No. 18-___

In the Supreme Court of the United States

TIM SHOOP, Warden,

Petitioner,

v.

AHMAD FAWZI ISSA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 15-4147

United States Court of Appeals
for the Sixth Circuit

AHMAD FAWZI ISSA,

Petitioner–Appellant,

v.

MARGARET BRADSHAW, Warden,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

No. 1:03-cv-00280—Sandra S. Beckwith,
District Judge.

Argued: May 2, 2018

Decided and Filed: September 21, 2018

Before: COLE, Chief Judge; MERRITT and MOORE,
Circuit Judges.

COUNSEL

ARGUED: S. Adele Shank, LAW OFFICE OF S. ADELE SHANK, Columbus, Ohio, for Appellant. Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** S. Adele Shank, LAW

OFFICE OF S. ADELE SHANK, Columbus, Ohio, Lawrence J. Gregor, Dayton, Ohio, for Appellant. Jocelyn K. Lowe, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court in which COLE, C.J., and MERRITT, J., joined. MERTITT, J. (pp. 18-21), delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Ahmad Issa ("Issa"), sometimes known as Mike, petitioned the district court for a writ of habeas corpus. The district court denied all of Issa's grounds for relief, but it granted a certificate of appealability for Issa's first, third, fourth, fifth, sixth, ninth, eleventh, twelfth, twenty-seventh, pending twenty-eighth, pending twenty-ninth, and proposed twenty-eighth through thirty-seventh grounds. R. 218 (Order at 120) (Page ID #4717). For the following reasons, we **VACATE** and **REMAND** to the district court with instructions to grant a **CONDITIONAL WRIT OF HABEAS CORPUS**, giving the State of Ohio 180 days to retry Issa or to release him from custody.

I. BACKGROUND

A. Factual Background

On November 22, 1997, around 1:30 a.m., Andre Miles ("Miles") demanded money from two brothers, Maher Khriss ("Maher") and Ziad Khriss ("Ziad"),

outside of Maher's store, Save-Way II Supermarket ("Save-Way") in Cincinnati. *State v. Issa* (*Issa I*), 752 N.E.2d 904, 910 (Ohio 2001). After Maher and Ziad put money on the ground, Miles shot both of them with a high-powered assault rifle. *Id*. The Cincinnati police examined Miles's actions, and they hypothesized that Issa, an employee at Save-Way, had hired Miles to commit the murders because Linda Khriss ("Linda"), Maher's wife, offered Issa money to kill her husband. *Id*. The police speculated that Issa gave Miles the rifle and planned where Miles would shoot Maher. *Id*. Because of this theory, the State charged all three individuals with aggravated murder, and each defendant stood trial. *Id*. A jury, however, acquitted Linda, and Miles received a life sentence—Issa is the only one to receive a death sentence. *Id*. at 913, 928.

During the guilt phase in Issa's trial, Miles refused to testify even though he had already testified in Linda's earlier trial. R. 229-3 (App., Trial Tr. At 938-40) (Page ID #9504-06). Prior to his taking the stand, the prosecution had offered Miles immunity, but the prosecution revoked Miles's immunity the day before he was scheduled to make statements in Issa's trial. *Id*. Because Miles refused to testify, the trial court concluded that he was unavailable. *Id*. at 945 (Page ID #9511).

The trial court allowed the admission of Miles's out-of-court statements, however, through the testimony of sibling, Bonnie Willis ("Bonnie") and Joshua Willis ("Joshua") (together, the "Willises"), who were Miles's teenage friends at the time of the murders. *Id*. at 1087, 1162-63 (Page ID #9653, 9728-29). Joshua testified that, a few days prior to the

murders, he ran into Miles at the Save-Way, and Miles told Joshua that Issa had paid him to kill someone. *Id.* at 1164-65 (Page ID #9730-31). Miles asked Joshua if he wanted to help, but Joshua declined the offer and did not believe Miles was serious. *Id.* When Joshua told Bonnie about Miles's statement, she did not think Miles would actually kill anyone because Miles talked "about doing a lot of things and never did it." *Id.* at 1126 (Page ID #9692). Then, according to Joshua, around 5:00 p.m. on November 22, Miles called Joshua and told him that he had killed Maher and Ziad. *Id.* at 1167 (Page ID #9733). Miles informed Joshua that Miles had placed the rifle in a plastic bag and had put it in the Willises' backyard. *Id.*

The next day, according to the Willises' testimony, Miles went to the Willises' home and described the murders. *Id.* at 1094-97, 1168-69 (Page ID #9660-63, 9734-35). The Willises testified that Miles told the Willises that Issa was going to give Miles $2000 for killing Maher. *Id.* at 1106 (Page ID #9672). At Issa's trial, the Willises described Miles's statements to them about how the murders occurred; for instance, Bonnie stated that Miles said that he got the rifle, which was hidden behind some crates that were behind a dumpster at the Save-Way, and then waited for Maher to come back to the store. *Id.* at 1106-07 (Page ID #9672-73). Bonnie then testified that Miles told the Willises that, when Miles saw Maher with Ziad, Miles demanded money from them, and they placed money on the ground. *Id.* at 1107-08 (Page ID #9673-74). Miles told the Willises that as he was bending to pick up the money, however, the rifle went off and shattered Maher's beverage bottle. *Id.* According to Bonnie, Miles said that he shot each

brother several times. *Id.* Bonnie then testified that Miles stated that Miles ran to the Willises' home and put the rifle in their yard; Miles then might have met Issa at a nearby parking lot, and Issa perhaps then drove Miles home. *Id.* at 1103-04 (Page ID #9669-70). The Willises also testified at Issa's trial that, while Miles told his story, they thought that Miles was bragging. *Id.* at 1032, 1174-75 (Page ID #9598, 9740-41).

Joshua also testified at Issa's trial that, several days later, Joshua ran into Issa at the Save-Way, and Issa asked Joshua "Does anybody know?" and Joshua said "No, not that I know of." *Id.* at 1183 (Page ID #9749). During this discussion, Joshua told Issa that Issa needed to get the rifle from the Willises' backyard. *Id.* at 1171 (Page ID #9737). Issa replied that he would talk to Miles and that Miles would get the rifle. *Id.* When Joshua noticed that the bag was still in his yard, he confronted Issa again at the Save-Way. *Id.* at 1172 (Page ID #9738). Bonnie also testified that she told Issa he needed to get the rifle from their yard, and during this conversation, Issa asked Bonnie to tell Miles to not go near the store because police were investigating. *Id.* at 1099, 1133-32 (Page ID #9665).

Renee Hayes ("Hayes"), another Save-Way employee, also testified at Issa's trial. *Id.* at 836 (Page ID #9401). Hayes testified that she thought that she observed Linda and Issa exchange $2000 on November 25, but she was not certain and did not pay close attention. *Id.* at 847, 857 (Page ID #9412, 9422). Hayes also testified, however, that all employees would help count and package money. *Id.* at 846 (Page ID #9411). Furthermore, Hayes did not

hear Linda or Issa make statements regarding a murder, but she did hear them discuss making a deposit for the store. *Id.* at 853-54 (Page ID #9418-19). According to Hayes, the money was deposited into the store's checking account on November 25. *Id.* at 853 (Page ID #9418).

Additionally, Dwayne Howard, Hayes's husband, testified, and he stated that he saw a rifle at Issa's apartment. *Id.* at 861, 864-66 (Page ID #9427, 9430-32). Howard then identified during Issa's trial the rifle that he saw in Issa's apartment as the murder weapon. *Id.* at 866 (Page ID #9432). Also, according to Howard, Issa told Howard "Don't be telling people [sic] no lies [sic] and stuff like that, seen him with a gun [sic]." *Id.* at 869 (Page ID #9435). On the other hand, Howard also stated that he does not know anything about guns and that he would not be able to identify the murder weapon if there were two identical rifles in front of him. *Id.* at 872, 875 (Page ID #9438, 9441).

Souhail Gammoh ("Gammoh"), another Save-Way employee, also testified that, on the night of the murders, Issa gave him a ride home from work. *Id.* at 887 (Page ID #9453). When Issa dropped Gammoh off between 1:14 and 1:20 a.m., Issa told Gammoh that he might pick Gammoh up later to go to a bar. *Id.* at 890 (Page ID #9456). Issa eventually did return around twenty-five or thirty-five minutes later, but Gammoh based this time range on the amount of beer that he had consumed from the time that Issa dropped off Gammoh and then returned. *Id.* at 894 (Page ID #9460).

Gammoh then testified that, at the crime scene, Gammoh told an officer that he and Issa closed the

store, dropped off Issa's mom, and then went to the bar; he did not mention to the officer, however, that Issa was not with Gammoh all night. *Id.* at 903-04 (Page ID #9469-70). When Gammoh saw Issa later, Issa told Gammoh that the "[n]ext time they ask [Gammoh], tell them that [they] were together." *Id.* at 906 (Page ID #9472). Gammoh also testified that he observed Issa take a white trash bag out of Issa's trunk, but Gammoh did not know whether the trash bag was short-and-square or long-and-thin shaped. *Id.* at 916-17 (Page ID #9482-83). Additionally, Gammoh thought that he saw a rifle in Issa's apartment two weeks before the murders. *Id.* at 919 (Page ID #9485).

When an officer testified at Issa's trial, he stated that the police knew that the murder weapon used 7.62-caliber ammunition. R. 229-2 (App., Trial Tr. at 764-65) (Page ID #9329-30). The police then found one round of 7.62-caliber ammunition in Issa's apartment, but they did not find a weapon. *Id.* at 765 (Page ID #9330). A firearms examiner also testified that the round from Issa's apartment was from a different manufacturer than the discharged cartridge casings found next to the murder weapon. *Id.* at 777-78 (Page ID #9342-43).

