel. This is simply a bridge too far to demonstrate a denial of a constitutional right.

The Court finds an appeal from this decision could not be taken in good faith. 28 U.S.C. § 1915(a)(3). Since Petitioner has not made a substantial showing of a denial of a constitutional right directly related to his conviction or custody, the Court declines to issue a certificate of appealability. 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); Rule 11 of Rules Governing § 2254 Cases.

IT IS SO ORDERED.

/s Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: September 29, 2023

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

FREDERICK M. HILL, Petitioner, v. WARDEN HAROLD MAY, Respondent.	)	Case No. 5:19-CV-01640-CAB JUDGE CHRISTOPHER A. BOYKO MAGISTRATE JUDGE JENNIFER DOWDELL ARMSTRONG **REPORT & RECOMMENDATION**

I. INTRODUCTION

Petitioner, Frederick M. Hill ("Mr. Hill"), seeks a writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 1). Mr. Hill is an Ohio inmate currently serving a 27-year term of imprisonment for: (1) one first-degree felony count of felonious assault with three firearm specifications; (2) one second-degree felony count of possession of marijuana; (3) one second-degree felony count of illegal cultivation of marijuana; (4) one third-degree felony count of discharge of a firearm near a prohibited premises; and (5) one fourth-degree felony count of improperly handling a firearm in a motor vehicle.

Mr. Hill, acting *pro se*, asserts two grounds for relief in his petition. *Id.* Respondent, Warden Harold May ("Warden"), filed an answer/return of writ on May 3, 2021. (ECF No. 21). Mr. Hill filed a traverse on June 7, 2021. (ECF No. 24).

This matter was referred to me on September 2, 2022, under Local Rule 72.2 to prepare a report and recommendation on Mr. Hill's petition and other case-dispositive motions. (*See* ECF non-document entry dated September 2, 2022). For the foregoing reasons,

APPENDIX C

I recommend that the Court DISMISS and/or DENY Mr. Hill's claims. I further recommend that this Court grant Mr. Hill a certificate of appealability as to ground one of his petition, but deny him a certificate of appealability as to ground two.

II. RELEVANT FACTUAL BACKGROUND

For purposes of habeas corpus review of state court decisions, a state court's findings of fact are presumed correct and can be contravened only if the habeas petitioner shows, by clear and convincing evidence, that the state court's factual findings are erroneous. 28 U.S.C. § 2254(e)(1); *Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013); *Mitzel v. Tate*, 267 F.3d 524, 530 (6th Cir. 2001). This presumption of correctness applies to factual findings made by a state court of appeals based on the state trial court record. *Mitzel*, 267 F.3d at 530. The Ohio Court of Appeals for the Fifth District summarized the facts as follows:

> {¶4} On March 20, 2017, Detective Jesse Gambs of the Canton Police Department's Special Investigations Unit was assigned to investigate a possible marijuana grow operation located in a commercial warehouse at 1805 Allen Avenue SE in Canton, Ohio. He testified that he began his investigation by obtaining the electric records for that location for the past two years since growing marijuana takes a lot of electricity. The electric bill was in the name of Price is Right Auto Sales, LLC which was registered in the name of Frederick M. Hill of Barberton, Ohio. Detective Gambs testified that he next obtained a search warrant for a thermal imaging of the building. The result was inconclusive. Detective Gambs and another detective knocked on the doors at the property on April 12, 2017. No one answered, but they heard a dog inside. Detective Gambs testified that upon approaching the door on the southwest side, he could detect the smell of growing marijuana.
>
> {¶5} After obtaining a search warrant for the location, on April 12, 2017 at approximately 3:00 p.m., the Detective along with other officers forced entry into the building after no one responded to knocking on the door. No one was present in the building but the officers located a pit bull type of dog. They were able to corral the dog into an office room and then called the Humane Society. The officers then began searching and inventorying the contents of the building and were at the warehouse for over seven hours. They located a marijuana growing operation inside the building that included plants as tall as six feet tall as well as smaller plants in the earlier stages of development. The officers also located fans, air conditioning units, fluorescent lights, discarded empty bottles, gloves, a drying rack hanging from the ceiling with marijuana hanging on it, and chemicals used in a marijuana grow operation. The warehouse also contained a FoodSaver machine allegedly used in packaging the drugs.

{¶6} The officers collected a total of seventeen trash bags of marijuana totaling over 62,000 grams. They also collected the bottles and gloves and sent them for DNA testing.

{¶7} After the officers finished their search, they left a copy of the inventory and search warrant on a table inside the main room. They also left a note asking appellant to call Detective Gambs. The note was left on a door of one of the grow rooms inside the building. The note said "[S]orry we missed you. Can't wait to meet in person, Please call me" with the number of the office phone. Trial Transcript at 244.

{¶8} Deputy Sheriff Jarrod Blanc of the Stark County Sheriff's Department worked out at the gym located next door to the grow operation. He testified that he was contacted by Detective Gambs about the possible grow operation and had conducted the thermal imaging scan of the building as part of the investigation. He testified that he used the gym about four times a week at approximately 6:30 a.m. or 7:30 a.m. and that he had seen an orange Dodge Ram parked in front of the warehouse on one occasion.

{¶9} Deputy Blanc testified that, on April 12, 2017, he went to the gym after work and that, before going to the gym, he was aware that a search warrant was being executed at 1805 Allen because Detective Gambs had told him that they were in the process of obtaining a search warrant. Deputy Blanc testified that he spoke with Detective Gambs and other officers on the scene for about two minutes and then returned to the gym to work out. When he was leaving the gym at approximately 10:45 p.m. in a spare van belonging to the Metro unit that was not a police vehicle and had no identifying markings, lights or sirens, he noticed the orange Dodge Ram parked near the southwest corner of the building. At the time he was wearing his gym shorts. The front driver's door was open and the headlights were on. As he continued driving northbound on Allen Avenue, Deputy Blanc sent Detective Gambs a text message alerting him that he had seen the Dodge Ram at the building and was going to conduct surveillance. Deputy Blanc parked in a parking lot a quarter mile away so that he could observe the Dodge Ram. At the time, his firearm was in his duffel bag behind the seat. Deputy Blanc testified that the Dodge Ram drove right past him and stopped. A white male then exited the Dodge Ram holding a firearm.

{¶10} Deputy Blanc testified that he was not able to reach his firearm and decided to drive away from the area and drove south on Allen Avenue. He testified that the Dodge Ram started following him down Allen Avenue and that when he pulled out onto Cleveland Avenue, the vehicle pulled up beside him. Blanc testified that he slammed on his brakes and heard three gunshots coming from the Dodge Ram as it went past him. He then turned into a Taco Bell lot to retrieve his gun and the Dodge Ram continued past him north on Cleveland Avenue. According to Deputy Blanc, an individual who was waiting in the Taco Bell line told him that the Dodge Ram turned around southbound and followed him. He then called for back-up assistance. Deputy Blanc next retrieved his firearm and credentials and sat inside the van in the Taco Bell parking lot waiting for the suspect to come around the corner and waiting for Canton police officers to arrive as back-up. The Dodge Ram fled. During the incident, Deputy Blanc was on the phone with Detective Gambs telling him where he was at. Once back-up arrived and he got out of his vehicle, Deputy Blanc noticed that a bullet had struck the B pillar,

which is directly behind the driver's shoulder, and the back pillar of the vehicle, which is also on the driver's side. There was testimony at trial that two "ballistic impacts" were found on the van.

{¶11} After the shooting, appellant drove the Dodge Ram to Canal Fulton, Ohio where he abandoned it at Skipco Auto Auctions. Appellant's stepson, who he had called, picked him up and dropped him off at appellant's home in Barberton, Ohio. Two cartridge casings were located on the driver's seat of the Dodge Ram and an unspent bullet (a .380 caliber Hornaday) was on the driver's side door. Thereafter, on April 25, 2017, landscapers found two pistols on Mill Avenue. One was a black Ruger 9 millimeter with an extended clip and the other a silver chrome pistol with no clip. Testing determined that both pistols were operable.

{¶12} At trial, Mike Talkington, a Detective with the Canton Police Department, testified that by using the serial number, manufacturer and caliber of the pistols found by the landscapers, he was able to use a website called eTrace to contact the ATF and traced the silver pistol, a 9 caliber Ruger, to appellant. The website indicted that appellant had purchased the same on December 10, 2015. He testified that he traced the black pistol to Gina Marie Grippe and that the same had been purchased on January 18, 2017.

{¶13} Larry Mackey, a firearms and fingerprint expert, testified that both guns were operable and he opined that the cartridge casings recovered from appellant's vehicle were fired from the silver pistol. He further testified that a latent fingerprint lifted from one of the pistols belonged to appellant.

{¶14} At trial, appellant testified on his own behalf. He testified that he was of Eskimo origin and had developed headaches that became unbearable. Appellant further testified that Eskimo elders told him that the seeds of marijuana plants would provide him with some relief. Because he was unable to find anyone to sell him the seeds, appellant decided to grow the marijuana located in the building to help his health condition. He testified that surgery was not an option because Eskimos did not believe in it. Appellant, when asked, testified that he did not intend to sell any of the marijuana, but wanted to eat the seeds to help him.

{¶15} Appellant further testified that the FoodSaver found in the building was not used to package or vacuum seal marijuana, but was used when he went to a local fishery to get fish guts to be mixed in with the fertilizer.

{¶16} When questioned about the events of April 12, 2017, appellant testified that when he went to the building, he could tell that something was "kind of odd." Trial Transcript at 541. He testified that after unlocking the door to the building, he realized that something was wrong because the dog did not come running and there was "stuff thrown everywhere." Trial Transcript at 542. He saw a little pile of blood with what appeared to be the dog's footprints in it and panicked. Appellant testified that he saw the note left by the Detective which was pinned to the door with a knife and read it. When asked, he testified that at that point, he did not have any idea that the police were involved and did

not see any business card or anything else left behind. He further testified that he did not see the search warrant and a copy of the affidavit and that if they had been left there, he would have seen them.

{¶17} Appellant testified that he then called the number on the note twice, but no one answered. When he exited the building, appellant saw a van. He testified that the van took off towards him and that he had to jump out of the way. Appellant testified that he did not have his gun drawn and did not have his gun on his person at this time. Appellant, who was fearful and had no idea the driver of the van was a police officer, got into his truck to follow the van in order to get the license plate number. He testified that he caught up to the van on Cleveland Avenue and pulled up next to it. The following is an excerpt from appellant's testimony at trial:

{¶18} A: He's in the, the slow lane, what I call the slow lane, the right lane.

{¶19} And, ah, just as I - - we get right about the Taco Bell, I was able to see his, part of his tag number and just about the time that I get just the nose of the truck, just about where that sliding door is, I hear gunshots, you know.

{¶20} And at about that time, that's - - I did have my gun sitting right there. And usually I don't even carry a gun. I don't know why I even had it that night, but I did have it.

{¶21} Q: The, the silver one?

{¶22} A: Yes, sir.

{¶23} Q: That we saw earlier?

{¶24} A: Yes, sir.

{¶25} Q: Okay.

{¶26} A: And, ah - - and I, I fired back twice. You know, he fired at me and I fired back. So.

{¶27} Trial Transcript at 551-552.

{1J28} Appellant testified that he was afraid that someone was chasing him and might pose a danger to his family, so he did not want to park his vehicle in front of his house. He testified that he called his stepson and asked him to meet appellant at Skipco Auto Auction and give appellant a ride home. Appellant testified that he left his vehicle at Skipco and his stepson dropped him off at his home in Barberton, Ohio. According to appellant, he left both his silver pistol and his black pistol inside the vehicle and never discarded them on the side of the road.

(ECF No. 21-2, Exhibit 26); *State v. Hill*, No. 2017CA00183, 2018 WL 4636196, 2018-Ohio-3901 (5th Dist. Sept. 24, 2018).

III. PROCEDURAL HISTORY

A. State Court Conviction

On April 21, 2017, Mr. Hill was indicted on the following offenses: (1) one first-degree felony count of felonious assault, in violation of R.C. § 2903.11(A)(2), with three firearm specifications; (2) one second-degree felony count of possession of marijuana, in violation of R.C. § 2925.11(A)(C)(3)(g); (3) one second-degree felony count of illegal cultivation of marijuana, in violation of R.C. § 2925.04(A)(C)(5)(f); (4) one second-degree felony count of trafficking in marijuana, in violation of R.C. § 2925.03(A)(2)(C)(3)(g); (5) one third-degree felony count of discharge of a firearm on or near prohibited premises, in violation of R.C. § 2923.162(A)(3)(C)(2); and (6) one fourth-degree felony count of improperly handling a firearm in a motor vehicle, in violation of R.C. § 2923.16((A) and/or (B). (ECF No. 21-2, Exhibit 1). Mr. Hill entered pleas of not guilty to all charges.

On May 3, 2017, Mr. Hill, through counsel, filed a request for a bill of particulars. (ECF No. 21-2, Exhibit 3). The State provided a bill of particulars on May 5, 2017. (ECF No. 21-2, Exhibit 4).

On May 25, 2017, Mr. Hill, through counsel, filed a motion to unseal the affidavit, search warrant, inventory, and return relating to the thermal imaging search of the warehouse executed on or about March 25, 2017, and the physical search of the warehouse performed on or about April 12, 2017. (ECF No. 21-2, Exhibit 5). On June 2, 2017, the State filed an opposition to Mr. Hill's motion to unseal, arguing that the affidavit contained information regarding an ongoing investigation. (ECF No. 21-2, Exhibit 7).

On June 2, 2017, Mr. Hill, through counsel, filed a preliminary motion to suppress evidence obtained from searches performed of the warehouse and his residence. (ECF No. 21-2, Exhibit 6). Mr. Hill argued that the searches violated his rights under the Fourth and

Fourteenth Amendments, as well as Article I, Section 14 of the Ohio Constitution, because the State lacked probable cause. *Id.* Mr. Hill also argued that any evidence obtained during or subsequent to those searches was fruit of the poisonous tree and should be suppressed. *Id.*

The trial court did not rule on Mr. Hill's motion to suppress. Instead, on July 10, 2017, the trial court granted the motion of Mr. Hill's counsel to withdraw. (ECF No. 21-2, Exhibit 8). On July 12, 2017, the trial court appointed new counsel to represent Mr. Hill. (ECF No. 21-2, Exhibit 9). The Warden states that Mr. Hill's new counsel withdrew the motion to suppress at an August 7, 2017 hearing. (ECF No. 21, PageID #184). While the transcript of that hearing is not in the record, Mr. Hill does not dispute the Warden's assertion that his counsel withdrew the motion to suppress.

On September 1, 2017, the jury found Mr. Hill guilty on Count One (felonious assault); Count Two (possession of marijuana); Count Three (illegal cultivation of marijuana); Count Five (discharge of a firearm near a prohibited premises); and Count Six (improperly handling a firearm in a motor vehicle). (ECF No. 21-2, Exhibit 12). The jury also found Mr. Hill guilty of all three firearm specifications in connection with Count I. *Id.* The jury was unable to reach a verdict on Count Four (trafficking in marijuana). *Id.* On September 20, 2017, the trial court declared a mistrial as to Count Four and entered a nolle prosequi at the request of the State. (ECF No. 21-2, Exhibits 13-14).

On September 5, 2017, the trial court sentenced Mr. Hill to a term of 11 years on Count One, with an additional term of three years for the firearm specification on Count One, and an additional term of five years on Count One for the specification of discharging a firearm from a motor vehicle. (ECF No. 21-2, Exhibit 16). The trial court merged the other firearm specification into the specification for discharging a firearm from a motor vehicle

(Count Six). *Id.* The trial court ordered that Mr. Hill would serve the sentences for felonious assault and the firearm specifications consecutively. *Id.* The trial court also sentenced Mr. Hill to a term of eight years on Count Two (possession of marijuana), and merged Count Three (illegal cultivation of marijuana) with Count Two after finding that those charges were allied offenses of similar import. *Id.* The trial court further also that the charges in Count Five (discharge of a firearm near a prohibited premises) were allied offenses of similar import and merged Count Five with Count One (felonious assault). *Id.* The trial court sentenced Mr. Hill to a term of 12 months on Count Six. *Id.* Finally, the trial court ordered that Mr. Hill would serve his sentence for Count Two consecutive with the sentence for Count One, and would serve the sentence for Count Six concurrent with the sentence for Count One, for an aggregate sentence of 27 years. *Id.*

B. Direct Appeal

On September 28, 2017, Mr. Hill, through new appellate counsel, timely filed a notice of appeal to the Fifth District Court of Appeals. (ECF No. 21-2, Exhibit 17). Mr. Hill raised the following two claims on direct appeal:

1. The trial court erred when it ordered appellant to serve his firearm specification consecutively with his discharging firearm from motor vehicle specification.

2. The trial court erred by instructing the jury on flight.

Id.

On May 23, 2018, Mr. Hill filed a *pro se* "Legal Notice to All Concerning Parties," stating that he did not want his appellate counsel to represent him because appellate counsel had failed to consult with Mr. Hill before filing the appellate brief and had denied Mr. Hill the opportunity to present errors that could only be raised on direct appeal. (ECF No. 21-2, Exhibit 19). On June 5, 2018, the Fifth Appellate District denied Mr. Hill's motion to require

his appellate counsel to withdraw, stating that appellate counsel had already filed an appellate brief. (ECF No. 21-2, Exhibit 20).

On June 14, 2018, the State filed its appellate brief. (ECF No. 21-2, Exhibit 21). On July 2, 2018, Mr. Hill, acting *pro se*, requested leave to file a supplemental brief pursuant to Ohio Appellate Rule 16(c). (ECF No. 21-2, Exhibit 22). In his memorandum in support, Mr. Hill argued that the search and seizure of his property was illegal and stated that he attempted to have his court-appointed trial counsel file a motion to suppress, but that trial counsel refused to do so. *Id.* Mr. Hill also stated that he "clearly understand[s] how important it is to have this Court review every potential assignment of error committed by the State to properly raise and exhaust them." *Id.* Mr. Hill also stated that he intended to raise several additional grounds for relief if granted leave to file a supplemental brief, including:

> **GROUND NO. 1**: Appellate counsel was ineffective for not raising that trial counsel was ineffective for not filing a motion to suppress evidence which clearly prejudice appellant and denied him due process of law.
>
> **Supporting facts**: It could have been proven through a MOTION TO SUPPRESS EVIDENCE that police officers unlawfully entered Appellant's property without a warrant which the FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION prohibit warrantless searches and seizures.
>
> *Id.*

On July 11, 2018, the Fifth Appellate District denied Mr. Hill's motion to file a supplemental brief. (ECF No. 21-2, Exhibit 23). On September 24, 2018, the Fifth Appellate District issued an opinion affirming the judgment of the trial court. (ECF No. 21-2, Exhibit 26).

C. Ohio Supreme Court

On December 11, 2018, Mr. Hill, acting *pro se*, filed a notice of appeal to the Ohio Supreme Court. (ECF No. 21-2, Exhibit 27). Mr. Hill also filed a motion for a delayed appeal,

stating that he had previously submitted his notice of appeal, but that the clerk had returned the notice because it was not received in time for filing. (ECF No. 21-2, Exhibit 28). On February 6, 2019, the Ohio Supreme Court granted Mr. Hill's motion for a delayed appeal. (ECF No. 21-2, Exhibit 29).

On March 1, 2019, Mr. Hill, acting *pro se*, filed his memorandum in support of jurisdiction in the Ohio Supreme Court. (ECF No. 21-2, Exhibit 30). Mr. Hill raised the following two propositions of law:

1. The trial court erred when it ordered appellant to serve his firearm specification consecutively with his discharging firearm from motor vehicle specification.
2. The trial court erred by instructing the jury on flight.

Id. On May 15, 2019, The Ohio Supreme Court declined to accept jurisdiction of Mr. Hill's appeal pursuant to Ohio S.Ct.Pract.R. 708(B)(4). (ECF No. 21-2, Exhibit 32).

D. Motion for Final Appealable Order

On December 10, 2018, Mr. Hill, acting *pro se*, filed a motion in the trial court pursuant to Ohio Criminal Rule 32(C) requesting entry of a final appealable order. (ECF No. 21-2, Exhibit 33). In his motion, Mr. Hill argued that both the jury verdict and the sentencing order were interlocutory orders because the clerk of court purportedly filed them without the judge's signature. *Id.* On December 19, 2018, the trial court denied Mr. Hill's motion. (ECF No. 21-2, Exhibit 34).

On January 11, 2019, Mr. Hill timely filed a notice of appeal to the Fifth Appellate District from the trial court's order denying Mr. Hill's motion for entry of a final appealable order. (ECF No. 21-2, Exhibit 35). On April 29, 2019, the Fifth Appellate District issued an opinion affirming the judgment of the trial court. (ECF No. 21-2, Exhibit 38). On May 20, 2019, Mr. Hill timely filed a notice of appeal to the Ohio Supreme Court. (ECF No. 21-2,

Exhibit 39). On August 6, 2019, the Ohio Supreme Court declined to accept jurisdiction of Mr. Hill's appeal pursuant to Ohio S.Ct.Pract.R. 708(B)(4). (ECF No. 21-2, Exhibit 41).

E. Rule 26(b) Application to Reopen Appeal

On December 10, 2018, Mr. Hill, acting *pro se*, filed a motion in the Fifth Appellate District to reopen his direct appeal pursuant to Ohio Appellate Rule 26(B). (ECF No. 21-2, Exhibit 42). In his motion, Mr. Hill argued that reopening was warranted because his appellate counsel was ineffective for failing to raise three assignments of error:

1. The trial court violated appellant's constitutional rights and committed plain error when it entered convictions for all offenses against appellant after it failed to provide the jury with verdict forms that identified the degree of the offenses or the statute of the violation of the offenses charged pursuant to R.C. § 2945.75.

2. Trial Court committed plain error where it did not make the statutorily required findings prior to imposing consecutive sentences pursuant to R.C. § 2929.14(C)(4).

3. Trial counsel was ineffective, whereby violating appellant's sixth amendment right to effective assistance of counsel, for not attacking the validity of the search warrant or objecting to the methods of law enforcement's search and seizure procedures that violated the appellant's Fourth Amendment Right to the United States Constitution.

Id.

In support of Assignment of Error Number Three, Mr. Hill argued that "[t]he triggering event of Fourth Amendment analysis in this case is the officers' entry upon the 'perimeter' of appellant's property and subsequent progress through the north side of the fence, around the fence which was not open to the public to the rear of the property, allowing them access to the door where an alleged smell of marijuana was present." *Id.*

The State filed an opposition on January 8, 2019. (ECF No. 21-2, Exhibit 44). With respect to Assignment of Error Number Three, the State argued that appellate counsel could not be ineffective in failing to pursue an appeal because the search warrant was not part of

the record and appellate counsel is confined to the record on appeal. *Id.* On January 24, 2019, Mr. Hill filed a reply, reiterating his argument that the detectives improperly gained access to his property to perform the knock and talk. (ECF No. 21-2, Exhibit 45).

On February 13, 2019, the Fifth Appellate District issued an opinion granting in part and denying in part Mr. Hill's motion to reopen his direct appeal. (ECF No. 21-2, Exhibit 46). The Fifth Appellate District held that Mr. Hill had established a genuine issue as to whether his appellate counsel was ineffective in failing to argue that the verdict form deprived Mr. Hill of his constitutional rights with respect to Count Six (improperly handing a firearm in a motor vehicle) because the verdict form did not set forth the degree of culpability or specify any aggravating factors. *Id.* The Fifth Appellate District remanded the case to the trial court for appointment of new appellate counsel with respect to Mr. Hill's argument that the verdict form was improper with respect to Count Six. *Id.*

The Fifth Appellate District denied Mr. Hill's motion in all other respects. *Id.* With respect to Assignment of Error Number Three, the Fifth Appellate District agreed with the State that Mr. Hill's appellate counsel was not ineffective in failing to challenge the search warrant because the search warrant was not part of the record on appeal. *Id.* The Fifth Appellate District also noted that a "knock and talk" is "recognized as a constitutionally sound police procedure." *Id.* Accordingly, the Fifth Appellate District found that Mr. Hill's appellate counsel was not ineffective in failing to challenge the validity of the search warrant or objecting to the methods of the search and seizure. *Id.*

On March 8, 2019, the State filed a motion in the trial court to vacate Mr. Hill's sentence on Count Six and to dismiss Count Six of the indictment. (ECF No. 21-2, Exhibit 49). The trial court granted the State's motion on March 12, 2019. (ECF No. 21-2, Exhibit

50).

On April 1, 2019, Mr. Hill timely filed a notice of appeal to the Supreme Court of Ohio from the Fifth Appellate District's judgment on Mr. Hill's motion to reopen his direct appeal. (ECF No. 21-2, Exhibit 54). Mr. Hill raised the following propositions of law:

1. Appellate court erred in denying appellant's argument that the trial court violated appellant's constitutional rights and committed plain error when it entered convictions for all offenses against appellant after it failed to provide the jury with verdict forms that identified the degree of the offenses or the statute of the violation of the offenses charged pursuant to R.C. § 2945.75.

2. Appellate court erred in denying appellant's argument that the trial court committed plain error where it did not make the statutorily required findings prior to imposing consecutive sentences pursuant to R.C. § 2929.14(C)(4).

3. Appellate court erred in denying appellant's argument that trial counsel was ineffective, whereby violating appellant's sixth amendment right to effective assistance of counsel, for not attacking the validity of the search warrant or objecting to the methods of law enforcement's search and seizure procedures that violated the appellant's Fourth Amendment Right to the United States Constitution.

(ECF No. 21-2, Exhibit 55). The State moved to dismiss Mr. Hill's appeal for lack of a final appealable order. (ECF No. 21-2, Exhibit 56). On June 12, 2019, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to Ohio S.Ct.Pract.R. 708(B)(4) and denied the State's motion to dismiss the appeal. (ECF No. 21-2, Exhibit 57).

F. Motion for Leave to File Delayed Motion for New Trial

On November 22, 2019, Mr. Hill, proceeding *pro se*, filed a Motion for Leave to File Delayed Motion for New Trial pursuant to Ohio Criminal Rule 33(B). (ECF No. 21-2, Exhibit 58). In his motion, Mr. Hill argued that newly discovered evidence supported his delayed request for a new trial. Specifically, Mr. Hill stated that, on or about January 10, 2019, he received correspondence from his trial attorney dated November 9, 2018. *Id.* Mr. Hill stated that the correspondence included: (1) three photographs purportedly showing that the

warehouse was completely encircled by a chain-link fence, contrary to the testimony of Detective Gambs; and (2) a "case report" containing information used to obtain the search warrant, which stated that the detective went around the fence, and that the back part of the property was not fenced in. *Id.* Mr. Hill claimed that he was not aware his trial counsel possessed documents that could be used to challenge the search warrant until he received this correspondence. *Id.* Mr. Hill also argued that, because his appellate counsel was in possession of these documents, his appellate counsel was ineffective for not informing Mr. Hill that he could potentially challenge his conviction collaterally and for failing to inform Mr. Hill about the procedural rules governing such a challenge. *Id.*

On December 18, 2019, the State filed an opposition to Mr. Hill's motion. (ECF No. 21-2, Exhibit 59). On December 23, 2019, the trial court denied Mr. Hill's motion for a new trial, holding that: (1) Mr. Hill's motion was untimely because he had not filed it within 120 days of the verdict, as required by Ohio Rule of Criminal Procedure 33(B); and (2) the purported newly discovered evidence would not change the outcome of the trial. (ECF No. 21-2, Exhibit 60).

On January 21, 2020, Mr. Hill timely filed a notice of appeal to the Fifth Appellate District. (ECF No. 21-2, Exhibit 61). Mr. Hill raised the following two assignments of error:

1. The trial court abused its discretion when it determined that trial counsel's failure to use available evidence to challenge the manner in which law enforcement obtained the search warrant in violation of the Sixth and Fourteenth Amendment to the United States Constitution, did not create a strong probability of a different outcome were a new trial to be granted.

2. Appellant was denied the effective assistance of appellate counsel, in violation of the Sixth and Fourteenth Amendment to the United States Constitution, when counsel failed to inform his client of the potential post-conviction issues in his case or the mandatory procedures involved with such pleadings.

(ECF No. 21-2, Exhibit 62).

On August 11, 2020, the Fifth Appellate District issued an opinion affirming the trial court's judgment. (ECF No. 21-2, Exhibit 68). The Fifth Appellate District first held that Mr. Hill's assignments of error focused on issues that were not properly before the trial court because the trial court's statements regarding whether Mr. Hill was likely to succeed on the merits were unnecessary to resolve the motion. *Id.*

The Fifth Appellate District also held that Mr. Hill's motion was untimely because a motion for a new trial must be filed within 120 days of the verdict. *Id.* The Fifth Appellate District further rejected Mr. Hill's argument that the motion was timely because it was based on newly discovered evidence. *Id.* The Fifth Appellate district held that Mr. Hill was not unaware of the purported newly discovered facts and was not unavoidably prevented from obtaining them through reasonable diligence. *Id.* The Fifth Appellate District noted that Mr. Hill received the materials in January 2019 but did not file his motion for a new trial until ten months later in November 2019. *Id.* The Fifth Appellate District also held that, while Rule 33(B) does not contain an express time limitation for delayed motions based on newly discovered evidence, "[a] 'trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence.'" *Id.* (quoting *State v. Griffith*, 11th Dist. No. 2005-T-0038, 2006-Ohio-2935, Stark County, Case no. 2020CA00019).

The Fifth Appellate District further held that the evidence Mr. Hill was relying on was not newly discovered. As the court stated:

> {¶26} The newly discovered evidence Hill relies upon in support of his motion was readily available to him and could have been obtained with reasonable diligence. Hill claims that the photographs and the affidavit of the officer are the newly discovered evidence, but the facts purportedly discovered by appellant are not the photographs, but the photographic view of the fence allegedly surrounding the warehouse in which the marijuana was grown. Hill rented the building and presumably was aware of the presence of the gate in the fence blocking the driveway when he visited the building. Though the photographs may memorialize the condition of the fence at the time they

were taken, the view that they provide would have been readily available to Hill and his counsel from the date of his arrest.

Id.

On September 8, 2020, Mr. Hill timely filed a notice of appeal to the Ohio Supreme Court from the Fifth Appellate District's ruling. (ECF No. 21-2, Exhibit 69). On November 10, 2023, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4). (ECF No. 21-2, Exhibit 72).

G. Federal Habeas Action

On July 18, 2019, Mr. Hill, acting *pro se*, filed his 28 U.S.C. § 2254 habeas petition. (ECF No. 1). On September 3, 2019, Mr. Hill filed a motion to withdraw his habeas petition without prejudice (ECF No. 3), which District Judge Christopher A. Boyko granted on November 6, 2019 (ECF No. 4).

On May 11, 2020, Mr. Hill filed a motion for leave to file a petition for writ of habeas corpus and a motion to stay proceedings. (ECF No. 6). On June 5, 2020, Judge Boyko granted Mr. Hill's motion to reopen the case but denied his motion for leave to stay the proceedings. (ECF No. 7). Mr. Hill's habeas petition raises the following two grounds for relief:

1. Defendant was denied the effective assistance of trial counsel, in violation of the Sixth and Fourteenth Amendment to the United States Constitution, when counsel failed to use available evidence to challenge the manner in which law enforcement obtained the search warrant.

2. Defendant was denied the effective assistance of appellate counsel, in violation of the Sixth and Fourteenth Amendment to the United States Constitution, when counsel failed to inform his client of the potential post-conviction issues in his case or the mandatory procedures involved with such pleadings.

(ECF No. 6-1).

On July 15, 2020, Mr. Hill filed a second motion to stay proceedings or, alternatively, to reinstate his motion to dismiss without prejudice pending resolution of his claims in state

court. (ECF Doc No. 10). On September 9, 2020, Magistrate Judge William H. Baughman, Jr. granted Mr. Hill's motion to stay the habeas proceedings pending the resolution of his state court proceedings. (ECF No. 12). On December 28, 2020, Mr. Hill filed a motion to lift the stay (ECF No. 14), which Magistrate Judge Baughman granted on December 29, 2020. (*See* ECF non-document entry dated December 29, 2020).