Based on this evidence, on September 2, 1998, the jury convicted Issa of aggravated murder with a death penalty specification because the offense was committed for hire, so the penalty phase of the trial began. R. 229-3 (App., Trial Tr. at 1521-22) (Page ID #10089-90). Then on September 10, 1998, the jury recommend the death penalty, and the trial court sentenced Issa to death on October 16, 1998. *Id.* at 1642, 1647, 1651 (Page ID #10210, 10215, 10219).

B. Procedural Background

On direct appeal, the Ohio Supreme Court affirmed Issa's conviction and sentence. *See Issa I*, 752 N.E.2d at 928. However, before the Ohio Supreme Court issued its decision, Issa filed a petition for postconviction relief. *State v. Issa (Issa II)*, No. C-000793, 2001 WL 1635592, at *1 (Ohio Ct. App. Dec. 21, 2001) (per curiam). After the trial court denied the petition, the Ohio Court of Appeals determined that Issa was not entitled to relief. *Id.* at *6. When Issa appealed this decision, the Ohio Supreme Court denied review on April 17, 2002. *State v. Issa (Issa III)*, 766 N.E.2d 162 (Table) (Ohio 2002).

On April 17, 2003, Issa filed his initial petition for writ of habeas corpus in the district court. R. 8 (Pet.) (Page ID #4784). After a series of procedural steps over the years, on September 21, 2015, the district court issued its decision regarding Issa's petition. *Issa v. Bagley* (*Issa IV*), No. 1:03-CV-280, 2015 WL 5542524 (S.D. Ohio Sept. 21, 2015). The district court denied Issa's requests for relief, but it granted a certificate of appealability for several grounds: (1) first ground, failure to call Linda as a witness; (2) third and fourth ground, failure to perform adequate mitigation and present additional mitigation witnesses; (3) fifth ground, failure to obtain cultural expert and/or professional translator; (4) sixth ground, admission of the Willises' testimony about Miles's hearsay statements; (5) ninth ground, equitable tolling for ineffective assistance of appellate counsel claim; (6) eleventh ground, disproportionate sentence; (7) twelfth ground, failure to utilize mitigation expert; (8) twenty-seventh

ground, appellate counsel's conflict of interest; (9) pending twenty-eighth ground, Ohio's lethal injection protocol violates the Eighth Amendment, (10) pending twenty-ninth ground, Ohio's lethal injection protocol violates the Fourteenth Amendment; and (11) proposed twenty-eighth through thirty-seventh ground, legality of Ohio's method of lethal injection. *Id.* at *54. These grounds are now before this panel.

II. DISCUSSION

Issa filed his petition in 2003, so the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. R. 8 (Pet.) (Page ID #4784). For a question of law, this court can grant relief if a state-court judgment "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." 28 U.S.C. § 2254(d)(1) (emphasis added). A decision is "contrary to" when "it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'"[1] *Williams v. Mitchell*, 792

[1] This opinion will focus on the "contrary to" prong. Although Issa does not explicitly state the phrase "contrary to" in the section of his brief discussing the Confrontation Clause, he does discuss the state supreme court's improper application of Supreme Court law. *See* Appellant's Br. at 48, 58. The State also stated in its brief that the state supreme court's decision regarding the Confrontation Clause "was neither contrary to, nor an unreasonable application of, clearly established federal law." Appellee's Br. at 12. Accordingly, we will review whether the state supreme court's decision was "contrary to" Supreme Court precedent.

F.3d 606, 611-12 (6th Cir. 2015) (alterations in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). "When the state court issues a decision that is contrary to federal law, we review the merits of the petitioner's claim de novo." *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006); *see also Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006). For this analysis, we cannot consider Supreme Court dicta or the decisions of the courts of appeals. *Brumley v. Wingard*, 269 F.3d 629, 638 (6th Cir. 2001).

A. The Ohio Supreme Court's decision is contrary to Supreme Court precedent regarding the Confrontation Clause.

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. At the time of Issa's trial in 1998, the test in *Ohio v. Roberts*, 448 U.S. 56 (1980), controlled. Eventually, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court replaced and overruled this test in *Roberts*.[2] *See*

[2] In *Desai v. Booker*, 538 F.3d 424 (6th Cir. 2008), we stated that a habeas applicant cannot receive relief under *Roberts* when the out-of-court statements were admissible under *Crawford*. *See* 538 F.3d at 427; *see also Doan v. Carter*, 548 F.3d 449, 457 (6th Cir. 2008); *Jackson v. McKee*, 525 F.3d 430, 438 (6th Cir. 2008).

Nevertheless, the conclusions in *Desai*, *Doan*, and *Jackson* run afoul of the manner of analysis that we established in earlier cases. *See Fulcher*, 444 F.3d at 799–811; *Stallings v. Bobby*, 464 F.3d 576, 581–84 (6th Cir. 2006). In *Fulcher*, a defendant contended that the admission of a taped statement to police violated the Confrontation Clause. *See* 444 F.3d at 797. Because *Roberts* was the controlling law at the time, we

Davis v. Washington, 547 U.S. 813, 825 n.4 (2006). *Crawford*, however, is not retroactive.[3] *See Whorton v. Bockting*, 549 U.S. 406, 421 (2007).

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considered whether the admission of the witness's statements violated the Confrontation Clause. *Id.* at 800. For this analysis, we first determined that the state court had applied law that was contrary to the governing law. *Id.* at 806. We then reviewed de novo whether the statements had sufficient indicia of trustworthiness under *Roberts*, and we concluded that they did not. *Id.* at 808. Next, we determined that the error was not harmless. *Id.* at 811. Lastly, we examined the defendant's argument that *Crawford* applied. *Id.* We stated, however, that "[g]iven our decision to order that the writ be granted on the basis of pre-*Crawford* law, we find it *unnecessary* to address . . . *Crawford*." *Id.* at 811 (emphasis added). Thus, in *Fulcher*, we concluded that we did not need to consider *Crawford* when we had already determined that relief was warranted under *Roberts*. We again applied this format, and rejected examining the out-of-court statements under *Crawford*, in *Stallings*, 464 F.3d at 581–84.

Because our analysis in *Desai*, *Doan*, and *Jackson* occurred after we had already established the applicable format for analyzing this issue in *Fulcher* and *Stallings*, the format in *Fulcher* and in *Stallings* controls our analysis here. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."); *see* 6 Cir. R. 32.1(b) (stating that published panel opinions are binding on all subsequent panels). We therefore do not consider *Crawford* when the state court erred in its application of the then-governing decision in *Roberts*.

[3] In its brief, the State did not address *Desai* or whether *Crawford* applies to prevent Issa from obtaining relief. *See* Appellee's Br. at 26-33.

Under *Roberts,* there is a two-part test to determine whether an out-of-court statement is valid under the Confrontation Clause: the witness needs to be unavailable and the statement needs to have adequate "indicia of reliability." 448 U.S. at 66. There are two ways that an out-of-court statement can be reliable. First, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id*. If the statement does not fall within a firmly rooted hearsay exception, then "the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* Whether Miles's statements to the Willises have particularized guarantees of trustworthiness is the only issue we need to address because the Supreme Court eventually abrogated the unavailability requirement before Issa's trial, *White v. Illinois*, 502 U.S. 346, 354 (1992), and the State concedes that Miles's statements do not fall within a firmly rooted hearsay exception, *see* Appellee's Br. at 30.

For this analysis, as the Supreme Court has emphasized, "'particularized guarantees of trustworthiness' *must* be shown from *the totality of the circumstances*." *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (emphasis added). It also limited the scope of circumstances that a court can examine by stating "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* The Supreme Court nevertheless concluded that "courts have considerable leeway in their consideration of appropriate factors." *Id.* at 822. "[It] therefore decline[d] to endorse a mechanical test for determining 'particularized guarantees of

trustworthiness' under the [Confrontation] Clause." *Id.*

The Supreme Court also emphasized that this is not a slack requirement. "Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception," the Supreme Court has clarified "that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821. "Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." *Id.*

When conducting this analysis, the Supreme Court noted that a court cannot use "a preconceived and artificial litmus test." *Id.* at 819. For instance, in *Wright*, the Supreme Court examined whether a child's out-of-court statements regarding abuse were sufficiently trustworthy. *Id.* at 809, 816. The state supreme court had determined that the testimony was not trustworthy because the interview of the child did not follow procedural safeguards. *Id.* at 818. "Although [the Supreme Court] agree[d] with the court below that the Confrontation Clause bars the admission of the younger daughter's hearsay statements, [it] reject[ed] *the apparently dispositive weight* placed by that court on the lack of procedural safeguards at the interview." *Id.* (emphasis added). In support of this reasoning, the Supreme Court stated that "[o]ut-of-court statements made by

children regarding sexual abuse arise in *a wide variety of circumstances*, and [it] d[id] not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial." *Id.* (emphasis added). The Supreme Court was concerned that "[t]he procedural requirements identified by the court below, to the extent regarded as conditions precedent to the admission of child hearsay statements in child sexual abuse cases, may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes." *Id.* Thus, it concluded that, "[a]lthough the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, [it] decline[d] to read into the Confrontation Clause *a preconceived and artificial litmus test* for the procedural propriety of professional interviews in which children make hearsay statements against a defendant." *Id.* at 819 (emphasis added).