The Warden filed an answer/return of writ on May 3, 2021. (ECF No. 21). Mr. Hill, acting *pro se*, filed a traverse on June 7, 2021. (ECF No. 24).

IV. STANDARDS OF REVIEW AND GOVERNING LAW

A. Jurisdiction

28 U.S.C. § 2254(a) authorizes this court to entertain an application for a writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." A state prisoner may file a § 2254 petition in the "district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him[.]" 28 U.S.C. § 2241(d). The Stark County Court of Common Pleas sentenced Mr. Hill, and the Court takes judicial notice that Stark County is within this Court's geographic jurisdiction. Accordingly, this Court has jurisdiction over Mr. Hill's § 2254 petition.

B. Exhaustion and Procedural Default

Under AEDPA, state prisoners must exhaust all possible state remedies, or have no remaining state remedies, before a federal court can review a petition for a writ of habeas corpus on the merits. 28 U.S.C. § 2254(b) and (c); *see also Rose v. Lundy*, 455 U.S. 509 (1982). This entails giving the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). In other words, "the highest court in the state in which the petitioner was convicted [must have] been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). The exhaustion requirement, however, "refers only to remedies still available at the time of the federal petition." *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982). It "does not require pursuit of a state remedy where such a pursuit is clearly futile." *Wiley v. Sowders*, 647 F.2d 642, 647 (6th Cir. 1981).

Procedural default is a related but "distinct" concept from exhaustion. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). It occurs when a habeas petitioner fails to obtain consideration of a federal constitutional claim by state courts because he failed to: (1) comply with a state procedural rule that prevented the state courts from reaching the merits of the petitioner's claim; or (2) fairly raise that claim before the state courts while state remedies were still available. *See generally Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87 (1977); *Engle*, 456 U.S. at 125 n.28; *Williams*, 460 F.3d at 806. In determining whether there has been a procedural default, the federal court again looks to the last explained state-court judgment. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); *Combs v. Coyle*, 205 F.3d 269, 275 (6th Cir. 2000). A claim is fairly presented when it has been asserted as a federal constitutional issue at every state of the state court review process. *Thompson v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 285 (6th Cir. 2010); *Williams*, 460 F.3d at 806.

Procedural default, however, can be excused and will not preclude consideration of a claim on federal habeas review if the petitioner can demonstrate: (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law;" or (2) "failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman v. Thompson*,

501 U.S. 722, 750 (1991). A "fundamental miscarriage of justice" can occur only when the procedurally defaulted claim – supported by new reliable evidence not presented at trial – would establish that the petitioner was "actually innocent" of the offense. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006).

C. Cognizable Federal Claim

Under 28 U.S.C. § 2254(a), a state prisoner may challenge his custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." A petitioner's claim is not cognizable on habeas review if it "presents no federal issue at all." *Glaze v. Morgan,* No. 1:19-CV-02974, 2022 WL 467980, at *4 (N.D. Ohio Jan. 18, 2022) (quoting *Bates v. McCaughtry*, 934 F.2d 99, 101 (7th Cir. 1991)). Thus, "errors in application of state law . . . are usually not cognizable in federal habeas corpus." *Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007) (citing *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983)); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions.").

A federal habeas court does not function as an additional state appellate court; it does not review state courts' decisions on state law or procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988) (citing *Oviedo v. Jago*, 809 F.2d 326, 328 (6th Cir. 1987)). Instead, "federal courts must defer to a state court's interpretation of its own rules of evidence and procedure" in considering a habeas petition. *Id.* (quotation omitted). Moreover, "the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998).

D. AEDPA Standard of Review

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act,

Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), provides in relevant part as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(*Id.*)

To determine whether relief should be granted, the Court must use the "look-through" methodology and look to the "last explained state-court judgment" on the petitioner's federal claim. *Ylst*, 501 U.S. at 804 ("The essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play."); *Wilson v. Sellers*, 138 S. Ct. 1188, 1193 (2018) ("We conclude that federal habeas law employs a 'look through' presumption.").

"A decision is 'contrary to' clearly established federal law when 'the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Otte v. Houk*, 654 F.3d 594, 599 (6th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). "Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quotations and citations omitted). "[U]nder the unreasonable application clause, a federal habeas court may grant the writ if the state court

identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). "The unreasonable application clause requires the state court decision to be more than incorrect or erroneous —it must be "objectively unreasonable." *Id.*

Under § 2254(d)(2), "when a federal habeas petitioner challenges the factual basis for a prior state court decision rejecting a claim, the federal court may overturn the state court's decision only if it was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(d)(2)). A state court decision is an "unreasonable determination of the facts" under § 2254(d)(2) only if the trial court made a "clear factual error." *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). A state court's factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Wood v. Allen*, 558 U.S. 290, 301 (2010). Even if "[r]easonable minds reviewing the record might disagree" about the finding in question, "on habeas review that does not suffice to supersede the trial court's ... determination." *Rice v. Collins*, 546 U.S. 333, 341-42 (2006). The prisoner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt*, 571 U.S. at 18 (citing 28 U.S.C. § 2254(e)(1)).

For state prisoners, the § 2254(d) standard "is difficult to meet . . . because it is meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This is because, "[a]s amended by AEDPA, § 2254(d) is meant only to stop short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Id.* at 103. "It preserves authority to issue the writ in cases where there is no possibility [that] fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents" and "goes no further."

Id. Thus, in order to obtain federal habeas corpus relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.*

V. ANALYSIS

A. Ground One: Ineffective Assistance of Trial Counsel

Mr. Hill argues that he was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments because his trial counsel failed to use available evidence to challenge the manner in which law enforcement obtained the search warrant for the warehouse. (ECF No. 6-1.) In particular, Mr. Hill argues that his appointed trial counsel was constitutionally ineffective in abandoning the motion to suppress evidence obtained from the search of the warehouse. Mr. Hill also argues that the motion to suppress was meritorious because the detective who obtained the search warrant lied in his supporting affidavit and in his trial testimony about whether the warehouse was surrounded by a chain link fence. I recommend denying Mr. Hill's petition as to ground one both because Mr. Hill procedurally defaulted the claim and because the claim fails on the merits.

1. Procedural Default

The Warden argues that Mr. Hill has procedurally defaulted his ineffective assistance of trial counsel claim. It is undisputed that Mr. Hill did not raise his ineffective assistance of trial counsel claim on direct appeal. Instead, Mr. Hill argued only that: (1) the trial court erred when it ordered appellant to serve his firearm specification consecutively with his discharging firearm from motor vehicle specification; and (2) the trial court erred by instructing the jury on flight. (ECF No. 21-2, Exhibit 18).

Mr. Hill also attempted to raise the argument in his motion for a new trial in his Motion

Leave to File Delayed Motion for New Trial pursuant to Ohio Criminal Rule 33(B). (ECF No. 21-2, Exhibit 58). However, the trial court denied Mr. Hill's motion, and the Fifth District affirmed, holding that Mr. Hill's motion was untimely. (ECF No. 21-2, Exhibit 68). The Fifth Appellate District's enforcement of Ohio procedural rules constitutes an independent and adequate state ground that a federal court is not free to disturb. *See Kissner v. Palmer*, 826 F.3d 898, 904 (6th Cir. 2016) ("When a state court refuses to consider a habeas claim 'due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas review.'") (quoting *Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000)); *Davis v. Bradshaw*, No. 1:14 CV 2854, 2017 WL 626138, at *11 (N.D. Ohio Feb. 15, 2017) (adopting magistrate judge's recommendation that failure to comply with time requirements of Rule 33(B) constitutes adequate and independent state law ground foreclosing federal habeas relief).

Finally, while Mr. Hill did argue in his Rule 26(B) motion that his *appellate* counsel was ineffective for failing to raise whether trial counsel was ineffective in not pursuing a motion to suppress, it is well-settled that a Rule 26(B) motion raising an effective assistance of appellate counsel claim does not preserve the underlying claim for ineffective assistance of trial counsel. *See Tate v. Bunting*, No. 1:14CV2582, 2016 WL 11371449, at *8 (N.D. Ohio May 31, 2016), *report and recommendation adopted*, 2016 WL 3912481 ("The Sixth Circuit has held that raising an ineffective-assistance claim in a Rule 26(B) application based on appellate counsel's failure to raise an underlying claim does not preserve the underlying claim for federal habeas review, because 'the two claims are analytically distinct.'") (quoting *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005)); *Bibbs v. Bunting*, No. 1:16-cv-02069, 2017

WL 4083558, at *11 (N.D. Ohio May 17, 2017), *report and recommendation adopted*, 2017 WL 4077163 ("while [petitioner's] motion to reopen may have preserved his ineffective assistance of appellate counsel claims, it did not preserve the underlying claims, including the underlying claim of ineffective assistance of trial counsel"); *Heard v. Hudson*, No. 5:07CV3839, 2008 WL 5188274, at *2 (N.D. Ohio Dec. 10, 2008) (holding that "a claim of ineffective assistance of *trial* counsel cannot be raised in a Rule 26(B) application"). As a result, Mr. Hill did not properly present his ineffective assistance of trial counsel claim in Ohio state court, and the claim is procedurally defaulted.

Even though Mr. Hill procedurally defaulted on his ineffective assistance of trial counsel claim, the procedural default can nonetheless be excused if Mr. Hill demonstrates both cause and prejudice. *See Kelly v. Lazaroff*, 846 F.3d 819, 829 (6th Cir. 2017). Mr. Hill argues in his traverse that he has demonstrated "cause" because the documents he received on January 10, 2019 showed that his trial counsel possessed documents that could have been used to challenge the search warrant. (ECF No. 24, PageID # 1715). As the Fifth Appellate District noted, however, that "newly discovered evidence" went to a fact that Mr. Hill already knew as a party renting the warehouse: namely, that it was surrounded by a fence. ECF No. 21-2, Exhibit 68). That evidence therefore cannot constitute "cause" to excuse Mr. Hill's procedural default.

Mr. Hill argues in his traverse that the "newly discovered evidence" was not the existence of the fence, but rather the fact that his trial counsel had the photographs in his possession and thus should have known that the motion to suppress would be meritorious. (ECF No. 24, PageID # 1713). However, as the Fifth Appellate District noted, Mr. Hill waited ten months after receiving the purportedly new evidence before filing his motion seeking a

new trial, and the Fifth Appellate District held that Mr. Hill's failure to act in a timely fashion meant that his motion was not cognizable under Ohio law. (ECF No. 21-2, Exhibit 68).

I also conclude that Mr. Hill cannot rely on the alleged ineffective assistance of his appellate counsel to excuse his procedural default. "The Supreme Court has made clear that attorney error can excuse a petitioner's procedural default, but only where attorney error amounts to ineffective effective assistance of counsel." *Kelly*, 846 F.3d at 829 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). As a result, "the question of whether the actions of [a petitioner's] appellate counsel can excuse the procedural default of his ineffective-assistance-of-trial counsel claim depends on whether [the petitioner's] appellate counsel fell below the standard for constitutionally effective counsel . . . ." *Id.*

A petitioner claiming ineffective assistance of counsel must show that: (1) counsel's representation "fell below an objective standard of reasonableness," such that he was not performing as counsel guaranteed under the Sixth Amendment; and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Under the first prong, the petitioner must overcome the "strong[] presum[ption that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. For prejudice, the petitioner must show that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The *Strickland* standard is "extremely deferential" because "'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Kelly*, 846 F.3d at 829 (6th Cir. 2017) (quoting *Strickland*, 466 U.S. at 690). "[T]he goal is not to ensure that a criminal defendant

be afforded perfect counsel, but rather 'to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* (quoting *Strickland*, 466 U.S. at 687).

Mr. Hill raised an ineffective assistance of appellate counsel claim in his Rule 26(B) motion, and the Fifth Appellate District rejected that claim on the merits. ECF No. 21-2, Exhibit 46). Where the state court reaches the merits of an ineffective assistance of counsel claim, federal habeas courts provide AEDPA deference to that adjudication under § 2254(d). *Perkins v. McKee*, 411 F. App'x 822, 828 (6th Cir. 2011). The Sixth Circuit has emphasized the double layer of deference that federal courts must give state courts in reviewing federal ineffective assistance of counsel claims under AEDPA:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. ... An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so 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. ... 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. (quoting *Harrington*, 131 S.Ct. 770, 786-88).

The Fifth Appellate District held the following in rejecting Mr. Hill's argument that his appellate counsel was ineffective in failing to raise the suppression issue:

> Appellant further contends that his trial counsel was ineffective in failing to challenge the validity of the search warrant or to object to the methods of law enforcement's search and seizure.
>
> In the case sub judice, a search warrant was executed on May 4, 2017 at a location that appellant was renting. The search warrant was based on an affidavit. Appellant's trial counsel filed a motion to unseal the search warrants and appellee, in its response, indicated that the warrant was based on an affidavit containing information relating to

an uncharged suspect or suspects. While appellant's trial counsel filed a Preliminary Motion to Suppress, the motion was abandoned by trial counsel.

As noted by appellee, the search warrant is not part of the record on appeal. As noted by the court in *State v. Ellis*, 8th Dist. Cuyahoga No. 90844, 2009-Qhio-4359, ¶ 6:

> Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 50 N.E. 97; *Carran v. Saline Co.* (1928), 7 Ohio Law Abs. 5 and *Republic Steel Corp. v. Sontag* (1935), 21 Ohio Law Abs. 358. Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter. *See State v. lshmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500. Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649,650, 2001-Ohio1892, 758 N.E.2d 1130. "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke*, 97 Ohio St.3d 55, 2002-0hio-5310, 1J 10, 776 N.E.2d 79.

Appellate counsel cannot be Ineffective in falling to argue that the search warrant was not valid when the warrant was not part of the record.

Appellant also contends that appellate counsel was ineffective in failing to contest the search of the warehouse. However the "knock and talk. effectuated at the door to the warehouse, prior to the discovery of the marijuana, is recognized as a constitutionally sound police procedure. *Kentucky v. King*, 563 U.S .452, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011). "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether [the person at the door is an officer or a private person], the occupant has no obligation to open the door or to speak." *State v. Miller*, 2nd Dist. Montgomery No. 24609, 2012-0hlo5206, 982 N.E.2d 739, 1J 18, citing *King*, *supra*, 131 S.Ct. at 1862. At trial, Detective Gambs testified that upon approaching the door on the southwest side, he could detect the smell of growing marijuana. On such basis, he obtained a search warrant. *See United States v. Charles*, 29 F. Appx. 892,898 (3d Cir.2002) (officer may obtain warrant based on "plain smell" of marijuana from inside house during lawful "knock and talk").

We find that appellate counsel was not ineffective in failing to challenge the validity of the search warrant or to object to the methods of law enforcement's search and seizure.

(ECF No. 21-2, Exhibit 46).

Applying the doubly-deferential standard of review, I conclude the Fifth Appellate District did not err in rejecting Mr. Hill's ineffective assistance of appellate counsel claim

and Mr. Hill has not demonstrated cause and prejudice to excuse his procedural default. As discussed below, however, I believe that reasonable jurists could dispute whether the Fifth Appellate District's application of the "knock and talk" rule in the circumstances presented here is consistent with the Fourth Amendment. I also believe that reasonable jurists could dispute whether Mr. Hill's appellate counsel provided constitutionally adequate representation in failing to raise whether trial counsel was ineffective in withdrawing the motion to suppress despite Mr. Hill's *pro se* attempts to raise the issue. Accordingly, I recommend that Mr. Hill be granted a certificate of appealability with respect to whether his procedural default of ground one should be excused on the basis of ineffective assistance of appellate counsel.

2. Whether Trial Counsel Was Ineffective

Alternatively, I recommend rejecting ground one on the merits, as I find that Mr. Hill's trial counsel was not constitutionally ineffective in failing to pursue the suppression motion.