The plurality in *Lilly v. Virginia*, 527 U.S. 116, 136 (1999), also examined the application of the "residual trustworthiness test" to a codefendant's statements.[4] According to the plurality, the Supreme Court "ha[s] consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another

[4] We have previously concluded that Justice Stevens wrote the opinion of the court because "the remaining two justices (Scalia and Thomas) believed that the Confrontation Clause barred a *broader* range of statements against penal interest." *Fulcher*, 444 F.3d at 800 n.4.

person."[5] *Id.* at 128. "[B]ecause the use of an accomplice's confession 'creates a special, and vital need for cross-examination,' a prosecutor desiring to offer such evidence must comply with *Bruton*, hold separate trials, use separate juries, or abandon the use of the confession." *Id.* (quoting *Gray v. Maryland*, 523 U.S. 185, 194-95) (1998)). The plurality stated that the Court has "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Id.* at 131 (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)).

The plurality in *Lilly* then noted, however, that "the presumption of unreliability that attaches to codefendants' confessions . . . may be rebutted." *Id.* at 137 (alteration in original) (quoting *Lee*, 476 U.S. at 543). For instance, the Supreme Court has held that "any inherent unreliability that accompanies co-conspirator statements made during the course and in furtherance of the conspiracy is *per se* rebutted by the circumstances giving rise to the long history of admitting such statements." *Id.* Nevertheless, the plurality noted that "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice"; for

[5] In *Greene v. Fisher*, 565 U.S. 34, 40 (2011), the Supreme Court concluded that "clearly established Federal law" is the law that existed at the time of "the last state-court adjudication on the merits" of the claim. Because the Ohio Supreme Court adjudicated Issa's Confrontation Clause argument on the merits and the United States Supreme Court decided *Lilly* before the Ohio Supreme Court examined Issa's claim, the standards set in *Lilly* are applicable here.

instance, "when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." *Id.*

In the case at hand in *Lilly*, the plurality considered several facts to conclude that "[i]t [was] abundantly clear that neither the words that [the codefendant] spoke nor the setting in which he was questioned provides any basis for concluding that his comments regarding petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting." *Id.* at 139. For instance, the plurality noted that "[the codefendant] was in custody for his involvement in, and knowledge of, serious crimes and made his statements under the supervision of governmental authorities." *Id.* The plurality also averred that the codefendant "was primarily responding to the officers' leading questions, which were asked without any contemporaneous cross-examination by adverse parties." *Id.* In light of this, the plurality resolved that the codefendant "had a natural motive to attempt to exculpate himself as much as possible." *Id.* It was furthermore concerning to the plurality that the codefendant "was obviously still under the influence of alcohol." *Id.* The plurality then concluded that "[e]ach of these factors militates against finding that his statements were so inherently reliable that cross-examination would have been superfluous." *Id.*

Under the *Roberts* standard, the Ohio State Supreme Court reviewed Issa's allegation that the admission of Mile's statements to the Willises violated the Confrontation Clause:

Applying *Lilly* and [*State v.*] *Madrigal*[, 721 N.E.2d 52 (Ohio 2000),] to this case, it is clear that in order to determine whether the admission of evidence concerning Miles's confession violated appellant's confrontation rights, we must examine the circumstances under which the confession was made. Unlike the declarants in *Lilly* and *Madrigal*, Miles was not talking to police as a suspect when he made the out-of-court statement. Miles's confession was made spontaneously and voluntarily to his friends in their home. Moreover, Miles had nothing to gain from inculpating appellant in the crime. In fact, by stating that appellant had hired him to kill Maher, Miles was admitting a capital crime, *i.e.*, murder for hire. 'Furthermore, Miles's statement was clearly not an attempt to shift blame from himself because he was bragging about his role as the shooter in the double homicide.

We therefore find that the circumstances surrounding the confession did "'render the declarant [Miles] particularly worthy of belief.'" *Madrigal*, 87 Ohio St.3d at 387, 721 N.E.2d at 63, quoting *Wright*, 497 U.S. at 819, 110 S.Ct. at 3148, 111 L.Ed.2d at 655. Our decision herein is buttressed by Chief Justice Rehnquist's separate opinion in *Lilly*, in which he noted that in a prior case, the court "recognized that statements to fellow prisoners, *like confessions to family members or friends*, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant." (Emphasis

> added.) *Id.*, 527 U.S. at 147, 119 S.Ct. at 1905, 144 L.Ed.2d at 141 (Rehnquist, C.J., concurring in judgment). Accordingly, we hold that the admission of Bonnie's and Joshua's testimony concerning Miles's confession did not violate the Confrontation Clause.

Issa I, 752 N.E.2d at 919. Thus, the Ohio Supreme Court determined that Miles's statements were trustworthy simply because he made them to his friends.

The Ohio Supreme Court's analysis, however, is contrary to *Wright*. Throughout its reasoning, the Ohio Supreme Court did not consider *Wright*'s requirement to examine the "totality of the circumstances" surrounding the out-of-court statement. *See Issa*, 752 N.E.2d at 919. Instead, the Ohio Supreme Court focused only on whether Miles made these statements to the police—this was the determinative factor: "Our decision herein is buttressed by Chief Justice Rehnquist's separate opinion in *Lilly*, in which he noted that in a prior case, the court 'recognized that statements to fellow prisoners, *like confessions to family members or friends*, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant.'" *Id.* (internal citation omitted) (quoting *Lilly*, 527 U.S. at 147 (Rehnquist, J., concurring)). By not considering any other facts, the Ohio Supreme Court applied "a preconceived and artificial litmus test" and failed to consider "the totality of the circumstances," which is contrary to what a court "must" do during this analysis. *Wright*, 497 U.S. at 819.

B. A de novo review of the totality of the circumstances shows that Miles's statements to the Willises are not trustworthy.

Because we have determined that the Ohio Supreme Court has applied law contrary to Supreme Court precedent, we review de novo whether the out-of-court statements are admissible under the *Roberts* standard. *See Fulcher*, 444 F.3d at 799, 806 (conducting de novo review to conclude that the statements were inadmissible under the *Roberts* standard). Although the Supreme Court has not provided a set list of factors for us to consider, it has described several factors that are relevant to the case before us. For instance, if a statement is spontaneous, then it suggests that the statement is trustworthy. *See Wright*, 497 U.S. at 821. Additionally, when the speaker has consistently repeated the statements, it suggests that the statement is trustworthy. *Id*. When a speaker has a motive to fabricate the statement, however, the statement might not be trustworthy, which can occur when the speaker makes the statements to the police. *See id*. at 821-22; *see also Lee*, 476 U.S. at 544. The declarant's mental state at the time that the statement was made also provides insight into whether the statement is trustworthy. *Wright*, 497 U.S. at 821. In contrast, when a speaker makes the statement to someone other than police, such as a friend or family, the nature of the relationship could suggest that the statement is trustworthy. *Cf. Lilly*, 527 U.S. at 139.

Several facts suggest that Miles's statements to the Willises are trustworthy. For instance, the Willises testified that that they were friends with

Miles. R. 229-3 (App., Trial Tr. at 1087, 1162-63) (Page ID #9653, 9728-29). Miles, in fact, had lived at the Willises' home for a period of time. *Id.* at 1087 (Page ID #9653). That Miles made the statements about the murders at the Willises' home points towards trustworthiness. *Id.* at 1142 (Page ID #9708). Additionally, by making these statements voluntarily, Miles did not have a reason to shift blame to Issa. Miles also made these statements voluntarily, and he did not make these statements in response to leading questions. Therefore, several facts suggest trustworthiness.

A deeper examination of the circumstances surrounding Miles's statements, nonetheless, suggests that they are not trustworthy. Bonnie, for example, testified that Miles boasted and bragged frequently, so she did not take him seriously:

> Q. Dre was talking about killing somebody?
>
> A. No. As I said, I did not talk to Dre. Everything that I heard was from my brother. Dre was talking about doing a lot of things and never did it; when I heard it. I said, you know - -
>
> A. Dre had a tendency to brag, talk big, right. He came from Chicago. He talked about a lot of things he did.
>
> Q. And you didn't necessarily believe all his stories?
>
> A. I did but I didn't. To me, that was really no big deal, if he did that's him; if he didn't that's still him.

Q. You think it was a big deal that Dre may be bragging about killing two people?

A. What's the big deal? As I said, I - -

. . . .

Q. When [Miles] was describing to you these cold-blooded killings, what's his attitude? How - -

A. He had no remorse at all. He was actually bragging.

Q. He had no remorse at all? He was actually bragging? He was boasting?

A. Right.

Q. He was a big man, a tough guy?

A. Right.

Id. at 1126, 1137-38 (Page ID #9692, 9703-04). Joshua made similar observations about Miles's demeanor:

Q. Some time before that shooting happened, did anyone discuss shooting with you?

A. Yes.

Q. Who?

A. Andre Miles.

. . . .

Q. And what did Andre Miles say to you?

A. He said he had to kill somebody for some money and that he was hired by Mike and he asked me did I want to take part in it. I said he was crazy.

. . . .

Q. Did you take him seriously at that point?

A. No, it went in one ear and out the other. I got back in the car and left.

. . . .

Q. Can you state whether or not Andre Miles ever talked about killing anyone else if they talked?

A. He joked around with it a lot. I didn't never take him seriously. I always knew he was capable of doing it, though.

Q. What did he joke around about?

A. He would always joke around, say he killed somebody in Chicago or different places.

Id. at 1164-65, 1174-75 (Page ID #9730-31, 9740-41). Because the Willises stated that they believed Miles often lied and that Miles was bragging, the circumstances of the Willises' specific relationship with Miles suggest that Miles's statements are not trustworthy.