It is true that a "single, serious error may support a claim of ineffective assistance of counsel," including the failure to file a "plainly meritorious" suppression motion. *Hendrix v. Palmer*, 893 F.3d 906, 922 (6th Cir. 2018) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 303, 385 (1986)); *see also Tankesly v. Mills*, 491 F. App'x 649, 655 (6th Cir. 2012) ("A defense attorney's failure to move to suppress evidence may form the basis of a Sixth Amendment ineffective assistance claim."). However, "the failure to file a [meritorious] suppression motion does not constitute *per se* ineffective assistance of counsel." *Hendrix*, 893 F.3d at 922 (quoting *Kimmelman*, 477 U.S. at 384) (alterations in original). Instead, "[f]or such a failure to constitute deficient performance, the meritorious nature of the motion must be so plain that 'no competent attorney would think a motion to suppress would have failed.'" *Id.* (quoting *Premo v. Moore*, 562 U.S. 115, 124 (2011). In addition, the petitioner must "show

that counsel had no reasonable strategic rationale for not filing the motion." *Id.* I find that Mr. Hill has not met that standard here.

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. In assessing the warrant, the "critical element" is "that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Abernathy*, 843 F.3d 243, 250. (6th Cir. 2016).

There is a presumption that an affidavit supporting a search warrant is valid. *See United States v. Bateman*, 945 F.3d 997, 1008 (6th Cir. 2019). However, despite this presumption, "a search warrant is invalid when the supporting affidavit contains a statement, necessary to the finding of probable cause, that is later demonstrated to be false and included by an affiant knowingly and intentionally, or with a reckless disregard for the truth." *United States v. Duval*, 742 F.3d 246, 250 (6th Cir. 2014) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). "*Franks* also extends to circumstances in which an officer omits evidence in a search-warrant affidavit that is critical to determining the existence of probable cause." *Id.* at 251. "[T]o be constitutionally problematic, the material must have been deliberately or recklessly omitted and must have *undermined* the showing of probable cause." *Id.* (quoting *Franks*, 438 U.S. at 596-97).

Mr. Hill argues that his counsel violated *Strickland* in failing to pursue the suppression

motion because Detective Gambs purportedly lied in his supporting affidavit and at trial regarding the existence of a chain link fence around the warehouse and the steps detectives had to take to gain access to the property. The questions regarding Detective Gambs' affidavit and the steps the detectives took to gain access to the property are important, as Detective Gambs conceded at trial that investigative efforts prior to the "knock and talk" had not borne fruit. (*See* ECF No. 16-2, Exhibit 2, Aug. 29, 2017 Trial Tr. 239:6-241:8).

Evaluation of Mr. Hill's argument is complicated by the fact that neither the search warrant nor the affidavit appears in the record. However, Mr. Hill attached a "case report" to his delayed motion for a new trial, which states that Detective Gambs and another detective "approached from the north side of the building as that side is completely open." (ECF No. 21-2, Exhibit 58-D). Mr. Hill claims that statement was a lie and that the building was completely surrounded by a chain link fence. In his affidavit in support of his motion to reopen his appeal, however, Mr. Hill stated that the chain-linked fence "surrounded three quarters of the property" and that "[t]he only opening was at the far back of the property where the property was placed against a set of railroad tracks." (ECF No. 21-2, Exhibit 43). Given the uncertainty in the record and Mr. Hill's own prior statements that the fence only surrounded the property on three sides, I cannot find that Mr. Hill's trial counsel was constitutionally ineffective in failing to pursue an argument that Detective Gambs knowingly lied in his affidavit such that the search was constitutionally improper.

Mr. Hill also argues that the search was unlawful because the detectives obtained probable cause for the warrant only after trespassing onto the "curtilage" of the property without a warrant in violation of the Fourth Amendment. However, Detective Gambs testified that he and another detective entered the property in an attempt to speak to someone

associated with the warehouse. (ECF No. 21-2, Exhibit 26). As the Fifth Appellate District noted, the "knock and talk" rule is an established exception to the warrant requirement. *See Watson v. Pearson*, 928 F.3d 507, 512 (6th Cir. 2019). Indeed, the United States Supreme Court has held, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). While the Supreme Court clarified in *Jardines* that the scope of the "knock and talk" exception is limited to the activities permitted by a traditional invitation, *id.*, I cannot say that the application of *Jardines* to this case was so clear that Mr. Hill would have been guaranteed to prevail on a motion to suppress.

That is particularly true because the warehouse was a commercial property, not a private residence. Neither the United States Supreme Court nor the Sixth Circuit has decided whether there is such as a thing as "business curtilage." *See United States v. Mathis*, 738 F.3d 719, 730 (6th Cir. 2013) ("while business premises too enjoy Fourth Amendment protections, we have not decided whether there is such a thing as 'business curtilage.'") (citation omitted); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 n.7. While it is unnecessary to decide that question today, the uncertainty regarding whether the curtilage rule applies to commercial businesses further supports the conclusion that Mr. Hill's trial counsel was not ineffective in failing to pursue the motion to suppress.

Thus, while Mr. Hill's trial counsel may have had reasonable arguments in favor of suppression, Mr. Hill has not established that "the meritorious nature of the motion [was] so plain that no competent attorney would think a motion to suppress would have failed." *Hendrix*, 893 F.3d at 922. Accordingly, even if Mr. Hill had not procedurally defaulted his

ineffective assistance of trial counsel claim, I recommend that Mr. Hill's petition be denied on the merits with respect to ground one. However, I believe that reasonable jurists could dispute whether trial counsel was ineffective in light of *Jardines* in withdrawing the motion to suppress for reasons that do not appear in the record. As a result, I recommend that the Court grant Mr. Hill a certificate of appealability with respect to ground one.

B. Ineffective Assistance of Appellate Counsel

In ground two, Mr. Hill argues that his appellate counsel was ineffective in failing to inform him of the potential post-conviction issues in his case and the mandatory procedures involved in filing a post-conviction petition. (ECF No. 6-1.) In particular, Mr. Hill argues that his appellate counsel should have advised him of the need to raise an ineffective assistance of counsel claim in a collateral proceeding and the deadline to bring the claim. In his traverse, Mr. Hill clarifies that ground two is "intended to show justifiable reason for not filing a new trial motion sooner." (ECF No. 24, PageID # 1717). The Warden argues that Mr. Hill procedurally defaulted his ineffective assistance of appellate counsel claim because he did not raise the claim until his Rule 33(B) motion for a new trial, which the Fifth Appellate District rejected as untimely. The Warden is correct.

In *Gunner v. Welch*, 749 F.3d 511 (6th Cir. 2014), the Sixth Circuit held that appellate counsel has an obligation to inform a client of the tine constraints for filing post-conviction relief challenging the effectiveness of trial counsel, and that failure to do so can constitute ineffective assistance of appellate counsel sufficient to excuse a procedural default that would otherwise bar a habeas claim. *Id.* at 516-20. However, "a petitioner is required to exhaust his cause ground in state court." *Williams v. Lazaroff*, 648 F. App'x 548, 553 (6th Cir. 2016). Thus, a petitioner is "required to bring in state court his claim of ineffective assistance of appellate counsel for failing to advise [the petitioner] during his direct appeal of the deadline

for state post-conviction proceedings." *Id.*

Under Ohio law, a petitioner generally must raise an ineffective assistance of appellate counsel claim in an application to reopen the appeal under Ohio Rule of Appellate Procedure 26(B). *See Smith v. Warden*, 780 F. App'x 208, 222 (6th Cir. 2019) (noting that a Rule 26(B) application is the primary procedural vehicle for raising an ineffective assistance of appellate counsel claim under Ohio law). Mr. Hill filed a Rule 26(B) application. However, while Mr. Hill argued in his Rule 26(B) application that his appellate counsel was ineffective in several respects, Mr. Hill did *not* argue that his appellate counsel was ineffective in failing to inform Mr. Hill of the deadlines governing post-conviction relief. ECF No. 21-2, Exhibit 28). And while Mr. Hill did attempt to raise the claim in his motion for leave to file a motion for a new trial, the Fifth Appellate District held that Mr. Hill's motion was untimely under Ohio law. (ECF No. 21-2, Exhibit 68). As noted above, the Fifth Appellate District's ruling that Mr. Hill failed to comply with the time limitations of Rule 33(B) is an independent and adequate state ground that a habeas court cannot revisit. Mr. Hill has thus procedurally defaulted his ineffective assistance of appellate counsel claim. *See Kissner*, 826 F.3d at 904.

Because Mr. Hill has procedurally defaulted his ineffective assistance of appellate counsel claim, he must demonstrate cause and prejudice to excuse the default. Mr. Hill does not point to any cause that would excuse his procedural default, and instead asserts that he raised the claim at the earliest opportunity. (*See* ECF No. 24, PageID # 1717). As the Fifth Appellate District noted, however, Mr. Hill waited ten months after receiving the files from his trial and appellate counsel before he filed his motion. (ECF No. 21-2, Exhibit 68). Mr. Hill thus has not established cause to excuse his procedural default.

Even if Mr. Hill had not procedurally defaulted his ineffective assistance of appellate

counsel claim, the claim fails on the merits. While Mr. Hill relies on *Gunner* for the proposition that his appellate counsel was required to advise him of the deadlines governing collateral proceedings, "*Gunner* did not involve a Rule 26(B) application . . . and the Sixth Circuit has expressly declined to extend it to that context." *Tate*, 2016 WL 11371449 at *9 (citing *McClain v. Kelly*, 631 F. App'x 422, 433-37 (6th Cir. 2015)). As a result, appellate counsel's alleged failure to advise a defendant about the option of filing a Rule 26(B) application "does not constitute cause to excuse the procedural default of his appellate counsel ineffective assistance claims." *Id.* I also have not located any decisions holding that *Gunner* applies to a Rule 33(B) motion for a new trial. Accordingly, Mr. Hill's appellate counsel was not ineffective in purportedly failing to advise Mr. Hill of the post-conviction deadlines applicable to his case.

VI. RECOMMENDATION REGARDING CERTIFICATE OF APPEALABILITY

A. Legal Standard

As amended by AEDPA, 28 U.S.C. § 2253(c)(1) provides that a petitioner may not appeal a denial of an application for a writ of habeas corpus unless a judge issues a certificate of appealability. The statute further provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Although the statute does not define what constitutes a "substantial showing" of a denial of a constitutional right, the burden on the petitioner is obviously less than the burden for establishing entitlement to the writ; otherwise, a certificate could never issue. Rather, the courts that have considered the issue have concluded that "[a] 'substantial showing' requires the applicant to 'demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve

encouragement to proceed further.'" *Hicks v. Johnson*, 186 F.3d 634, 636 (5th Cir. 1999) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 755 (5th Cir. 1996)). The statute requires that certificates of appealability specify which issues are appealable. 28 U.S.C. § 2253(c)(3).

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), 28 U.S.C. foll. § 2254. "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." *Id.*; *see also* 28 U.S.C. § 2253(c)(3) ("The certificate of appealability under [§ 2253(c)(1)] shall indicate which specific issue or issues satisfy the showing required by [§ 2253(c)(2)]."). In light of the Rule 11 requirement that the court either grant or deny the certificate of appealability at the time of its final adverse order, a recommendation regarding the certificate of appealability issue is included here.

B. Analysis

If the Court accepts my recommendations, Mr. Hill will not be able to show that the Court's ruling on his ground two claim is debatable among jurists of reason. With respect to ground one, however, I believe that jurists of reason could debate whether trial counsel was constitutionally ineffective in withdrawing Mr. Hill's motion to suppress evidence obtained from the search of the warehouse in light of the limitations on "knock and talks" that the Supreme Court identified in *Jardines* and the undisputed evidence that the warehouse was, at a minimum, surrounded by a fence at three sides such that the detectives had to go around to gain access to the building. I also believe that jurists of reason could debate whether Mr. Hill's appellate counsel was constitutionally ineffective—thereby excusing Mr. Hill's procedural default of ground one—in failing to raise the suppression issue on direct appeal despite Mr.

Hill's attempts to do so *pro se*. Accordingly, I recommend that Mr. Hill be granted a certificate of appealability with respect to ground one, but not with respect to ground two.

VII. RECOMMENDATION

For the foregoing reasons, I RECOMMEND that the Court DISMISS and/or DENY Mr. Hill's petition for a writ of habeas corpus under 28 U.S.C. § 2254. I also recommend that the Court grant him a certificate of appealability with respect to ground one and deny him a certificate of appealability with respect to ground two.

Dated: April 5, 2023

Jennifer Dowdell Armstrong
Jennifer Dowdell Armstrong
U.S. Magistrate Judge

NOTICE TO PARTIES REGARDING OBJECTIONS

Local Rule 72.3(b) of this Court provides:

> **Any party may object to a Magistrate Judge's proposed findings, recommendations or report made pursuant to Fed. R. Civ. P. 72(b) within fourteen (14) days after being served with a copy thereof, and failure to file timely objections within the fourteen (14) day period shall constitute a waiver of subsequent review, absent a showing of good cause for such failure.** Such party shall file with the Clerk of Court, and serve on the Magistrate Judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. **Any party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.** The District Judge to whom the case was assigned shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. The District Judge need conduct a new hearing only in such District Judge's discretion or where required by law, and may consider the record developed before the Magistrate Judge, making a determination on the basis of the record. The District Judge may also receive further evidence, recall witnesses or recommit the matter to the Magistrate Judge with instructions.

Id. (emphasis added).

Failure to file objections within the specified time may result in the forfeiture or waiver of the right to raise the issue on appeal either to the district judge or in a subsequent appeal to the United States Court of Appeals, depending on how or whether the party responds to the report and recommendation. *Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019). Objections must be specific and not merely indicate a general objection to the entirety of the report and recommendation; a general objection has the same effect as would a failure to object. *Howard v. Sec'y of Health and Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991).

Stated differently, objections should focus on specific concerns and not merely restate the arguments in briefs submitted to the magistrate judge. "A reexamination of the exact same argument that was presented to the Magistrate Judge without specific objections 'wastes judicial resources rather than saving them, and runs contrary to the purpose of the Magistrates Act.'" *Overholt v. Green*, No. 1:17-CV-00186, 2018 WL 3018175, *2 (W.D. Ky. June 15, 2018) (quoting *Howard*). The failure to assert specific objections may in rare cases be excused in the interest of justice. *See United States v. Wandahsega*, 924 F.3d 868, 878-79 (6th Cir. 2019).

No. 23-3929

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK M. HILL,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
WARDEN KENNETH BLACK,	)	
	)	
Respondent-Appellee.	)	

Before: NORRIS, MOORE, and BLOOMEKATZ, Circuit Judges.

Frederick M. Hill, a pro se Ohio prisoner, petitions the court to rehear en banc its order denying his application for a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(b)(1)(A).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Kelly L. Stephens
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: June 11, 2025

Mr. Frederick M. Hill
Richland Correctional Institution
P.O. Box 8107
Mansfield, OH 44901

Re: Case No. 23-3929, *Frederick Hill v. Kenneth Black*
Originating Case No.: 5:19-cv-01640

Dear Mr. Hill,

The court has granted your motion for an extension of time in which to file a petition for rehearing en banc.

Your petition was filed on this date.

Sincerely yours,

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

cc: Ms. Maura O'Neill Jaite

APPENDIX F

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, Plaintiff - Appellee -vs- FREDERICK MARK HILL, Defendant - Appellant	:	JUDGES: Hon. John W. Wise, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 2017CA00183 OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2017-CR-0700

Forchione

JUDGMENT: Affirmed

DATE OF JUDGMENT:

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO
Prosecuting Attorney

By: KATHLEEN O. TATARSKY
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza South, Suite 510
Canton, Ohio 44702-1413

For Defendant-Appellant

GEORGE URBAN
116 Cleveland Ave NW, Suite 808
Canton, Ohio 44702

5D

Baldwin, J.