Similarly, Miles's testimony in Linda's trial directly contradicts the statements that he allegedly made to the Willises after the murders:

Q. Mr. Miles, what is your relationships to the Willises?

A. Just a friend.

Q. Good friend of yours?

A. Just a friend -- associates.

Q. Associated in what, sir?

A. I know them. I mean, I talk to them, I conversate with them. We speak. We hang out.

Q. What do you hang out doing together?

A. Drinking. Whatever.

Q. Getting high?

A. Yeah.

. . . .

Q. Let's talk about the Willises for a second. You talked with Bonnie and Joshua Willis before you committed this murder, didn't you, sir?

A. No.

Q. You had no conversation with them --

A. About this incident?

Q. -- about the fact that you were approached by Ahmad Issa to have these people killed.

A. No.

Q. When is the last time that you saw either of the Willises before you killed these people?

A. I don't remember, offhand.

Q. A week? A month? A year?

A. Probably a couple weeks, maybe a week.

Q. Did you talk to them after the murder?

A. Yes.

Q. How soon after?

A. The next day.

> Q. And is that when you told Joshua Willis what you had done?
>
> A. No.
>
> Q. Is it your testimony that you never told them what you did?
>
> A. Never told them.
>
> Q. So certainly you never gave them any information that Linda was involved in this murder-for-hire scheme, did you?
>
> A. No.

R. 228-1 (L. Khriss Trial Tr. at 468-72) (Page ID #8028-32). Based on the testimony, Miles never discussed the murders with the Willises, which conflicts with Miles's alleged statements to the siblings. Thus, based on the totality of the circumstances, Miles's statements are not sufficiently trustworthy to warrant their admission in Issa's trial.

C. The error was not harmless.

"[A] constitutional error is cause for federal habeas relief only if it has 'a substantial and injurious effect or influence in determining the jury's verdict.'" *Hill v. Hofbauer*, 337 F.3d 706, 718 (6th Cir. 2003) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). "This Court has held that the *Brecht* standard survived the enactment of AEDPA." *Fulcher*, 444 F.3d at 822. "[T]he proper standard by which to gauge the injurious impact . . . is to consider the evidence before the jury absent the constitutionally infirm evidence." *Brumley*, 269 F.3d at 646. There are five factors to consider: (1) the importance of the out-of-court statements to the

prosecution's case; (2) whether the statements are cumulative; (3) whether other evidence materially contradicts or corroborates the out-of-court statements; (4) the amount of cross-examination that occurred; and (5) the strength of the prosecution's case. *See Madrigal v. Bagley*, 413 F.3d 548, 551 (6th Cir. 2005) (quoting *Delaware v. Van Ardall*, 475 U.S. 673, 684 (1986)).

First, Miles's out-of-court statements were important to the prosecution's case. The prosecution, for instance, emphasized in its closing that it wanted the jury "to look at . . . Bonnie and Josh's statements because that's where you get the statements of Andre Miles, that's where you find Andre Miles did the shooting." R. 229-3 (App., Trial Tr. at 1445) (Page ID #10013). Additionally, at the end of closing argument, the prosecution stated that the Willises "provided details to the police that the police didn't have. Think of that. They are *the cornerstone* of this investigation." *Id.* at 1448–49 (Page ID #10016–17) (emphasis added). Thus, Miles's out-of-court statements were central to the prosecution's case.

Second, Miles's statements are the only direct evidence implicating Issa in a murder for hire. Hayes, for example, stated that she possibly observed Linda and Issa exchange $2,000, but she also stated that employees regularly helped count and package money. *See id.* at 846-48 (Page ID #9411-13). She also said that money was deposited into the store's checking account on November 25, 1997. *Id.* at 853 (Page ID #9418). However, Howard and Gammoh each testified that he believed that he saw a rifle in Issa's apartment. *Id.* at 864-66, 919 (Page ID #9430-32, 9485). Gammoh's testimony also suggests that

Issa might have had time to assist Miles because Issa dropped Gammoh off between 1:14 a.m. and 1:20 a.m. on the night of the murders and then picked Gammoh up about twenty-five or thirty-five minutes later—Gammoh came up with the calculation of this amount of time because that is how long it took him to finish his beer. *Id.* at 890, 894 (Page ID #9456, 9460). According to Gammoh's testimony, the next day, Issa told Gammoh that the "[n]ext time [the police] ask [Gammoh], tell them that [Issa and Gammoh] were together, you know." *Id.* at 906 (Page ID #9472). Gammoh also stated that he observed Issa take a white trash bag out of Issa's trunk, but he did not know the bag's shape. *Id.* at 916-17 (Page ID #9482-83). Regarding the rifle, an officer testified that the police found one round of 7.62-caliber ammunition in Issa's apartment, but this was from a different manufacturer than the cartridges next to the murder weapon. R. 229-2 (App., Trial Tr. at 765, 777-78) (Page ID #9330, 9342-43). Joshua also stated in court, regarding the rifle in the Willises' backyard, that Issa told Joshua "[o]kay. I'll talk to Andre and if Andre don't come and get it, I will." R. 229-3 (App., Trial Tr. at 1171) (Page ID #9737). Bonnie similarly testified that Issa asked Bonnie to tell Miles to not go to the Save-Way because the police were investigating. *Id.* at 1099 (Page ID #9665). In reviewing this remaining evidence, however, we cannot conclude that Miles's inadmissible statements did not have "a substantial and injurious effect or influence in determining the jury's verdict," so the error was not harmless. *Brecht*, 507 U.S. at 623 (quoting *Kotteakosv v. United States*, 328 U.S. 750, 776 (1946)).

III. CONCLUSION

Because the admission of Miles's statements violated the Confrontation Clause under then governing Supreme Court law and was not harmless, we **VACATE** and **REMAND** to the district court with instructions to grant a **CONDITIONAL WRIT OF HABEAS CORPUS**, giving the State of Ohio 180 days to retry Issa or to release him from custody. In light of this conclusion, we will not address Issa's additional grounds for relief.

CONCURRENCE

MERRITT, Circuit Judge, concurring. I agree and concur in Judge Moore's opinion that the admission of the hearsay testimony of Joshua and Bonnie Willis violated the Confrontation Clause, but the failure to call Linda Khriss as a witness also constituted ineffective assistance of counsel.

Issa was charged with aggravated murder with prior calculation and design and a death specification of murder for hire. Issa's codefendant, Linda Khriss, facing the same charges as Issa, testified in her own trial and denied hiring anyone to kill her husband. She specifically exonerated Issa, testifying at her trial that Issa did not conspire to kill her husband. Linda Khriss Trial Tr. at 101. She denied the existence of any plan to kill her husband.

> Q. [A]t any time prior to the death of your husband did you and Ahmad Issa conspire or plan to kill your husband?

A. No sir, we never did.

Linda Khriss Tr. Trans. At 86. Linda Khriss was acquitted. The state then presented the same theory at Issa's trial that it relied on at Linda's: Linda hired Issa to kill her husband, and Issa hired Miles to be the triggerman. Linda Khriss was available to testify at Issa's trial—and in fact sat in the courtroom throughout much of his trial. Yet trial counsel failed to call her. Issa therefore did not benefit from the testimony she gave at her own trial. The failure of Issa's counsel to have Linda testify to disprove Issa's involvement in the murder constitutes ineffective assistance of counsel.

The Sixth Amendment guarantees to a criminal defendant "the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. This right to counsel is "the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the petitioner's trial. *Id.* at 694.

Strickland first directs us to examine whether counsel's performance was deficient, that is, whether it "fell below an objective standard of reasonableness" measured under "prevailing professional norms." *Id.* at 688. The state contends that because counsel's decision not to call Linda was "strategic," it cannot be ineffective. "Strategic" decisions can be unreasonable depending on the circumstances and therefore deficient under *Strickland*. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). Simply labelling the decision "strategic" is not enough under *Strickland*. "A lawyer who fails adequately to investigate, *and to introduce into evidence*, [information] the demonstrate[s] his client's factual innocence, *or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict*, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (emphasis added). Therefore, an attorney's failure to present available exculpatory evidence is ordinarily deficient absent some clearly discernible reason. *Stewart v. Wolfenbarger*, 468 F.3d 338, 355-61 (6th Cir. 2006) (trial counsel has been found ineffective when she fails to present exculpatory testimony); *see also Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991); *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir. 1990); *appeal after remand*, 961 F.2d 113 (8th Cir. 1992) (failure to interview alibi witnesses was deficient performance under first *Strickland* factor); *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (failure to call witnesses to contradict eyewitness identification of defendant was ineffective assistance).

I cannot perceive any legitimate strategic reason for the failure to present evidence that would show that a jury of twelve had just concluded that Linda was not guilty of the same crime Issa was being tried for. It seems obvious that Linda's testimony would have been helpful to raise reasonable doubt about whether she hired Issa to kill Maher Khriss.

The second *Strickland* prong requires us to determine whether "there is 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 only testimony directly tying Issa to the murders was the hearsay testimony of Miles introduced through Bonnie and Joshua Willis, testimony the state recognized as the "cornerstone" of their case. The Willis' hearsay testimony should not have been admitted; but, once it was, Issa's trial counsel needed to refute it. What better way to disprove the charge than to show that Linda had just been acquitted of the same charge?

The Ohio court failed to reasonably apply *Strickland*. Issa raised the claim of ineffective assistance of counsel in his state post-conviction petition for relief. The Ohio Court of Appeals found, without citing any basis for its conclusion, that because part of Linda's testimony "could be damaging" to Issa, counsel's strategic decision not to call her as a witness was not ineffective assistance. *State v. Issa*, C-000793, 2001 WL 1635592, at *4 (Ohio Ct. App. Dec. 21, 2001), *appeal not allowed for review*, 766 N.E.2d 162 (Ohio 2002) (Table). The Ohio court does not explain the content of the so-called "damaging" testimony given by Linda at her trial. The record in this case reflects only the testimony of

an acquitted codefendant who testified in her own defense, denying any plan to kill her husband, as well as explicitly denying that she hired Issa to kill her husband. The Ohio court's speculation about the possibility of Linda's testimony being "damaging" is insufficient to satisfy *Strickland*, *Towns v. Smith*, 395 F.3d 251, 259-60 (6th Cir. 2005) (no support in the record for speculation that the witnesses' testimony would have been damaging to defendant), and is therefore an unreasonable application of Supreme Court law. Even if something in the testimony could be perceived as negative, it was far outweighed by the fact that Linda's testimony disproved the entirety of the state's case and exonerated Issa. The failure to call Linda Khriss as a witness fell below an objective standard of reasonableness, caused harm to Issa and was an unreasonable application of *Strickland*.

There is one final reason that Issa should not be put to death. Even if he contributed in some way to the murder in this case, it is completely irrational to select him for execution while Linda and Miles are spared. The death penalty system has "capriciously" and "freakishly" selected Issa for death just as Justice Stewart described in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972). If the Eighth Amendment is to "draw its meaning from evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), we should not let Issa be executed when the trigger man (Miles) is simply imprisoned. The State of Ohio does not attempt to explain these inconsistent verdicts. The irrationality of these inconsistencies is apparent.

No. 15-4147

United States Court of Appeals
for the Sixth Circuit

AHMAD FAWZI ISSA,

Petitioner–Appellant,

v.

MARGARET BRADSHAW, Warden,

Respondent–Appellee.

Before: COLE, Chief Judge; MERRITT and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

Filed: September 21, 2018

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is VACATED and REMANDED with instructions to grant a CONDITIONAL WRIT OF HABEAS CORPUS, giving the State of Ohio 180 days to retry Ahmad Fawzi Issa or release him from custody.

ENTERED BY ORDER OF THE COURT:

/s/ Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:03-cv-280

Ahmad Issa,

Petitioner,

vs.

Margaret Bagley, Warden,

Respondent.

ORDER

Filed: September 21, 2015

Petitioner, Ahmad Issa, was convicted by an Ohio jury of aggravated murder. After the penalty phase trial, the jury recommended that he receive the death penalty. The trial court engaged in its own analysis of the sentencing factors, and ultimately agreed with the jury's recommendation. Issa's direct appeal and post-conviction proceedings challenging the conviction and his sentence were unsuccessful. Issa now seeks a writ of habeas corpus on a variety of grounds.

FACTS OF THE CASE

The Ohio Supreme Court set forth the following facts in its opinion rejecting Issa's direct appeal:

> At approximately 1:30 a.m. on November 22, 1997, Andre Miles, armed with a high-powered assault rifle, confronted brothers Maher and Ziad Khriss in a parking lot in

front of Save-Way II Supermarket in Cincinnati, Ohio ("Save-Way") and demanded money. As Maher and Ziad put money on the ground and pleaded for their lives, Miles shot and killed them.

After investigating the shootings, Cincinnati police concluded that Miles had been hired to kill Maher. The police theorized that Maher's wife, Linda Khriss, had offered to pay …. Ahmad Fawzi Issa to kill Maher. The police believed that Issa then enlisted Miles to do the killing, supplied him with the weapon, and arranged the opportunity. Issa, Miles, and Linda were each charged with aggravated murder.

Prior to the murders, Maher and Linda Khriss owned and operated Save-Way. In addition to Maher and Linda, Renee Hayes, Souhail Gammoh, and Issa worked at the store. Bonnie Willis and her brother Joshua Willis, who were both teenagers at the time of the murders, lived with their mother approximately one block from Save-Way. Because they often shopped at Save-Way, they were familiar with the store employees. Miles had previously lived with the Willis family and was a close friend of Bonnie and Joshua.

In the two weeks preceding the murders, two witnesses saw Issa with a rifle in his apartment. On November 14, Dwyane Howard, Hayes's husband, went to Issa's apartment to wake him for work. Issa invited Howard in and showed him a military-style rifle. When Howard asked Issa what he was

going to do with the rifle, Issa's only response was "a little sneer." After the murders, Issa called Howard and told him not to tell anyone that he had seen Issa with a gun. At Issa's trial, Howard identified the murder weapon as being identical to the rifle Issa had shown him. No more than two weeks before the murders, Issa's coworker and friend, Gammoh, while visiting at Issa's apartment, also saw Issa with a rifle.

A few days before the murders, Joshua went to Save-Way and saw Miles standing out in front of the store. Joshua and Miles started talking, and Miles told Joshua that Issa was going to pay him to kill somebody. Miles asked Joshua if he wanted to take part in the crime for half of the money. Joshua did not take Miles seriously and told him he was crazy. On November 20, the Thursday evening before the Saturday morning murders, Joshua told Bonnie about his conversation with Miles. Bonnie also did not believe that Miles would actually kill someone, because Miles "had a tendency to * * * talk big." That is, he talked "about doing a lot of things and never did it."

Linda, Maher, Gammoh, and Hayes worked late at Save-Way on the evening of November 21. At approximately 10:00 p.m., Miles arrived at the store and asked for Issa. Although Issa was scheduled to work at 10:00 p.m., he was not yet there. Linda drove to Issa's apartment to wake him, and then she returned to the store. Issa arrived around 11:15 p.m. Miles

was waiting at the store, and when he arrived, Issa and Miles went outside together to talk.

Around midnight, Maher left Save-Way with a friend to check on another store that Maher owned. Maher left his truck in the Save-Way parking lot and instructed Linda and Issa to put the keys to the truck near the right front tire and that Maher would come back later to get the truck.

At approximately 1:09 a.m. the Save-Way employees closed the store for the night. Issa put the keys near Maher's truck as he had been instructed. Issa's mother was visiting from Jordan and was with Issa at the store when it closed. Issa, his mother, and Gammoh left the store in Issa's car. Issa drove his mother to his apartment, and then he drove Gammoh home. When Issa dropped Gammoh off at approximately 1:20 a.m., he told Gammoh that he was going back home to check on his mother but that he might come back later and take Gammoh to a bar. Approximately twenty-five to thirty-five minutes later, Issa returned to Gammoh's apartment, and they went to a bar together. After Gammoh heard about the murders, he asked Issa where he went before he returned to Gammoh's apartment. Issa told Gammoh, "Don't tell the police. Tell them that we were together all the time."

At approximately 1:26 a.m. on November 22, Sherese Washington was driving near Save-Way when she heard gunshots. Frightened, she stopped her car and turned off

the headlights. She then saw a man run from the Save-Way parking lot and down Iroll Street (the street on which Bonnie and Joshua lived). Sherese went home and called 911. Within four minutes of the shooting, Cincinnati police officers arrived at Save-Way and discovered Maher's and Ziad's bodies in the parking lot. Medical personnel arrived shortly thereafter but were unable to revive the Khriss brothers.

Near the bodies, crime-scene investigators for the Cincinnati Police found six 7.62 caliber rifle casings, a broken beverage bottle, and several $1 bills. A small crater in the blacktop near Ziad's body and a fresh gouge in the dirt near Maher's body were noted by officers as possibly having been made by gunfire. Officers also documented that three milk crates had been arranged like steps behind a dumpster in the parking lot. The police found this noteworthy because all the other items behind the dumpster were in disarray, and the police speculated that the perpetrator may have arranged these milk crates.

Dr. Lawrence Schulz, a deputy coroner for Hamilton County, performed autopsies on Maher and Ziad and testified as to his findings. Schulz found that a single bullet had struck the palm of Maher's left hand and traveled through the back of his hand and then entered his check. The bullet then perforated Maher's lungs and his aorta, causing his death within a few minutes. Ziad had been shot in the palm of his right hand

and twice in his left arm. Each bullet that struck his arm traveled through to his chest.

Joshua testified that around 5:00 p.m. on November 22, Miles called him and told him that he had killed Maher and Ziad and that he had put the gun in Bonnie and Joshua's back yard in a white plastic bag. He told Joshua not to touch the gun.

The following day, November 23, Miles came to the Willises' home. Bonnie and Joshua both testified regarding the conversation they had with Miles. Miles told them that Issa was going to pay him $2,000 for killing Maher but "since [Maher's] brother also got killed that night he had to throw in an extra $1,500." According to Miles, Issa had not paid him yet. Miles told the Willises that, on the might of the shooting, Issa gave Miles the rifle, which Miles described as an M-90. Miles then sat on milk crates behind a dumpster outside the store and waited for Maher to come back for his truck. When Maher returned with Ziad, Miles confronted them and demanded money. Maher and Ziad pulled money from their pockets, dropped it on the ground and pleaded with Miles not to shoot.

Miles said that when he reached down for the money, the gun went off and the beverage bottle that Maher was holding shattered. Then Miles said he "got trigger happy. He freaked. He shot them once. He might as well kill them." While Maher was "still squirming," Miles said, he shot him in the head, and then shot Ziad in the head. After that, Miles picked

up the money they had thrown down, but said he left two $100 bills on the ground. Miles said that after the shooting he ran down Iroll Street, put the rifle in the Willises' back yard, and then met Issa in a nearby parking lot and Issa drove him home.