{¶1} Defendant-appellant Frederick Hill appeals his conviction and sentence from the Stark County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 21, 2017, the Stark County Grand Jury indicted appellant on one count (Count One) of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the first degree, one count (Count Two) of possession of marijuana in violation of R.C. 2925.11(A)(C)(3)(g), a felony of the second degree, one count (Count Three) of illegal cultivation of marijuana in violation of R.C. 2925.04(A)(C)(5)(f), a felony of the second degree, one count (Count Four) of trafficking in marijuana in violation of R.C. 2925.03(A)(2)(C)(3)(g), a felony of the second degree, one count (Count Five) of discharge of a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3)(C)(2), a felony of the third degree, and one count (Count Six) of improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(A) and/or (B), a felony of the fourth degree. The felonious assault count included a firearm specification pursuant to R.C. 2941.145 , a discharging a firearm from a motor vehicle specification pursuant to R.C. 2941.146 and a firearm specification pursuant to R.C. 2941.1412, which prohibits discharging a firearm at a peace officer or corrections officer. At his arraignment on April 28, 2017, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, a jury trial commenced on August 29, 2017. The following testimony was adduced at the trial.

{¶4} On March 20, 2017, Detective Jesse Gambs of the Canton Police Department's Special Investigations Unit was assigned to investigate a possible

marijuana grow operation located in a commercial warehouse at 1805 Allen Avenue SE in Canton, Ohio. He testified that he began his investigation by obtaining the electric records for that location for the past two years since growing marijuana takes a lot of electricity. The electric bill was in the name of Price is Right Auto Sales, LLC which was registered in the name of Frederick M. Hill of Barberton, Ohio. Detective Gambs testified that he next obtained a search warrant for a thermal imaging of the building. The result was inconclusive. Detective Gambs and another detective knocked on the doors at the property on April 12, 2017. No one answered, but they heard a dog inside. Detective Gambs testified that upon approaching the door on the southwest side, he could detect the smell of growing marijuana.

{¶5} After obtaining a search warrant for the location, on April 12, 2017 at approximately 3:00 p.m., the Detective along with other officers forced entry into the building after no one responded to knocking on the door. No one was present in the building but the officers located a pit bull type of dog. They were able to corral the dog into an office room and then called the Humane Society. The officers then began searching and inventorying the contents of the building and were at the warehouse for over seven hours. They located a marijuana growing operation inside the building that included plants as tall as six feet tall as well as smaller plants in the earlier stages of development. The officers also located fans, air conditioning units, fluorescent lights, discarded empty bottles, gloves, a drying rack hanging from the ceiling with marijuana hanging on it, and chemicals used in a marijuana grow operation. The warehouse also contained a FoodSaver machine allegedly used in packaging the drugs.

{¶6} The officers collected a total of seventeen trash bags of marijuana totaling over 62,000 grams. They also collected the bottles and gloves and sent them for DNA testing.

{¶7} After the officers finished their search, they left a copy of the inventory and search warrant on a table inside the main room. They also left a note asking appellant to call Detective Gambs. The note was left on a door of one of the grow rooms inside the building. The note said "[S]orry we missed you. Can't wait to meet in person, Please call me" with the number of the office phone. Trial Transcript at 244.

{¶8} Deputy Sheriff Jarrod Blanc of the Stark County Sheriff's Department worked out at the gym located next door to the grow operation. He testified that he was contacted by Detective Gambs about the possible grow operation and had conducted the thermal imaging scan of the building as part of the investigation. He testified that he used the gym about four times a week at approximately 6:30 a.m. or 7:30 a.m. and that he had seen an orange Dodge Ram parked in front of the warehouse on one occasion.

{¶9} Deputy Blanc testified that, on April 12, 2017, he went to the gym after work and that, before going to the gym, he was aware that a search warrant was being executed at 1805 Allen because Detective Gambs had told him that they were in the process of obtaining a search warrant. Deputy Blanc testified that he spoke with Detective Gambs and other officers on the scene for about two minutes and then returned to the gym to work out. When he was leaving the gym at approxiamley 10:45 p.m. in a spare van belonging to the Metro unit that was not a police vehicle and had no identifying markings, lights or sirens, he noticed the orange Dodge Ram parked near the southwest corner of the building. At the time he was wearing his gym shorts. The front driver's door

was open and the headlights were on. As he continued driving northbound on Allen Avenue, Deputy Blanc sent Detective Gambs a text message alerting him that he had seen the Dodge Ram at the building and was going to conduct surveillance. Deputy Blanc parked in a parking lot a quarter mile away so that he could observe the Dodge Ram. At the time, his firearm was in his duffel bag behind the seat. Deputy Blanc testified that the Dodge Ram drove right past him and stopped. A white male then exited the Dodge Ram holding a firearm.

{¶10} Deputy Blanc testified that he was not able to reach his firearm and decided to drive away from the area and drove south on Allen Avenue. He testified that the Dodge Ram started following him down Allen Avenue and that when he pulled out onto Cleveland Avenue, the vehicle pulled up beside him. Blanc testified that he slammed on his brakes and heard three gunshots coming from the Dodge Ram as it went past him. He then turned into a Taco Bell lot to retrieve his gun and the Dodge Ram continued past him north on Cleveland Avenue. According to Deputy Blanc, an individual who was waiting in the Taco Bell line told him that the Dodge Ram turned around southbound and followed him. He then called for back-up assistance. Deputy Blanc next retrieved his firearm and credentials and sat inside the van in the Taco Bell parking lot waiting for the suspect to come around the corner and waiting for Canton police officers to arrive as back-up. The Dodge Ram fled. During the incident, Deputy Blanc was on the phone with Detective Gambs telling him where he was at. Once back-up arrived and he got out of his vehicle, Deputy Blanc noticed that a bullet had struck the B pillar, which is directly behind the driver's shoulder, and the back pillar of the vehicle, which is also on the driver's side. There was testimony at trial that two "ballistic impacts" were found on the van.

{¶11} After the shooting, appellant drove the Dodge Ram to Canal Fulton, Ohio where he abandoned it at Skipco Auto Auctions. Appellant's stepson, who he had called, picked him up and dropped him off at appellant's home in Barberton, Ohio. Two cartridge casings were located on the driver's seat of the Dodge Ram and an unspent bullet (a .380 caliber Hornaday) was on the driver's side door. Thereafter, on April 25, 2017, landscapers found two pistols on Mill Avenue. One was a black Ruger 9 millimeter with an extended clip and the other a silver chrome pistol with no clip. Testing determined that both pistols were operable.

{¶12} At trial, Mike Talkington, a Detective with the Canton Police Department, testified that by using the serial number, manufacturer and caliber of the pistols found by the landscapers, he was able to use a website called eTrace to contact the ATF and traced the silver pistol, a 9 caliber Ruger, to appellant. The website indicted that appellant had purchased the same on December 10, 2015. He testified that he traced the black pistol to Gina Marie Grippe and that the same had been purchased on January 18, 2017.

{¶13} Larry Mackey, a firearms and fingerprint expert, testified that both guns were operable and he opined that the cartridge casings recovered from appellant's vehicle were fired from the silver pistol. He further testified that a latent fingerprint lifted from one of the pistols belonged to appellant.

{¶14} At trial, appellant testified on his own behalf. He testified that he was of Eskimo origin and had developed headaches that became unbearable. Appellant further testified that Eskimo elders told him that the seeds of marijuana plants would provide him with some relief. Because he was unable to find anyone to sell him the seeds, appellant decided to grow the marijuana located in the building to help his health condition. He

testified that surgery was not an option because Eskimos did not believe in it. Appellant, when asked, testified that he did not intend to sell any of the marijuana, but wanted to eat the seeds to help him.

{¶15} Appellant further testified that the FoodSaver found in the building was not used to package or vacuum seal marijuana, but was used when he went to a local fishery to get fish guts to be mixed in with the fertilizer.

{¶16} When questioned about the events of April 12, 2017, appellant testified that when he went to the building, he could tell that something was "kind of odd." Trial Transcript at 541. He testified that after unlocking the door to the building, he realized that something was wrong because the dog did not come running and there was "stuff thrown everywhere." Trial Transcript at 542. He saw a little pile of blood with what appeared to be the dog's footprints in it and panicked. Appellant testified that he saw the note left by the Detective which was pinned to the door with a knife and read it. When asked, he testified that at that point, he did not have any idea that the police were involved and did not see any business card or anything else left behind. He further testified that he did not see the search warrant and a copy of the affidavit and that if they had been left there, he would have seen them.

{¶17} Appellant testified that he then called the number on the note twice, but no one answered. When he exited the building, appellant saw a van. He testified that the van took off towards him and that he had to jump out of the way. Appellant testified that he did not have his gun drawn and did not have his gun on his person at this time. Appellant, who was fearful and had no idea the driver of the van was a police officer, got into his truck to follow the van in order to get the license plate number. He testified that

he caught up to the van on Cleveland Avenue and pulled up next to it. The following is an excerpt from appellant's testimony at trial:

{¶18} A: He's in the, the slow lane, what I call the slow lane, the right lane.

{¶19} And, ah, just as I - - we get right about the Taco Bell, I was able to see his, part of his tag number and just about the time that I get just the nose of the truck, just about where that sliding door is, I hear gunshots, you know.

{¶20} And at about that time, that's - - I did have my gun sitting right there. And usually I don't even carry a gun. I don't know why I even had it that night, but I did have it.

{¶21} Q: The, the silver one?

{¶22} A: Yes, sir.

{¶23} Q: That we saw earlier?

{¶24} A: Yes, sir.

{¶25} Q: Okay.

{¶26} A: And, ah - - and I, I fired back twice.

You know, he fired at me and I fired back. So.

{¶27} Trial Transcript at 551-552.

{¶28} Appellant testified that he was afraid that someone was chasing him and might pose a danger to his family, so he did not want to park his vehicle in front of his house. He testified that he called his stepson and asked him to meet appellant at Skipco Auto Auction and give appellant a ride home. Appellant testified that he left his vehicle at Skipco and his stepson dropped him off at his home in Barberton, Ohio. According to

appellant, he left both his silver pistol and his black pistol inside the vehicle and never discarded them on the side of the road.

{¶29} At the conclusion of the testimony and the end of deliberations, the jury, on August 31, 2017, found appellant guilty of all of the counts and specifications with the exception that the jury was unable to reach a verdict on Count Four, trafficking marijuana, and the trial court declared a mistrial as to that count. At the request of appellee, a nolle proesequi was entered on such count on September 20, 2017. As memorialized in an Entry filed on September 20, 2017, appellant was sentenced to eleven (11) years in prison for the charge of felonious assault (Count One) and to three (3) years in prison for the accompanying firearm specification pursuant to R.C. 2941.145. The trial court ordered that the two run consecutively. Appellant also was sentenced to five (5) years in prison for discharging a firearm from a motor vehicle, to be served consecutive with Count One. The trial court merged the firearm specification pursuant to R.C. 2941.1412 as contained in Count One into the specification of discharging a firearm from a motor vehicle as contained in Count One. Appellant also was sentenced to eight (8) years in prison on the charge of possession of marijuana (Count Two) and the trial court merged Count Three with Count Two. The trial court also merged Count Five with Count One. The trial court also sentenced appellant to twelve (12) months in prison for the charge of improperly handling firearms in a motor vehicle as contained in Count Six and ordered that appellant serve Count Two consecutive with Count One and Count Six concurrent with Count One. Appellant was sentenced to a total prison term of 27 years.

{¶30} Appellant now raises the following assignments of error on appeal:

{¶31} "I. THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT TO SERVE HIS FIREARM SPECIFICATION CONSECUTIVELY WITH HIS DISCHARGING A FIREARM FROM A MOTOR VEHICLE SPECIFICATION."

{¶32} "II. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FLIGHT."

I

{¶33} Appellant, in his first assignment of error, argues that the trial court erred when it ordered appellant to serve the three (3) year sentence for the firearm specification and the five (5) year sentence for discharging firearms from motor vehicle specification consecutively. Appellant contends that that trial court should have run the sentences concurrently because they involve the same act or transaction.

{¶34} Our review of appellant's challenge to his sentence is limited to determining whether his sentence is clear and convincing contrary to law as measured against the evidence in the record. R.C. 2953.08(G)(2); *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 7.

{¶35} A trial court is required to impose a three year prison sentence when the offender is convicted of displaying, brandishing, or using a firearm to facilitate the offense. (R.C. 2941.145) and a five year prison sentence when an offender is convicted of discharging a firearm from a motor vehicle (R.C. 2941.146).

{¶36} R.C. 2929.14(B)(1) states, in relevant part, as follows:

> b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision

of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

{¶37} R.C. 2929.14(B)(1) further states, in relevant part, as follows:

(c)(i) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in division (A) of section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code.

{¶38} In addition, R.C. 2929.14(C)(1) states as follows:

(C)(1)(a) Subject to division (C)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under

> the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

{¶39} Appellant, in the case sub judice, was charged with felonious assault in Count One of the indictment. The first specification to Count One of the indictment charged defendant with having a firearm on or about his person or under his control while committing the felonious assault, in violation of R.C. 2941.145. The second specification charged defendant with committing the felonious assault offense by discharging a firearm from a motor vehicle, in violation of R.C. 2941.146. The third specification is not at issue in this case.

{¶40} In *State v. Phillips*, 8th Dist. Cuyahoga No. 96329, 2012-Ohio-473, the defendant was found guilty of multiple counts of attempted murder, felonious assault, attempted felonious assault, and two counts of inducing panic. The jury also found the defendant guilty of firearm specifications included in the attempted murder, felonious

assault, and attempted felonious assault counts. The trial court sentenced the defendant to a total of 92 years' incarceration.

{¶41} The defendant then appealed, arguing, in part, that trial court unconstitutionally subjected him to multiple sentences by imposing multiple firearm specifications and ordering them to be served consecutively. The court, in *Phillips*, held in relevant part as follows at paragraph 38:

> Additionally, cumulative sentences for three- and five-year firearm specifications are permitted in an attempted murder case where gunshots are fired from a moving vehicle. R.C. 2929.14(D)(1)(b). The specifications prohibit different activity and require different proof, thus imposing different penalties. *State v. Walker,* 2d Dist. No. 17678, 2000 WL 873222 (June 30, 2000). As such, Phillips could be sentenced to an additional three, plus an additional five years, for a total of eight years for the firearm specifications in Counts 1, 2, 3, and 4.

{¶42} In *State v. Sheffey,* 8th Dist. Cuyahoga No. 98944, 2013–Ohio–2463, the defendant was indicted on four counts of felonious assault and one count of improperly discharging into habitation, one count of having weapons under disability, and one count of criminal damaging. The felonious assault and improperly discharging into habitation counts each carried one- and three-year firearm specifications. They further carried a five-year specification for a "drive-by shooting."

{¶43} After the jury found him guilty and the defendant was sentenced to a total of fourteen years in prison, the defendant appealed, arguing, in part, that the trial court should have merged all the firearm specifications that stemmed from the drive-by

shooting. In affirming the sentence, the court, in *Sheffey*, stated, in relevant part, at paragraphs 26-29:

> Although not subject to R.C. 2941.25, firearm specifications may be subject to merger under R.C. 2929.14. We review Sheffey's challenge of the trial court's imposition of multiple firearm specifications to determine whether it is contrary to law. *See* R.C. 2953.08. Applying that standard, we find that the trial court's imposition of the firearm specifications complies with R.C. 2929.14.
>
> Ordinarily, the court is forbidden from imposing sentence on multiple firearm specifications for "felonies committed as part of the same act or transaction." R.C 2929.14(B)(1)(b). However, this section applies only to the extent that R.C. 2929.14(B)(1)(g) does not apply, which states:
>
> If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

In this case, Sheffey was found guilty of committing two or more felonies. Four of those felonies were felonious assault, and he was found guilty of firearm specifications under R.C. 2929.14(B)(1)(a). Under R.C. 2929.14(B)(1)(g), the court was required to impose on Sheffey prison terms for the two most serious specifications stated in (B)(1)(a), and could also, in its discretion, impose sentence for any other specifications. *See State v. Cassano,* 8th Dist. No. 97228, 2012–Ohio–4047, ¶ 34; *State v. Worth,* 10th Dist. No. 10AP–1125, 2012–Ohio–666, ¶ 96; *State v. Beatty–Jones,* 2d Dist. No. 24245, 2011–Ohio–3719, ¶ 16; *see also State v. Isreal,* 12th Dist. No. CA2011–11–115, 2012–Ohio–4876, ¶ 73 (recognizing that R.C. 2929.14(B)(1)(g) "serves as an exception to the rule that multiple firearm specifications must be merged for purposes of sentencing when the predicate offenses were committed as a single criminal transaction").