Bonnie and Joshua noticed that Miles was wearing new clothes "from head to toe." Miles said that he "had bought the new clothes with the money that he got from the two victims." While describing the killings, Miles showed "no remorse at all. He was actually bragging." Miles also told Bonnie and Joshua, "If anybody knows about this or tells, I'll kill them." Miles reiterated that the rifle was in a white plastic bag in their back yard and that neither Bonnie nor Joshua should touch it. Miles promised to come back and remove the gun. Both Bonnie and Joshua saw an object wrapped in a white bag in their back yard and Joshua described it as "shaped like a gun."

A few days later, Joshua went to Save-Way, and as soon as Issa saw him Issa asked, "Does anybody know?" Joshua said, "No, not that I know of." Joshua then told Issa, "You're going to have to come and get this gun. I don't want to put my family in this type situation." Although Joshua did not mention Miles, Issa replied, "Okay. I'll talk to Andre [Miles] and if Andre don't come and get it, I will." After a few days, Joshua noticed the white bag was still in his yard. Joshua again went to the store and confronted Issa about it. Issa again promised Joshua that either he or Miles would remove

the gun. Bonnie also went to the store and told Issa that the gun needed to be removed from their yard. Issa told her the same thing he had told Joshua. Issa also told Bonnie to "tell [Miles] not to come around the store because the police were investigating, that he would get in touch with him." A few days later, Miles removed the gun.

On November 25, while working at Save-Way, Hayes saw Linda hand Issa two $1,000 packets in cash and "some other money." The state theorized that this represented at least a partial payoff for the killing. The defense, on the other hand, attempted to show that this money was deposited in a Save-Way bank account later that same day. The bank deposit ticket entered into evidence, however, indicated that the money deposited in the Save-Way account on that day did not include $2,000 in cash. The defense suggested that Hayes had been mistaken regarding the amount she saw Linda give Issa.

On December 4, police learned that Miles had admitted to Bonnie and Joshua that he had committed the murders. Police arrested Miles that evening, and he confessed to the crime and sketched a map depicting where he had disposed of the murder weapon. Following the map, police recovered a MAK-90, 7l62 caliber, semiautomatic rifle. Expert testimony established that the rifle had fired a fatal bullet extracted from Maher's body, thus confirming it was the murder weapon. An

attempt to determine who had purchased the weapon was unsuccessful.

In the same vicinity as the rifle, police found a banana-style magazine clip that fit the murder weapon. The clip contained twelve 7.62 caliber hollow-point rifle bullets. The same foreign manufacturer made all of the shells found at the crime scene and the bullets in the clip. There were no fingerprints on the rifle, the clip, or the ammunition.

On December 5, officers executed a search warrant on Issa's apartment and found a single live 7.62 caliber bullet in a nightstand drawer in Issa's bedroom. The manufacturer of this bullet was different from the manufacturer of the bullets found in the murder weapon's clip and from the casings found at the crime scene.

State v. Issa, 93 Ohio St.3d 49, 50-54, 752 N.E.2d 904 (2001).[1]

Issa was indicted by a Hamilton County grand jury for aggravated murder with two death penalty specification, firearm use and murder for hire. A jury returned a guilty verdict following a week-long trial. After the penalty phase trial, the same jury recommended that the death penalty be imposed. The trial court separately weighed the aggravating and mitigating circumstances, and imposed the death penalty.

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[1] The Court substituted "Issa" for "appellant" throughout the above-quoted excerpt from the Supreme Court's opinion, and in subsequent excerpts included in this Order.

PROCEDURAL HISTORY

Issa appealed his conviction and his death sentence directly to the Ohio Supreme Court, raising fifteen propositions of law. (Apx. Vol. II at 4-6 and 52-129.) The Supreme Court rejected all of Issa's arguments. As required by Ohio law, the Supreme Court independently reviewed and weighed the aggravating circumstances found by the jury against the mitigating factors Issa presented, performed its own proportionality review, and then affirmed both the conviction and the sentence in the opinion quoted above.

While his direct appeal was pending, Issa filed a post-conviction petition in the trial court, eventually raising twenty-three separate grounds for relief. (Apx. Vol. V at 95-166, Third Amended Petition.) The trial court considered and rejected each of Issa's grounds. Issa appealed that order to the Ohio Court of Appeals, which also rejected his claims. *State v. Issa*, 2001 Ohio 3910, 2001 Ohio App. LEXIS 5762 (Ohio App. 1st Dist., Dec. 21, 2001) (unreported) (Apx. Vol. VII, pp. 368-380).[2] On April 17, 2002, the Ohio Supreme Court declined to review his post-conviction appeal, finding that it raised no substantial constitutional question. *State v. Issa*, 95 Ohio St.3d 1422, 766 N.E.2d 162 (2002) (table). Issa

[2] The Ohio Court of Appeals initially reversed and remanded the trial court's denial of Issa's post-conviction petition, because the court failed to adequately explain its findings. See Apx. Vol. VI at 287-290. On remand, the trial court explained its conclusion that Issa's claims lacked merit, which was then affirmed by the Court of Appeals in the decision cited.

was represented by the Ohio Public Defender's Office during his state post-conviction proceedings.

The Public Defender's office wrote to Issa on April 22, 2002, days after the Ohio Supreme Court denied review, telling Issa that his file would now be handled by the Chief Habeas Corpus Counsel in that office. That attorney, Mr. Bodine, would be in contact with Issa to discuss the issue. The Public Defender also wrote to the Jordanian embassy in Washington, D.C., in response to an inquiry from the embassy concerning Issa's case. In that letter, the Public Defender informed the embassy that Mr. Bodine "will be working on Mr. Issa's case to ensure that his case is timely filed in federal court and that he has counsel appointed to represent him." (Doc. 138, Exhibits 1 and 2.) For reasons that remain unknown, it was not until February 18, 2003 that the Public Defender filed a notice of intent to file a habeas petition and a request for appointment of counsel in this Court. (Docs. 2 and 3)

Despite the extremely short time remaining on the applicable one-year statute of limitations, Issa's newly-appointed counsel timely filed a petition containing 23 grounds for relief on April 17, 2003. (Doc. 8) The petition was then held in abeyance while Issa returned to the state courts to litigate an application to reopen his direct appeal. (Doc. No. 15) On September 24, 2003, the Ohio Supreme Court denied Issa's application to reopen (Apx. Vol. II at 402), and this Court dissolved the stay. (Doc. No. 20)

Issa subsequently filed three amended habeas petitions (Doc. Nos. 26, 33, 62), and this case was again held in abeyance while he pursued a second application to reopen his direct appeal in the Ohio

Supreme Court. (Doc. 64) The Ohio Supreme Court denied Issa's application because he had filed beyond the state filing deadline, and because Ohio law does not permit the filing of second or successive applications to reopen a direct appeal. *State v. Issa*, 106 Ohio St. 3d 1407, 830 N.E.2d 342 (2005)(table). This Court's second stay was dissolved on July 7, 2005. (Doc. No. 68)

After granting Issa's motion for an evidentiary hearing (Doc. 78), the Magistrate Judge presided over three days of hearings on March 6 and 7, and June 13, 2006. Issa presented testimony from several witnesses, including his original trial and appellate counsel and an expert in Arabic-Muslin culture and law. After post-hearing briefing, the Magistrate Judge filed his initial Report and Recommendations on December 20, 2007 to address several procedural and statute of limitation arguments raised by Respondent. (Doc. 134) Both parties filed objections to that Report. (Docs. 137 and 138) The Magistrate Judge then filed a second Report to address those objections and the merits of what the Magistrate Judge concluded were Issa's non-defaulted claims. (Doc. 146)

Issa filed objections to the second Report. (Doc. 148) This Court previously considered Issa's first objection, that the Magistrate Judge exceeded his jurisdiction by issuing a report on the merits of Issa's claims. This Court concluded that Issa had waived any objection to the exercise of the Magistrate Judge's jurisdiction over this matter. (Doc. 150) However, this Court also held that it would review de novo Issa's objections to any of the Magistrate Judge's recommendations, as required by 28 U.S.C.

§636(b)(1)(C). Issa stated that if this court found that the Magistrate Judge had jurisdiction to issue his merits Report and Recommendations, he was not objecting to the recommendations with respect to Grounds Two, Eight, Ten, Thirteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Four, Twenty-Five and Twenty-Six. If the Court found that the Magistrate Judge exceeded his jurisdiction, however, Issa asked the Court to review all of his claims de novo.

ANALYSIS

Standard of Review

Issa's petition is governed by the requirements of the Antiterrorism and Effective Death Penalty Act. Under the AEDPA, a federal court may not grant habeas corpus relief to a state prisoner unless it concludes that the state court's adjudication on the merits of the prisoner's claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). "A state court renders an adjudication 'contrary to' clearly established federal law when it '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.'" *Carter v. Mitchell*, 443 F.3d 517, 524 (6th Cir. 2007), citing *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court unreasonably applies clearly established federal law when it "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

In order to find that the state court's application of federal law is "objectively unreasonable," it must be more than simply incorrect. "To conclude that a state court's application of federal law was unreasonable, the Court must decide that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents.'" *Jackson v. Bradshaw*, 681 F.3d 753, 759 (6th Cir. 2012), quoting *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011).