Here, the trial court properly sentenced Sheffey on two of the three-year firearm specifications attached to the felonious assault counts as required under R.C. 2929.14(B)(1)(g). The trial court also properly imposed a five-year mandatory prison term pursuant to the firearm specification in R.C. 2941.146, also attached to the felonious assault counts. To the extent that the trial court did not merge the three- and five-year firearm specifications on one of the felonious assault counts, it was not required to do so. Indeed, under R.C. 2929.14(B)(1)(c), "if an offense is properly accompanied with a specification under R.C. 2941 .146 and another under 2941.145, there is no merger of the specifications, and the court must

impose a sentence for each." *State v. Coffman,* 10th Dist. No. 09AP727, 2010–Ohio–1995, ¶ 11; *see also State v. Walker,* 2d Dist. No. 17678, 2000 Ohio App. LEXIS 2952 (June 30, 2000).

{¶44} See also *State v. Bates*, 10th Dist. Franklin No. 03-AP-893, 2004-Ohio-4224. In such case, Bates was convicted of one count of murder in violation of Ohio Revised Code Section 2903.02, two firearm specifications in violation of Ohio Revised Code Section 2941.146, and one count of displaying, brandishing, indicating possession of or using a firearm in the commission of an offense in violation of Ohio Revised Code Section 2941.145. He was sentenced to consecutive terms of 15 years to life for the murder, 5 years for discharging a firearm while inside a motor vehicle, and 3 years for displaying, brandishing, indicating possession of or using a firearm in the commission of an offense, for an aggregate term of 23 years to life imprisonment.

{¶45} Bates then appealed his sentences on the firearm specifications, arguing that the trial court should have merged the two firearm specifications before sentencing him. The Ohio Court of Appeals for the Tenth Appellate District, in *Bates*, issued a decision affirming the consecutive sentences. In doing so, the court cited R.C. 2929.14 and the holding in *State v. Gresham,* 8th Dist. Cuyahoga App. No. 81250, 2003-Ohio-744, at ¶ 14 ("[I]t is clear that the legislature intended to cumulate the mandatory prison terms contained in R.C. 2941.141 and 2941.145, on the one hand, and R.C. 2941.146, and to require them to be served consecutively to one another and to the prison terms for the base offense."). See also *State v. Mhoon*, 8th Dist. Cuyahoga No. 98832, 2013-Ohio-2090 and *State v. Rice,* 10th Dist. Franklin No. No. 11AP–199, 2011-Ohio-6562 at paragraph 30 In which the court held, in relevant part, as follows:

As this court noted in *State v. Coffman,* 10th Dist. No. 09AP–727, 2010–Ohio–1995, former R.C. 2929.14(D)(1)(c), effective at the time of defendant's sentencing, governed defendant's R.C. 2941.146 specification for discharging a firearm from a motor vehicle, while R.C. 2929.14(D)(1)(a) governed sentencing on the firearm specification under R.C. 2941.145. See 2011 H.B. 86. In resolving the same argument in *Coffman,* this court concluded that "if an offense is properly accompanied with a specification under R.C. 2941.146 and another under 2941.145, there is no merger of the specifications, and the court must impose a sentence for each." *Id.* at ¶ 11, citing *State v. Bates,* 10th Dist. No. 03AP–893, 2004–Ohio–4224, ¶ 8, 10. Moreover, the court noted, R.C. 2929.14(E)(1)(a) requires that the terms be served consecutively. *Id.*, citing *Bates* at ¶ 9–10.

{¶46} See also *State v. Fant,* 2016-Ohio-7429, 76 N.E.3d 518, (7th Dist.) in which the court held as follows at paragraph 59:

The General Assembly has articulated the policy determination in R.C. 2929.14 that the firearm specifications in R.C. 2914.145 and R.C. 2929.146 shall have mandatory sentences and shall be served consecutively to each other and the underlying offense. Under R.C. 2929.14, trial court's do not have any discretion regarding consecutive sentences for these firearm specifications; they are statutorily mandated to impose consecutive sentences for the underlying offenses and these specifications.

{¶47} Based on the foregoing, we find that the trial court did not err in ordering appellant to serve his firearm specifications consecutively. The trial court was precluded, pursuant to R.C. 2929.14(B)(1)(c) and(C)(1)(a), from merging the three-year and five-year firearm specifications.

{¶48} Appellant's first assignment of error is, therefore, overruled,

II

{¶49} Appellant, in his second assignment of error, maintains that the trial court erred by instructing the jury on flight.

{¶50} It is well established that evidence of flight is admissible, as it tends to show consciousness of guilt. *Sibron v. New York*, 392 U.S. 40, 66, 88 S.Ct. 1889, 20 L.Ed.2d 917(1967). Further, a jury instruction on flight is appropriate if there is sufficient evidence in the record to support the charge. *See United States v. Dillon*, 870 F.2d 1125 (6th Cir.1989). The decision whether to issue a flight instruction rests within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Sims*, 13 Ohio App.3d 287, 289, 469 N.E.2d 554(1st Dist.1984). Abuse of discretion requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140(1983).

{¶51} In the case sub judice, the trial court instructed the jury as follows (Trial Transcript, Volume 4 at 24-25:

> Testimony has been admitted indicating the Defendant fled the scene. You are instructed that flight alone does not raise a presumption of guilt, but it may tend to indicate the Defendant's consciousness or aware

(sic) of guilt. If you find that the facts do not support that the Defendant fled the scene, or if you find that some other motive prompted the Defendant's conduct, or if you are unable to decide what the Defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the Defendant engaged in such conduct and if you decide the Defendant was motivated by a consciousness or an awareness of guilt, you may, but are not required to, consider that evidence in deciding whether the Defendant is guilty of the crimes charged. You alone will determine what weight, if any, is (sic) to give to the evidence.

{¶52} Flight from justice "means some escape or affirmative attempt to avoid apprehension." *State v. Wesley,* 8th Dist. Cuyahoga App. No. 80684, 2002- Ohio-4429 at paragraph 19, citing *United States v. Felix–Gutierrez* (C.A.9, 1991), 940 F.2d 1200, 1207.

{¶53} We note that appellant did not object to this instruction at the time that it was given, but did object to a jury instruction on flight when, at the beginning of the trial, the State moved to admit a jury instruction on flight.

{¶54} While appellant contends that the evidence adduced at trial did not substantiate a flight instruction, we disagree. As is stated above, testimony was adduced at trial that appellant, after pursuing Deputy Blanc in his Dodge Ram truck, took his truck to Skipco Auto Auctions in Canal Fulton and abandoned it there. He had, according to the evidence disposed of his two firearms on the side of Mill Street, and, after abandoning his truck, had called his stepson and had him drive appellant to his home in Barberton, Ohio where he remained until his arrest. As noted by appellee, "[t]he evidence demonstrated

that [appellant] deliberately fled the area, disposed of his truck, disposed to two firearms all in an attempt to avoid arrest or detention."

{¶55} Based on the foregoing, we find that the trial court did not abuse its discretion in giving an instruction on flight. The trial court's decision was not arbitrary, unreasonable or unconscionable.

{¶56} Appellant's second assignment of error is, therefore, overruled.

{¶57} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Wise, John, P.J. and

Delaney, J. concur.

HON. CRAIG R. BALDWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

CRB/dr

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff - Appellee	:	
-vs-	:	JUDGMENT ENTRY
FREDERICK MARK HILL	:	
Defendant - Appellant	:	CASE NO. 2017CA00183

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs are assessed to appellant.

HON. CRAIG R. BALDWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, Plaintiff - Appellee -vs- FREDERICK M. HILL, Defendant - Appellant	JUDGMENT ENTRY Case No. 17-CA-183

MCR 700
Forchione

This matter comes before the Court on Defendant-appellant's December 10, 2018 Application for Reopening pursuant to App.R. 26(B). Appellee has filed a response.

App.R. 26 (B) states as follows:

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

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(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

Appellant's application was filed on December 10, 2018 which is within ninety days from our Opinion's journalization on September 24, 2018. Appellant's application is, therefore, timely.

In his application to reopen, appellant maintains that he received ineffective assistance of appellate counsel on direct appeal.

The standard for reviewing claims for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ohio adopted this standard in the case of *State v. Bradley*, 42 Ohio St .3d 136, 538 N.E.2d 373 (1989)

These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel.

First, we must determine whether counsel's assistance was ineffective; *i.e.*, whether counsel's performance fell below an objective standard of reasonable representation and violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether the defense was actually prejudice by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. We apply the Strickland test to all claims of ineffective assistance of counsel, both trial counsel, or appellate counsel. *State v. Turner,* 5th Dist. Licking App. No.2006-CA-123, 2007-Ohio-4583 at paragraph 16.

Appellant bears the burden of establishing there is a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel, see, e.g. *State v. Spivey* 84 Ohio St.3d 24, 1998-Ohio-704, 701 NE 2d 696.

Appellant contends that his appellate counsel, on direct appeal, was ineffective for failing to raise the following assignments of error:

"I. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED PLAIN ERROR WHEN IT ENTERED CONVICTIONS FOR ALL OFFENSES AGAINST APPELLANT AFTER IT FAILED TO PROVIDE THE JURY WITH VERDICT FORMS THAT IDENTIFIED THE DEGREE OF THE OFFENSES OR THE STATUTE OF THE VIOLATION OF THE OFFENSES CHARGED PURSUANT TO R.C. § 2945.75."

"II. TRIAL COURT COMMITTED PLAIN ERROR WHERE IT DID NOT MAKE THE STATUTORILY REQUIRED FINDINGS PRIOR TO IMPOSING CONSECUTIVE SENTENCES PURSUANT TO R.C. § 2929.14 (C) (4)."

"III. TRIAL COUNSEL WAS INEFFECTIVE, WHEREBY VIOLATING APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, FOR NOT ATTACKING THE VALIDITY OF THE SEARCH WARRANT OR OBJECTING TO THE METHODS OF LAW ENFORCEMENT'S SEARCH AND SEIZURE PROCEDURES THAT VIOLATED THE APPELLANT'S FOURTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION."

Appellant first contends that his appellate counsel was ineffective in failing to challenge the verdict forms in this case. Appellant asserts that the jury verdict forms were defective, as they did not state the degree of the offenses charged. As noted by appellee, essentially appellant is making a *Pelfrey* claim. The *Pelfrey* Court held in the syllabus that "[p]ursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense *State v. Pelfrey,* 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735.

Generally, the statutory definition of an offense need not be included on the verdict form. *State v. Martin*, 2nd Dist. Montgomery No. 22744, 2009-Ohio-5303, ¶ 8. R.C. 2945.75 contains an exception to this rule:

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

Therefore, a verdict form signed by a jury must include either the degree of the offense or a statement an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense. *Pelfrey*, supra at ¶ 14. The verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed. *Id.* If the verdict form fails to include the degree of the offense or a statement the aggravating element has been found, the defendant can only be convicted of the least degree of the offense. *Id.* at ¶ 13. The most recent pronouncement of the Supreme Court remains that nothing outside of the verdict form should be considered in reaching a conclusion as to whether the verdict form is sufficient to support a conviction for anything greater than an offense of the least degree. *State v. Duncan*, 3rd Dist. Logan No. 8–12–15, 2014-Ohio-2720, 2014 WL 2859182, ¶ 10, *appeal not allowed*, 141 Ohio St.3d 1473, 2015-Ohio-554, 25 N.E.3d 1080, ¶ 10, citing *State v. McDonald*, 137 Ohio St.3d 517, 522, 2013-Ohio-5042, 1 N.E.3d 374, 379, ¶ 19.

As is stated above, appellant was convicted of felonious assault. With respect to the charge of felonious assault, the jury made additional findings in the form of written verdict forms finding that appellant purposefully or knowingly caused or attempted to cause the death of or physical harm to Agent J. Blanc and that a firearm was discharged at a peace officer while committing felonious assault. These "additional findings" are all that is required pursuant to R.C. 2945.75 to elevate the degree of the offense. See *State v. Nichols*, 5th Dist. Richland App. No.2009-CA-0111, 2010-Ohio-3104.

With respect to the charge of possession of marijuana (Count Two), the jury made an additional finding that the amount of marijuana was equal to or exceeding forty thousand grams. This finding is all that is required to elevate the degree of the offense to a felony of the second degree. With respect to the charge of illegal cultivation of marijuana (Count Three), the jury made an additional finding that the amount of marijuana was equal to or exceeding twenty thousand grams. This finding is all that is required to elevate the degree of the offense to a felony of the second degree.

With respect to the charge of discharge of a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3)(C)(2) (Count Three), the jury made the additional finding that the violation created a substantial risk of physical harm to any person or caused serious physical harm to property. This finding was sufficient to elevate the offense to a felony of the third degree.

Finally, with respect to the count (Count Six) charging appellant with improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(A) and/or (B), the verdict form reads as follows:

We the jury, being duly impaneled and sworn, find the Defendant, Frederick Hill [Guilty] of Improper Handling of a Firearm in a Motor Vehicle as charged in Count Six of the Indictment.

The indictment specifies that appellant was charged with a felony of the fourth degree. However, the minimum offense in the statute is a fourth degree misdemeanor. R.C. 2923.16. The verdict form did not set forth the degree of culpability or specify any aggravating factors. Thus, pursuant to R.C. 2945.75(A)(2) and the holding of the Ohio Supreme Court in *Pelfrey*, appellant should have been found guilty of a fourth degree

misdemeanor, not a fourth degree felony. See *State v. Manley,* 3rd Dist. Allen No. 1–11–04, 2011-Ohio-5082, 2011 WL 4538070.

Based on the foregoing, we find that appellant has established that there is a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel's with respect to counsel's failure to challenge the verdict form for the offense of improperly handling firearms in a motor vehicle.

Appellant further contends that his trial counsel was ineffective in failing to challenge the validity of the search warrant or to object to the methods of law enforcement's search and seizure.

In the case sub judice, a search warrant was executed on May 4, 2017 at a location that appellant was renting. The search warrant was based on an affidavit. Appellant's trial counsel filed a motion to unseal the search warrants and appellee, in its response, indicted that the warrant was based on an affidavit containing information relating to an uncharged suspect or suspects. While appellant's trial counsel filed a Preliminary Motion to Suppress, the motion was abandoned by trial counsel.

As noted by appellee, the search warrant is not part of the record on appeal. As noted by the court in *State v. Ellis,* 8th Dist. Cuyahoga No. 90844, 2009–Ohio–4359, ¶ 6:

> Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 50 N.E. 97; *Carran v. Soline Co.* (1928), 7 Ohio Law Abs. 5 and *Republic Steel Corp. v. Sontag* (1935), 21 Ohio Law Abs. 358. Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter. See *State v. Ishmail*

(1978), 54 Ohio St.2d 402, 377 N.E.2d 500. Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶ 10, 776 N.E.2d 79.

Appellate counsel cannot be ineffective in failing to argue that the search warrant was not valid when the warrant was not part of the record.

Appellant also contends that appellate counsel was ineffective in failing to contest the search of the warehouse. However the "knock and talk" effectuated at the door to the warehouse, prior to the discovery of the marijuana, is recognized as a constitutionally sound police procedure. *Kentucky v. King*, 563 U.S .452,131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011). "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether [the person at the door is an officer or a private person], the occupant has no obligation to open the door or to speak." *State v. Miller*, 2nd Dist. Montgomery No. 24609, 2012–Ohio–5206, 982 N.E.2d 739, ¶ 18, citing *King*, supra, 131 S.Ct. at 1862. At trial, Detective Gambs testified that upon approaching the door on the southwest side, he could detect the smell of growing marijuana. On such basis, he obtained a search warrant. See *United States v. Charles*, 29 F. Appx. 892, 898 (3d Cir.2002) (officer may obtain warrant based on "plain smell" of marijuana from inside house during lawful "knock and talk"). We find

that appellate counsel was not ineffective in failing to challenge the validity of the search warrant or to object to the methods of law enforcement's search and seizure.

Appellant finally argues that his appellate counsel was ineffective in failing to argue that the trial court erred when it did not make the required findings prior to imposing consecutive sentences pursuant to R.C. 2929.14(C)(4).

R.C. 2929.14(C)(4) states the following:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

In *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, syllabus, the Supreme Court of Ohio held: "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) *at the sentencing hearing* and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." (Emphasis added.). However, a word-for-word recitation of the language of the statute is not required. *Id.* As long as the reviewing court can discern the trial court engaged in the correct analysis and can determine the record contains evidence to support the findings, consecutive sentences should be upheld. *Id.*

In the case sub judice, the trial court noted that appellant had committed a "gruesome crime." Transcript of Sentencing hearing at 22. The trial court further indicated that on a scale of 3 to 11, "this the highest that there could be." Transcript at 27. He stated that he felt that appellant's crime was one of the worst that could have been committed and voiced his concern over protecting the public. The trial court also noted the multiple offenses.

While the trial court did not give a word-for-word recitation of the language of the statute, from the transcript, we can discern that the trial court engaged in the correct analysis and can determine that record contains evidence to support the findings. We find, therefore, that appellate counsel was not ineffective in failing to challenge the consecutive nature of appellant's sentence.

Based on the foregoing, we find that appellant cannot satisfy his burden of demonstrating that there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal with respect to his sentencing.

Appellant's Application for Reopening is, therefore, granted in part and denied in part. This matter is remanded to the trial court for the appointment of new appellate counsel within fourteen (14) days of the filing date of this Entry. Appellant's brief shall be filed on or before February 22, 2019. Such brief shall be limited to the issue raised in appellant's first assignment of error with respect to the verdict form for the offense of improperly handling firearms in a motor vehicle.

IT IS SO ORDERED.

HON. CRAIG R. BALDWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, Plaintiff - Appellee -vs- FREDERICK M. HILL Defendant - Appellant	:	JUDGES: Hon. William B. Hoffman, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 2020CA00019 OPINION
CHARACTER OF PROCEEDING:		Appeal from the Stark County Court of Common Pleas, Case No. 2017-CR-0700 Judge Forchione
JUDGMENT:		Affirmed
DATE OF JUDGMENT:		

APPEARANCES:

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Baldwin, J.

{¶1} Appellant, Frederick M. Hill, appeals the Stark County Common Pleas Court's denial of his motion for leave to file a motion for a new trial. Appellee is the State of Ohio.

STATEMENT OF FACTS AND THE CASE

{¶2} Hill previously appealed his August 31, 2017 conviction to this court and to the Supreme Court of Ohio. As a result one of the charges was dismissed by appellee, but the balance of the verdict was confirmed. Hill now contends that he has acquired evidence that will have a material impact on his case. The evidence, three photographs and a police officer's affidavit, were purportedly acquired by Hill in January 2019 from his trial counsel. Hill contends that this evidence will demonstrate that the search warrant for the warehouse containing the marijuana farm should have been suppressed and that any conviction based upon that evidence must be reversed.

{¶3} In 2017, the Stark County Grand Jury indicted Hill on one count (Count One) of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the first degree, one count (Count Two) of possession of marijuana in violation of R.C. 2925.11(A)(C)(3)(g), a felony of the second degree, one count (Count Three) of illegal cultivation of marijuana in violation of R.C. 2925.04(A)(C)(5)(f), a felony of the second degree, one count (Count Four) of trafficking in marijuana in violation of R.C. 2925.03(A)(2)(C)(3)(g), a felony of the second degree, one count (Count Five) of discharge of a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3)(C)(2), a felony of the third degree, and one count (Count Six) of improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(A) and/or (B), a felony of the fourth degree. The felonious assault count included

a firearm specification pursuant to R.C. 2941.145, a discharging a firearm from a motor vehicle specification pursuant to R.C. 2941.146 and a firearm specification pursuant to R.C. 2941.1412, which prohibits discharging a firearm at a peace officer or corrections officer. At his arraignment on April 28, 2017, Hill entered a plea of not guilty to the charges.

{¶4} Hill's case was presented to a jury beginning August 29, 2017. A comprehensive review of the evidence is unnecessary, but some references are pertinent.

{¶5} On March 20, 2017, Detective Jesse Gambs of the Canton Police Department's Special Investigations Unit was assigned to investigate a possible marijuana grow operation located in a commercial warehouse at 1805 Allen Avenue SE in Canton, Ohio. He began his investigation by obtaining the electric records for that address for the past two years and he discovered the electric bill was in the name of Price is Right Auto Sales, LLC which was registered in appellant's name. Detective Gambs next obtained a search warrant for thermal imaging of the building but the result was inconclusive, so he and another detective decided to attempt what Gambs described as "knock and talk." The detectives planned to knock on the warehouse doors and talk with whoever answered with the goal of gathering relevant evidence. They approached the building and knocked on two doors but no one answered. Detective Gambs noticed an odor of growing marijuana while he was at the door. The Detective completed an affidavit for a warrant, including a reference to the odor of marijuana, then returned to the scene and executed the warrant, leading to the discovery of what appeared to be a marijuana growing operation and, ultimately, the arrest of Hill.

{¶6} The record contains references to a fence and gate in the vicinity of the warehouse, a relevant fact in our analysis of the trial court's denial of Hill's motion for leave During the trial, Hill mentioned opening the gate in the fence and Officer Gambs described a gate across the driveway to the warehouse and made several references to the fence.

{¶7} On August 31, 2017 the jury found Hill guilty of all of the counts and specifications except Count Four, trafficking marijuana. The jury was unable to reach a verdict, the trial court declared a mistrial as to that count and a nolle prosequi was entered. On September 20, 2017 Hill was sentenced to a total prison term of 27 years.

{¶8} Hill filed a direct appeal of his conviction and sentence. We overruled Hill's assignments of error and affirmed Hill's conviction and sentence. *State v. Hill,* 5th Dist. Stark No. 2017CA00183, 2018-Ohio-3901, ¶ 30 motion for delayed appeal granted, 154 Ohio St.3d 1499, 2019-Ohio-345, 116 N.E.3d 153, (2019) appeal not allowed,155 Ohio St.3d 1455, 2019-Ohio-1759, 122 N.E.3d 216.

{¶9} On December 10, 2018, Hill filed a "motion requesting final appealable order" arguing the sentencing entry did not comply with Criminal Rule 32(C) because it did not contain the signature of the trial judge. The trial court denied Hill's motion and he filed an appeal, pro se, with this court. We denied the assignment of error and affirmed the trial court's decision on April 29, 2019. *State v. Hill,* 5th Dist. Stark No. 2019CA00005, 2019-Ohio-1606, appeal not allowed, 156 Ohio St.3d 1477, 2019-Ohio-3148, 128 N.E. 3d 235 (2019).

{¶10} Hill filed a motion to re-open his direct appeal and focused his attack on the charge of improperly handling a firearm in a vehicle. That charge was ultimately dismissed.

{¶11} Hill next filed a "Motion for Leave to File Delayed Motion for New Trial Pursuant to Ohio Criminal Rule 33 (B)" in which he requested leave because:

> The documents received on or about on or about January 10, 2019, were the first time Hill was aware that trial counsel possessed documents that that could be used to challenge the search warrant. Moreover, as more fully argued in the Motion for New Trial pursuant to Crim.R. 33(A), the new information shows that the "knock and talk" method used to obtain the search warrant was illegal and subject to suppression. Thus, not only was counsel ineffective for abandoning the motion to suppress, counsel was equally ineffective in failing to make that information part of the record.

{¶12} Appellee opposed the motion arguing that it was untimely, was an attempt to impeach a witness and would not change the outcome of the trial. The trial court denied the motion concluding that Hill had not demonstrated how or why he was unavoidably prevented from the discovery of the "newly discovered" evidence within the time limitations of Crim.R. 33. "The trial court also found that "[t]he Defendant has not provided evidence in support of his motion which would require the Court to set an evidentiary hearing in this matter." (Judgment Entry Dec. 23, 2019, pp. 2-3).

{¶13} Hill appealed the trial court's decision and submitted two assignments of error:

{¶14} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT TRIAL COUNSEL'S FAILURE TO USE AVAILABLE EVIDENCE TO CHALLENGE THE MANNER IN WHICH LAW ENFORCEMENT OBTAINED THE SEARCH WARRANT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, DID NOT CREATE A STRONG PROBABILITY OF A DIFFERENT OUTCOME WERE A NEW TRIAL TO BE GRANTED."

{¶15} "II. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN COUNSEL FAILED TO INFORM HIS CLIENT OF THE POTENTIAL POST-CONVICTION ISSUES IN HIS CASE OR THE MANDATORY PROCEDURES INVOLVED WITH SUCH PLEADINGS."

{¶16} We must preliminarily find that Hill's assignments of error focus upon issues that were not properly before the trial court. The trial court denied Hill's motion for leave to file a motion for new trial. While we recognize the trial court did comment on the merits of the motion and the likelihood of a different outcome if a new trial was granted, we will not consider that portion of the trial court's entry as pertinent to the disposal of this appeal as those comments were unnecessary to resolve the motion for leave to file a motion for a new trial. That portion of the opinion may have been relevant in the context of reviewing a motion for a new trial, but because such a motion was not before the trial court we will disregard them in our analysis.

STANDARD OF REVIEW

{¶17} A motion for a new trial pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990). It is also within the discretion of the trial court to determine whether a motion for a new trial and the material submitted with the motion warrants an evidentiary hearing. *State v. Hill*, 64 Ohio St.3d 313, 333, 1992–Ohio–43, 595 N.E.2d 884 (1992). To constitute an abuse of discretion, a trial court's decision must be unreasonable, unconscionable, or arbitrary. *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

{¶18} Crim.R. 33(B) provides that a motion for new trial based on newly discovered evidence must be filed:

> [W]ithin one hundred twenty days after the day upon which the verdict was rendered. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

{¶19} The verdict in Hill's case was rendered on August 31, 2017 but his motion was not filed until November 22, 2019. "Because appellant's motion was filed well outside the 120–day period, he was required to obtain leave of court to file his motion for new trial." *State v. Waddy*, 10th Dist. No. 15AP–397, 2016–Ohio–4911, 68 N.E.3d 381, appeal not allowed, 149 Ohio St.3d 1462, 2017–Ohio–5699, 77 N.E.3d 987 (2017), and cert. denied, U.S. No. 17–71452018 WL 1037605, quoting *State v. Hoover–Moore*, 10th Dist. Franklin No. 2015–Ohio–4863, 14AP–104, ¶ 13. "To obtain such leave, the defendant

must demonstrate by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days." *Id.* A party is "unavoidably prevented" from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence." *Id.*, quoting *State v. Walden*, 19 Ohio App.3d 141, 145–146, 483 N.E.2d 859 (10th Dist.1984).

{¶20} Appellant's proof must be more than conclusory allegations. "Clear and convincing proof that the defendant was 'unavoidably prevented' from filing 'requires more than a mere allegation that a defendant has been unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial.' " *State v. Lee*, 10th Dist. Franklin No. 05AP–229, 2005–Ohio–6374, 2005 WL 3220245, ¶ 9. The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Rodriguez—Baron*, 7th Dist. Mahoning No. 12–MA–44, 2012–Ohio–5360, 2012 WL 5863613, ¶ 11. Clear and convincing proof is that "which will produce in the mind of the trier of facts a firm belief of conviction as to the facts sought to be established." *Schniebel, supra* at 74.

{¶21} The "unavoidably prevented" requirement in Crim.R. 33 mirrors the "unavoidably prevented" requirement in R.C. 2953.23. "The phrase 'unavoidably prevented' in R.C. 2953.23(A)(1)(a) means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence." *Id.* at ¶ 28, citing *State v.*

Howard, 10th Dist. Franklin No. 15AP–161, 2016–Ohio–504, appeal not allowed, 147 Ohio St.3d 1413, 2016–Ohio–7455, 62 N.E.3d 185.

{¶22} Thus, the central inquiry in Hill's motion for leave to file a motion for a new trial is whether he was unaware of the facts disclosed by the new evidence and whether he was unavoidably prevented from obtaining that information through reasonable diligence.

ANALYSIS

{¶23} Hill contends the newly discovered evidence he relies upon is comprised of three photographs and the affidavit Officer Gambs' submitted to the court for the warrant after the "knock and talk" visit to the warehouse. Hill contends that he did not discover these documents until he received them in January 2019 purportedly because they were in the possession of his trial counsel and that this evidence reveals that the warrant to search the premises was improperly obtained. Hill's motion suffers from two different delinquencies.

{¶24} Hill concedes that he received the materials in January 2019, but he failed to explain to the trial court why he did not file a motion until November, approximately ten months later. A "'trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence.' (Citations omitted.) *State v. Golden*, 10th Dist. Franklin No. 09AP-1004, 2010-Ohio-4438, ¶ 18. As observed by the Seventh District Court of Appeals: "While Crim.R. 33(B) does not provide a specific time limit in which defendants must file a motion for leave to file a delayed motion for new trial, many courts have required defendants to file such a motion within a reasonable time after discovering the evidence. *State v. Griffith*, 11th Dist. No.2005–T–0038, 2006–Ohio–2935,

¶ 15. See also *State v. Berry*, 10th Dist. No. 06AP–803, 2007–Ohio–2244, ¶ 37; *State v. Willis*, 6th Dist. No. L–06–1244, 2007–Ohio–3959, ¶ 20; *State v. Newell*, 8th Dist. No. 84525, 2004–Ohio–6917, ¶ 16; *State v. Stansberry*, 8th Dist. No. 71004, 1997 WL 626063 (Oct. 9, 1997).

{¶25} We find that Hill's failure to provide the trial court with the rational for his delay in filing his motion for leave provided a basis for the denial of the motion, but a second material reason exists for the denial of the motion.

{¶26} The newly discovered evidence Hill relies upon in support of his motion was readily available to him and could have been obtained with reasonable diligence. Hill claims that the photographs and the affidavit of the officer are the newly discovered evidence, but the facts purportedly discovered by appellant are not the photographs, but the photographic view of the fence allegedly surrounding the warehouse in which the marijuana was grown. Hill rented the building and presumably was aware of the presence of the gate in the fence blocking the driveway when he visited the building. Though the photographs may memorialize the condition of the fence at the time they were taken, the view that they provide would have been readily available to Hill and his counsel from the date of his arrest.

{¶27} Hill has failed to provide any evidence to support a conclusion that he was unavoidably prevented from discovering the position of the fence.

{¶28} Likewise, the affidavit of Officer Gambs provides nothing that was not available for Hill's consideration at his trial. Hill contends Officer Gambs' affidavit is newly discovered evidence that the officer approached the warehouse from the rear when, Hill contends, the warehouse is surrounded by a fence. Whether the warehouse was

surrounded by a fence is a fact that Hill knew or could have discovered had he exercised reasonable diligence. Officer Gambs did testify that he approached the building and knocked on a door. Given that evidence, the facts Hill references to support his argument that Officer Gambs could not have approached the building without scaling the fence or otherwise passing through it were discoverable using reasonable diligence and Hill was not unavoidably prevented from acquiring this information.

{¶29} Prior to his purported receipt of the affidavit and photographs Hill filed a motion that reveals his prior knowledge of the facts that he now claims were disclosed by the newly discovered evidence. Hill filed a motion to reopen his appeal on December 10, 2018 in which he argued that "an illegal entrance was made to the property on April 12, 2017, and an illegally obtained search warrant was used to search the building." In this motion he argues "The triggering event of Fourth Amendment analysis in this case is the officers' entry upon the "perimeter" of appellant's property and subsequent progress through the north side of the fence, around the fence which was not open to the public to the rear of the property, allowing them access to the door where an alleged smell of marijuana was present."