The doctrine of procedural default bars a petitioner from raising habeas claims that were not properly presented to and considered by the state court. If a state court previously dismissed a state prisoner's federal claim because the prisoner failed to comply with a state procedural rule, a federal court ordinarily cannot consider the merits of that claim. See *Coleman v. Thompson*, 501 U.S. 722, 729-731 (1991). This doctrine bars habeas review of such claims if: (1) the petitioner failed to comply with a state procedural rule; (2) the state court clearly enforces that rule; (3) the rule is an adequate and independent state ground for denying review of the federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the

default. *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010 (en banc)(internal quotations omitted).

A petitioner can excuse a procedural default by showing cause and actual prejudice, or that the outcome in the case resulted in a fundamental miscarriage of justice that required habeas relief. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The cause and prejudice prong requires petitioner to establish a substantial "external" reason for his default. He must demonstrate prejudice by showing that his trial was infected with constitutional error. A fundamental miscarriage of justice is a rare occasion, and requires petitioner to demonstrate that the constitutional error was of such magnitude that it likely resulted in his conviction despite his actual innocence. That is, he must show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, or would have sentenced him to death rather than imposing another available sentence.

While the objections to the Magistrate Judge's recommendations concerning Issa's First through Twenty-Seventh claims were pending, the Supreme Court decided *Cullen v. Pinholster*, 563 U.S. 170 (2011). The Magistrate Judge ordered supplemental briefing on what impact that decision might have on this case, and issued a supplemental Report (Doc. 157). Noting the parties' differences with respect to the ultimate impact that the case will have on federal habeas corpus proceedings, the Magistrate Judge concluded that *Pinholster* rendered the decision to grant Issa an evidentiary hearing erroneous. He also found that *Pinholster* did not address what use may properly be made of evidence

developed during habeas proceedings if the federal court determines that the state court's decision fails to satisfy the standards of 28 U.S.D.C. §2254(d)(1). He further noted that since neither party suggested that *Pinholster* requires a different analysis or result on any of Issa's claims, he declined to offer an opinion on that issue.

The Court agrees with the Magistrate Judge's observations. In *Robinson v. Howes*, 663 F.3d 819 (6th Cir. 2011), the Sixth Circuit noted that after *Pinholster*,

> ... a federal habeas court may not rely on evidence introduced for the first time in that court and reviewed by that court in the first instance to determine that a state court decision was 'contrary to' or an 'unreasonable application of' clearly established federal law. ... However, if the claim was never 'adjudicated on the merits' in state court, the claim does not fall under 28 U.S.C. §2254(d) and *Pinholster* does not apply. In such cases, a federal habeas court may order an evidentiary hearing, provided the threshold standards for admitting new evidence in federal district court are met, see 28 U.S.C. §2254(e)(2), and decide the habeas petition under pre-AEDPA standards of review. See *Pinholster*, 131 S.Ct. at 1401 ('Section 2254(e)(2) continues to have force where 2254(d)(1) does not bar federal habeas relief. ... [N]ot all federal habeas claims by state prisoners fall within the scope of 2254(d), which applies only to claims 'adjudicated on the merits in State court proceedings.')

Id. at823.

With these standards in mind, the Court addresses Issa's claims for relief.

First Ground for Relief

Issa contends that his Sixth, Eighth and Fourteenth amendment rights were violated because he received ineffective assistance of counsel during the guilt phase of his trial. He contends that trial counsel failed to call Linda Khriss as a witness, and he asserts that her testimony would support a claim of actual innocence. Issa raised this claim as his fifth ground in his post-conviction petition. The Ohio Court of Appeals addressed the merits and held that counsel's decision whether or not to call a witness is a strategic one that does not amount to ineffective assistance absent a showing of prejudice. Noting that Khriss' testimony could have been both helpful and harmful to Issa's defense, the state court found that Issa did not demonstrate that counsel's decision not to call Khriss resulted in actual prejudice. (See Apx. Vol. VII at 376; *State v. Issa*, 2001 Ohio 3910 at **11-12.)

The court also rejected his argument that in order to fully present this claim, he should have been granted discovery. The court noted that Ohio's post-conviction statutes do not permit discovery "in the initial stages of the proceedings." *Id*. at *12, citing *State v. Bies*, 1999 Ohio App. LEXIS 3108 (Ohio App., June 30, 1999)(unreported). The court also noted that a postconviction claim may be dismissed without hearing if the petition does not set forth sufficient facts demonstrating substantive grounds for relief. *State v. Issa*, 2001 Ohio 3910, at *5. The Magistrate Judge concluded that the state court's

decision was not contrary to nor an unreasonable application of federal law, and recommended denial of this claim.

Ineffective assistance of counsel claims are governed by the standards articulated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. To demonstrate the required prejudice, Issa must show a reasonable probability that the result of his trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In addition, the *Strickland* court cautioned that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

> challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. (internal quotations and citations omitted).

Linda Khriss was tried before Issa, and a separate jury acquitted her of aggravated murder. Khriss testified in her own trial, and Issa offered an excerpt of her direct testimony in his state post-conviction proceedings. (Apx. Vol. III at 106-180; Exhibit 9 to Issa's post-conviction petition.) Khriss testified that her husband, Maher, had been threatened by another man with whom Maher owned a convenience store. According to Khriss, that man and Maher disagreed about the store's finances. A few days before Maher was murdered, the man allegedly told Maher that he was "going to show [him]" (meaning Maher). Earlier in the evening on the night of the murder, Maher told Linda that if he died, he wanted to be buried next to his grandfather in Jordan. Khriss did not understand why Maher made that comment to her. Khriss claimed that Maher left the Safe-Way store to meet with this man later the same night, and had called her about 1 a.m., telling her to close up their Safe-Way store and go home. Maher also spoke to Issa during that call, and told him to leave Maher's truck keys by the front tire in the store's parking lot. Khriss denied that she

ever spoke to Issa about having her husband killed, and denied giving him any money a few days after the murders. She testified that Issa and another store employee helped her count store receipts the night before she left for Jordan for Maher's funeral, but that the money was going to be deposited into the store's bank account.

In early December, the Cincinnati police asked Khriss to come to the department to talk about the murder investigation. An officer showed her a photograph of Andre Miles and one of Issa, and told her the two were at the station and had told police "everything about you hiring them to kill your husband." The officer said the police knew that Maher had abused Khriss. Khriss vehemently denied this, and said that the officer wanted her to give a statement that she had asked Issa to hire someone to kill or at least beat up Maher. The officer assured her that such a statement would not harm her. When the officer told her that making the statement would help them get the person who killed Maher, she agreed to make a tape recorded statement in order to "get a confession out of Issa." After additional discussions with the officers, Khriss gave a statement that about two weeks before the murder, she had a fight with Maher, Issa was there, and Issa asked Khriss why she would let Maher do that to her. Issa then offered his services to "take action" and she agreed to pay him $2,000. She testified at her own trial that this statement to the police was a lie.

Issa claims in his own post-conviction affidavit that he was told by his defense attorneys that they had "made a deal" with the State, that neither side

would call Khriss to testify during Issa's trial. (Apx. Vol. III at 99, Exhibit 7 to Issa's post-conviction petition.) He contends that Khriss was the only person who could corroborate his innocence and lack of involvement in Maher's murder.

Issa's chief trial counsel, Ms. Agar, testified at the evidentiary hearing in this case. After *Pinholster*, it appears that this testimony is inadmissible in this proceeding; but assuming that the Court could consider her testimony, the Court finds that it actually bolsters the Ohio Court of Appeals' decision. During her preparations for Issa's trial, she read the transcript of Khriss' trial testimony and spoke to Khriss' defense lawyer on several occasions. Agar talked with the Khriss case prosecutors, to other people who had listened to Khriss testify in her case, and to people who interviewed the Khriss jurors. Agar did not speak directly with Khriss because she believed Khriss was a "dreadful witness," and "the world's worst loose cannon." (Doc. 112, Evid. Hrg. Trans. At 133.) Agar was concerned that Khriss would create an emotional scene at Issa's trial because she had done so during her own trial.

Agar was also concerned about presenting Khriss, even recognizing the potential benefit to Issa that might result, because Agar had been given information that Khriss' jury "did not believe her testimony", and believed that Khriss had in fact hired people to harm Maher, but not to actually kill him. Agar learned that the state had opposed giving any lesser-included offense instructions or jury verdicts in the Khriss trial, and chose to proceed solely on aggravated murder charges. The Khriss jury concluded that the state had not proved beyond

a reasonable doubt that she intended to have her husband killed, and so they acquitted her. Agar testified that she could not present the same theory in Issa's case (that Khriss hired Issa only to beat up Maher, not to kill him) because of the firearm specification in Issa's indictment. Agar also spoke with Issa about Khriss. All of this information led Agar to her decision not to call Khriss as a witness because Khriss "was seriously emotionally unstable and might say anything." (Doc. 112, Evid. Hrg. Trans. at 144.) As the Ohio Court of Appeals concluded, Agar's decision was a tactical decision made upon information she gathered during the course of her investigation.

Issa's assertion that his trial lawyers made a "deal" with the prosecution concerning Khriss has no record support aside from Issa's untested affidavit, and is directly contradicted by Agar's testimony. Issa also suggests that counsel was deficient in not using the transcript of Khriss' testimony during his trial. The record before this Court contains only an excerpt of that transcript, and none of the cross-examination by the prosecution. It would be speculative at best to assume that the entire transcript would be helpful to Issa, or that Khriss would have testified that Issa was actually innocent of any involvement in Maher's murder. There is no evidence that Khriss was an unavailable witness under the Ohio evidence rules at the time of Issa's trial, a precondition to any independent use of a transcript of her testimony.