{¶30} Within the affidavit Hill filed in support of the motion to reopen his appeal he states "detective Gambs takes it upon himself to commit the illegal crossings of property with a fenced in area and thus, curtilage in the form of a chain-linked fence that was locked and surrounded three quarters of the property. The only opening was at the far back of the property where the property was placed against a set of railroad tracks." He repeats the argument later in his affidavit:

For detective Gambs to get to a door at the warehouse he had to walk around the northwest fence and walk across the yard which was approximately 150 feet from the fence line, which did not contain no (sic) public access to the front door because of the fence being locked. This was in fact a secured, private place that was not open for business, had no one in or on the property to allow access to any door of the warehouse, and for all intentional purposes, contained a curtilage.

When detective Gambs arrived at the location of the warehouse to conduct his "knock and talk", he was only able to perform such and (sic) act by entering onto the curtilage of Appellant's property by going around to the back of the property and into the back yard which violated Appellant's United States Constitution as protected under the Fourth Amendment because the detective and other officers did not have a search warrant at that time and the Appellant had a legitimate expectation of privacy there, and detective Gambs was not lawfully in a place from which he could have smelled any marijuana.

{¶31} The position of the fence in relation to the warehouse and the officer's alleged illegal approach are facts that existed and were known or discoverable by Hill and his counsel from the date of his arrest and were not, in any sense, newly discovered when Hill obtained the photographs and the affidavit. Hill had knowledge of the existence of the grounds supporting the motion for a new trial well in advance of the time prescribed for filing the motion. *State v. Walden, supra*. Hill's prior filing with this court betrays his knowledge of these facts before he received the photographs and affidavit and is fatal to

any argument that Hill was unavoidably prevented from obtaining this information until January 2019 or that these facts were not available for presentation to the court at an earlier date.

{¶32} The trial court also concluded that no hearing was required because "[d]efendant has not provided evidence in support of his motion which would require the Court to set an evidentiary hearing in this matter. Accordingly, he is not entitled to a hearing on this motion." We agree that "[n]o hearing is required, and leave may be summarily denied, where neither the motion nor its supporting affidavits embody prima facie evidence of unavoidable delay. *State v. Baldwin*, 5th Dist. Stark No. 2013CA00134, 2014–Ohio–290, ¶ 24. Affidavits filed outside of the 120–day time limit of Crim. R. 33 that fail to offer a sufficient explanation as to why evidence could not have been obtained sooner are inadequate to show that the movant was unavoidably prevented from obtaining the evidence within the prescribed time. *Ambartsoumov v. Warden, Chillicothe Correctional Inst.*, S.D.Ohio No. 2:12–CV–345, 2014 WL 4805384, *7, internal citations omitted. We find that the record reflects that Hill could have discovered the foundation of his motion early in this case and his motion and affidavit do not demonstrate a sufficient explanation as to why these facts could not have been discovered sooner.

{¶33} We hold that the trial court's denial of the motion for leave to file a motion for a new trial and the refusal to conduct a hearing were not an abuse of discretion. Appellant's assignments of error are denied and the ruling of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.

HON. CRAIG R. BALDWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

CRB/dw

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2020 AUG 11 AM 11:45

CLERK OF COURTS STARK COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff - Appellee	:	
-vs-	:	JUDGMENT ENTRY
FREDERICK M. HILL	:	
Defendant - Appellant	:	CASE NO. 2020CA00019

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs are assessed to appellant.

HON. CRAIG R. BALDWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

A TRUE COPY TESTE:
LOUIS J. GRILLI, CLERK
By
Date

IN THE COURT OF COMMON PLEAS

STARK COUNTY, OHIO

STATE OF OHIO	**CASE NO. 2017CR0700**
PLAINTIFF	**JUDGE FRANK FORCHIONE**
VS.	**JUDGMENT ENTRY**
FREDERICK M. HILL	
DEFENDANT	

Now comes the Court in consideration of the Defendant's Motion for Leave to File Delayed Motion for New Trial filed on November 22, 2019 and the State's Response filed on December 18, 2019. The Defendant is currently serving a prison term of 27 years for a conviction of Cultivation of Marijuana, Felonious Assault on a Police Officer, and other related charges.

Defendant claims he is entitled to a new trial based on newly discovered evidence relating to one of the search warrants used by the State to secure evidence. The Motion for Leave to File Delayed Motion for New Trial has been filed approximately two years after the Defendant's conviction and sentence. The Defendant claims he was unavoidably prevented from discovery of newly discovered evidence. However, his "newly discovered" evidence is documents given to him by his trial counsel in a letter dated November 9, 2018. According to the Defendant, those documents are three photographs of the building used for the marijuana grow that showed it completely encircled by a chain-link fence and a case report used by law enforcement to obtain a

APPENDIX A

search warrant. The Defendant claims that law enforcement mislead the common pleas judge to issue a search warrant by stating that the "knock and talk" leading to the smell of marijuana was possible because the back part of the building was not enclosed by a fence. Defendant claims that the building was surrounded by a fence so the "knock and talk" was not possible.

The State argues that the Defendant's Motion is untimely. The time requirement under Crim.R. 33 fulfills the purpose of finality of judgments and prevents undue prejudice to the State. *State v. Wilhelm*, 5th Dist. No. 05CA000007, 2005-Ohio-4400. The State claims that this "newly discovered" evidence is suspect, as photographs were offered into evidence at his trial and Defendant testified during the trial that he had seen the search warrant and copy of the affidavit. Therefore, Defendant has not demonstrated how or why he was unavoidably prevented from the discovery of the "newly discovered" evidence within the time limitations of Crim.R. 33.

More importantly, Defendant's "newly discovered evidence" would not change the outcome of the trial. Under the four-part test in *United States v. Barlow*, 693 F.2d 954, evidence must 1) have been discovered only after trial; 2) not have been discoverable early with the exercise of due diligence; 3) be material and not merely cumulative or impeaching, and 4) be likely to produce an acquittal if the case were retried. *Barlow at 966*. The evidence that he pursued a van containing Deputy Sheriff Blanc and fired at least three shots which narrowly missed him were not dependent on affidavit used to obtain the search warrant for the building.

Finally, the Defendant is not entitled to an evidentiary hearing on this motion. A trial court can choose not to grant an evidentiary hearing where it finds there is no

evidence presented in the motion and through affidavits sufficient to warrant an evidentiary hearing. *State v. Thompson*, 8th Dist. No. 89391, 2008-Ohio-316. The Defendant has not provided evidence in support of his motion which would require the Court to set an evidentiary hearing in this matter. Accordingly, he is not entitled to a hearing on this motion.

In conclusion, nothing contained in Defendant's newly discovered evidence creates a strong probability of a different outcome were a new trial to be granted. Therefore, this Court overrules Defendant's Motion for Leave to File Delayed Motion for New Trial and Request for Evidentiary Hearing.

IT IS SO ORDERED.

JUDGE FRANK G. FORCHIONE

cc: Prosecutor
Frederick M. Hill, regular mail

The Supreme Court of Ohio

State of Ohio

v.

Frederick Mark Hill

Case No. 2018-1767

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Stark County Court of Appeals; No. 2017CA00183)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

The Supreme Court of Ohio

State of Ohio

v.

Frederick M. Hill

Case No. 2019-0473

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

It is further ordered that appellee's motion to dismiss is denied.

(Stark County Court of Appeals; No. 17-CA-193)

Maureen O'Connor
Chief Justice

The Official Case Announcement can he found at http://www.supremecourt.ohio.gov/ROD/docs/

The Supreme Court of Ohio

State of Ohio

v.

Frederick M. Hill

Case No. 2020-1085

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Stark County Court of Appeals; No. 2020CA00019)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

KELLY L. STEPHENS
CLERK

Tel. (513) 564-7000
www.ca6.uscourts.gov

November 14, 2023

Ms. Sandy Opacich, Clerk
United States District Court
Northern District of Ohio
568 United States Courthouse
Federal Building
Two South Main Street
Akron, OH 44308

Dear Ms. Opacich:

Enclosed please find a motion for certificate of appealability in your case number **5:19-cv-1640 Frederick Hill v. Warden** . This document was received in this court on **November 3, 2023**.

An application for a certificate of appealability can be treated as a notice of appeal in a case where no formal notice of appeal is filed. *Cf. McMillan v. Barksdale*, 823 F.2d 981, 983 (6th Cir. 1987) (an application for a certificate of probable cause can be treated as a notice of appeal).

If no notice of appeal was filed in the above styled case, please file this motion for certificate of appealability as the notice of appeal. The notice should be filed on the date it was received in our court, pursuant to Federal Rules of Appellate Procedure 4(d), which states, "if a notice of appeal is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it received "and send it to the district court. The notice is then considered filed in the district court on the date so noted."

Very truly yours,

s/Patricia Elder
Senior Case Manager

Enclosure

APPENDIX N

No. 23-3929

FILED
Nov 17, 2023
KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK M. HILL,

Petitioner-Appellant,

v.

WARDEN KENNETH BLACK,

Respondent-Appellee.

ORDER

This matter is before the court upon initial review of the notice of appeal. The district court entered its judgment on September 29, 2023. The notice of appeal filed in the district court on November 3, 2023, is late. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a), 26(a).

It is ordered that Frederick M. Hill show cause in writing not later than 21 days from the date of this order why the appeal should not be dismissed for failure to comply with 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a). Such response should include a notarized statement or a 28 U.S.C. § 1746 declaration (a declaration under penalty of perjury that the declaration is true and correct). Such notarized statement or declaration should set forth or show the date of deposit of the notice of appeal in the institution's internal mail system and state or show that first-class postage was prepaid. Failure to provide a notarized statement or a declaration as provided by Federal Rule of Appellate Procedure 4(c) may result in dismissal of the appeal.

It is further ordered that the briefing schedule be held in abeyance.

ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX O

No. 23-3929

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 10, 2024
KELLY L. STEPHENS, Clerk

FREDERICK M. HILL,

Petitioner-Appellant,

v.

WARDEN KENNETH BLACK,

Respondent-Appellee.

ORDER

Before: MOORE, Circuit Judge.

This matter is before the court upon consideration of the notice of appeal.

This court entered an order on November 17, 2023, giving Frederick M. Hill an opportunity to show cause why his appeal from the district court's September 29, 2023, order should not be dismissed as untimely. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a), 26(a). Hill has responded by filing a notarized statement that he timely deposited his notice of appeal in his institution's internal mail system on October 23, 2023, although it was not mailed out until after that date. In support, he has provided a copy of an account withdrawal request dated October 23, 2023, that was witnessed by prison staff.

Hill's response demonstrates that the notice of appeal is timely filed. It is ordered that the show-cause order is therefore **WITHDRAWN**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX P

Sorry we missed you...
Cant wait to meet you in person!

Call me @
(330) 353-7264

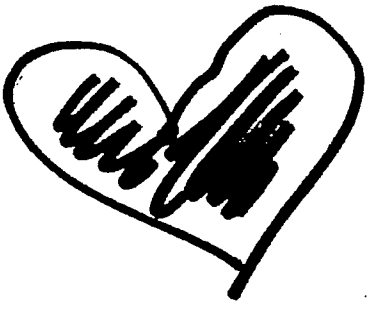

EXHIBIT D

Case Report

Oca	Incident Date	Location:	Date Assigned	Case No.
1704430	04/12/2017	1805 ALLEN AVE SE		

Detective | Case status | Classification

Detective memo

Case was received 3/20/17. Anonymous complaint claimed there was a large marijuana grow inside this building. I obtained a court order for electric records that did show what appeared to be extraordinarily high electric usage for the building. The electric records are in the name of "Price is Right Auto Sales LLC." A search with the Secretary of State shows this business does exist and that it was registered by Frederick Mark Hill of 1149 Stratford St. Barberton, OH 44203.

Over the course of the next few weeks I periodically went by the building during the day but the building always appeared empty. There was never any foot traffic or vehicles at the building other than a white Ford truck bearing plate #GIW6159. This vehicle was parked within an inch of a bay door on the south side of the building and never seemed to move. Also there is a gate in front of the building that was always padlocked.

I eventually decided to obtain a warrant for thermal imaging on the building in an attempt to determine if there was a marijuana grow inside. I obtained the warrant from Commonpleas Judge Kristin Farmer and served it on the morning of March 25th, 2017. The warrant was served with the assistance of Metro Detective Jared Blanc who has the proper thermal camera and is certified to use it. After looking at the building Jared Blanc determined that the results from the thermal imaging were inconclusive and was unable to tell me for sure weather it may be a marijuana grow.

At that point a Knock and Talk was the only realistic option that remained. On 4/12/17 myself and detective Kalabon attempted a knock and talk. We approached from the north of the building as that side is completely open. The rest of the building is surrounded by fencing. We knocked and received no answer but as we approached a south side door we could detect a distinct smell of growing marijuana coming from inside the building. At that time myself and Detective Kalabon left the area and secured a search warrant from Stark County Commonpleas Judge Kristin Farmer.

At approx 15:47 on 4/12/17 SIU detectives served the warrant. Upon entry we found no one inside except for a pitbull. The pitbull was secured in a room until the humane society could come and take the animal. Also inside were two large rooms that appeared to be built for the sole purpose of growing marijuana. There was a third additional grow room located on the opposite side of the building in a south-east room. The north east office room appeared to be where the marijuana was dried to prepare for sale. Additional grow lights were kept there as well. There was a large amount of chemicals used to grow marijuana found throughout the warehouse. The grow rooms themselves contained varying numbers of marijuana plants and grow lights. It appeared they were all set on automatic timers and were being run with large amounts of ballasts and power boxes. The inventory of items taken is too large to list here but the inventory can be found in the TAC report. The marijuana plants numbered over 100 and we elected to send it all to the lab for verification and weight instead of getting a preliminary weight at the office. We used 40 gallon bags to tag the plants and we had filled approx 17 of them by the time the grow was completely down. Once I have final figures on the weight charges will be added or adjusted accordingly.

During service of the search warrant one person did show up at the location. His name is Elmer Crousser. He told PTL Casto that there was a truck frame of his the property manager had left at 1805 Allen Ave for him to pick up and he was there to try to get it. Elmer said that he had been trying for a few weeks to get it but no one is ever there during the day. He had never met the person who actually leases the building but thought his name was Mark. Frederick M Hill has a middle name of Mark and is known to use this instead of his first name. We told him for the time being he had to

leave the area but there was a black truck frame exactly where he said it was behind the F-150 that was blocking the door. He also provided us with the name of the property manager. That man's name is Doug Halter. Phone# 330-268-2036. I did speak with him the next day and was able to secure a copy of the lease agreement. The lease was signed November 28, 2016 between the owner of the building and Frederick M Hill. Doug Halter also confirmed that Frederick M Hill usually went by the name of Mark.

Also while working directed patrol on 4/1/17 at approx 12:58AM SGT McWilliams did see a vehicle there with the plate number of GSA8576. This vehicle comes back to a Brandon Friedlein (297-96-5825). SGT MCWilliams saw the person operating this vehicle unlocking the gate to the building. He did compare the person he saw to the photo in LEADS and confirmed it was the registered owner Brandon. This name will come up again in report #1704457. Please see that report for details on what happened once SIU left the scene at 1805 Allen Ave SE.

The F-150 GIW6159 that was earlier referenced will be seized. It had not moved for weeks and seemed to be placed near the building in an attempt to keep anyone from accessing the bay door it was parked in front of. This bay door is directly next to the large grow rooms in the back of the building. It can be seen in surveillance photos taken on 3/23/17. These photos can be found in TAC.

Several items were taken from the scene to be processed for DNA. Once those items and final verification of weight for the marijuana taken are received back from the lab more additional charges are expected and this supplement will be updated accordingly.

EXHIBIT

D

28 USCS § 2253

APPENDIX F

Current through Public Law 119-20, approved June 20, 2025.

- United States Code Service
- TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001)
- Part VI. Particular Proceedings (Chs. 151 — 190)
- CHAPTER 153. Habeas Corpus (§§ 2241 — 2256)

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

History

HISTORY:

June 25, 1948, ch 646, 62 Stat. 967; May 24, 1949, ch 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch 655, § 52, 65 Stat. 727; April 24, 1996, P. L. 104-132, Title I, § 102, 110 Stat. 1217.

APPENDIX S