Moreover, Agar understood that Khriss was willing to testify in Issa's trial, and Agar affirmatively decided not to use her as a witness; see Doc. 112, Evid. Hrg. Trans. at 133. Issa cites the

testimony of Khriss' trial lawyer, David Scacchetti, who also testified in the evidentiary hearing in this case. Assuming this testimony is even admissible at this point, Scacchetti testified that if he had been representing Issa and learned that Khriss had been acquitted, he would have learned anything that he possibly could from Khriss' attorneys and would have called Khriss to testify. (See Doc. 120, Evid. Hrg. Trans. at 386-387; CM/ECF PAGEID 2476-2477.) The fact that two seasoned defense attorneys can reach different conclusions with respect to presenting evidence does not establish that Issa received ineffective assistance of counsel at his trial.

Strickland requires this Court to "indulge a strong presumption" that counsel's strategic decision, made after investigation and consideration, falls within the necessarily wide range of constitutionally competent legal representation. Ms. Agar's testimony fully supports the conclusion reached by the Ohio Court of Appeals, that her decision not to call Khriss as a witness was a strategic one, made after due investigation and consideration. Issa has not shown that the state court's decision on this issue was contrary to federal law. The Court therefore denies Issa's first claim for relief.

Second Ground for Relief

Issa contends that intentional prosecutorial misconduct during his trial denied him his constitutional rights to due process and a fair trial. This contention is premised on the alleged "deal" reached between the prosecutors and his attorneys to refrain from calling Linda Khriss as a witness during this trial. He alleges that his lawyers were subject to "prosecutorial influence and overreaching, which is

tantamount to misconduct" that infected his trial with unfairness amounting to a denial of due process. (Doc. 62, Third Am. Petition at 15, ¶¶66-67.)

This claim was raised in Issa's third amended post-conviction petition as his sixth ground for relief. (Apx. Vol. V at 119-120.) Both the post-conviction trial court and the Ohio Court of Appeals considered this claim together with Issa's ineffective assistance of counsel claim, which is raised here in his First Ground for Relief. As the Magistrate Judge concluded, Issa clearly presented this issue as a separate claim for relief in his state petition, but the state courts did not expressly address it in the context of prosecutorial misconduct. The Court agrees with the Magistrate Judge that this claim is reviewable on the merits.

Prosecutorial misconduct that could support habeas relief must be egregious, and must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Johnson v. Bell*, 525 F.3d 466, 482 (6th Cir. 2008), quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Even if the prosecutor's challenged conduct was improper or even "universally condemned," relief is available only if the Court concludes that the misconduct was so flagrant as to render the entire trial fundamentally unfair. *Bowling v. Parker*, 344 F.3d 487, 512-513 (6th Cir. 2003), citing *Darden*. If conduct is found to be improper, four factors should be considered to determine whether the conduct was flagrant and warrants reversal: "(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the

remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant." *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005).

The only evidence relating to any alleged prosecutorial over-reaching in striking a "deal" with Issa's lawyers concerning testimony from Linda Khriss is Issa's own post-conviction affidavit. His assertion is directly contradicted by Agar's sworn testimony, which the Court can consider in this claim for relief. Issa's trial co-counsel Terrance Landrigan also confirmed Agar's testimony. He testified in his deposition taken in this proceeding that he believed there was much more risk putting Khriss on the stand than any potential help her testimony might offer. He recalled that Khriss "really kind of admitted to a certain conversation between her and Issa about harming her husband and I didn't like that part of it." (Doc. 60, Landrigan Deposition at 79.)

The only reference the Court has found to any discussion between Issa's trial counsel and prosecutors about the potential use of transcripts from the Khriss trial is that cited by the Magistrate Judge, in a passage from Mr. Landrigan's deposition. Landrigan recalled an in-chambers conference during the trial in which the state indicated that, if the defense put on certain evidence or testimony, "then the State would have the ability to put a lot of damning stuff on the stand through the transcripts or the other trial material." (Doc. 60, Landrigan Deposition at 75.) Landrigan and Agar concluded that the state's position was correct. This vague reference, even combined with Issa's untested

affidavit, is plainly insufficient to establish a claim of prosecutorial misconduct that violated any of Issa's constitutional rights. Issa's second ground for relief is therefore denied.

Third, Fourth, and Fifth Grounds for Relief

Issa's third, fourth and fifth grounds for relief each contend that he received ineffective assistance of counsel at the penalty phase of his trial. His third ground argues that trial counsel failed to conduct a constitutionally reasonable and adequate investigation into his background, history and character. The fourth ground alleges that a number of his family members were available to testify and were not asked to do so. He contends these witnesses were not cumulative, and would have "humanized" and "Americanized" him to the jury. His fifth ground argues that counsel was ineffective in failing to consult with and present a cultural expert to testify about Issa's Jordanian and Muslim background.

As a preliminary matter, in each of these claims, Issa relies in part on statements obtained from his trial jurors that were presented with his post-conviction petition. Issa notes that one juror was "holding out" on imposing the death penalty, and believed that the defense "did not do a good job" informing the jury about Issa's good character, background, and qualities. A second juror's impressions are described in Issa's post-conviction counsel's affidavit describing an interview with that juror. (Apx. Vol. III at 205-206.) The Ohio Court of Appeals held that all of these juror statements were incompetent evidence, barred by the aliunde rule of Ohio Evid. Rule 606(B). For that reason, Issa's post-conviction trial court could not have considered these

juror statements in ruling on his petition. (See Apx. Vol. VII at 374.) The same result applies here. Fed. R. Evid. 606(B) precludes any reliance on juror assessments of counsel's trial performance, or on statements that jurors would have liked to learn more about Issa's background or family.

Regarding Issa's third and fourth claims of an inadequate investigation and presentation of mitigation witnesses, he argues that trial counsel failed to fully investigate his life and background, and failed to contact and present numerous family members to testify on his behalf. As a result, he alleges that counsel failed to present crucial mitigating evidence on his behalf, particularly with respect to testimony from his mother Sarah. (Doc. 62, Third Amended Petition at ¶¶76-79.) He alleges that both his American wife and ex-wife, as well as the ex-wife's grandmother and an uncle, were all available to favorably testify. Other family members living in Jordan were not contacted at all and did not testify. He alleges counsel failed in their duty of effective representation by abandoning their investigation after obtaining only rudimentary knowledge about his history and background. (Doc. 62 at ¶114.) The Ohio Court of Appeals rejected these claims in Issa's post-conviction proceedings, finding that the affidavits of various family members contained evidence that was cumulative to that presented to the jury, or that simply presented an alternative mitigation theory. The court noted that the case was not "a situation where counsel failed to present any mitigation at all or to engage in any meaningful preparation." (Apx. Vol. VII at 375.)

Issa's state post-conviction petition included statements and affidavits from a number of individuals. Betty Fisher, grandmother to Issa's wife Bobbie Foreman, states that Issa was good to her and her family, that he was kind-hearted, and he helped her with her medical problems that left her bedridden. Trial counsel did not contact Betty Fisher. (Apx. Vol. III at 190-191.) Pamela Swanson, a mitigation specialist for the Ohio Public Defender's office, filed an affidavit concerning her interview with Ellen Evans, Issa's former wife. Evans told Swanson that Issa was well-loved in the community, and he was particularly close to Maher Khriss. Evans' daughters loved Issa and he treated them like angels. She described Issa as sensitive and kind, and incapable of committing a murder. (Apx. Vol. III at 197-200.) Ms. Swanson also interviewed Bobbie Foreman, who told Swanson that the local police officers and her own family did not like "Arabians" and that her family disapproved of her marriage to Issa. (Apx. Vol. III at 202.) Neither Evans nor Foreman proffered their own affidavit, however.

Mustafa (David) Shalash was Issa's former employer, and he knew Issa and the Khriss family. Mustafa did speak to Issa's trial lawyers and he testified at Linda Khriss' trial, but he was not asked to testify at Issa's trial. He stated that he does not believe Issa had anything to do with the murders. (Apx. Vol. III at 207-208.) Mike Wittamore is Bobbie Foreman's uncle and he knew Issa. Wittamore believed that Issa was a hard worker and that he loved Bobbie. He stated that Issa called him the day after the murders to reassure him that Issa was not involved in the crimes. (Apx. Vol. III at 209-210.) None of these individuals (save for Shalash) were

contacted by Issa's lawyers and their affidavits state they would have testified on Issa's behalf if they had been asked to do so.

Issa's first amended post-conviction petition also attached affidavits from several family members in Jordan: his sister, Noha Issa (Apx. Vol. IV at 19); his cousin Ehssan Mohammed Abdel Fatah (*Id*. at 25); his sister Miriam Issa (Id. at 42); two statements from his mother Sarah Abdel Fatah Saad (*Id*. at 31 and 49); and his brother Jamal Fowzi Abdel Noor Ibrahheem Issa (*Id*. at 59). These affidavits were apparently drafted by the public defender's staff based on telephone conversations between these family members, Ms. Swanson (the mitigation specialist), and attorney Hawkins. The written English statements were then translated into Arabic by a certified translator, Dr. Alosh. (Apx. Vol. IV at 10-11, Alosh Affidavit.) Setting aside the daunting authentication problems presented by these affidavits, the affidavits of Noha, Ehssan Mohammed and Miriam are quite general and are cumulative to testimony that was presented to the jury.

Issa's mother Sarah and his brother Jamal testified during the penalty phase of Issa's trial. Sarah Issa came from her home in Jordan and arrived in Cincinnati shortly before she testified. She met briefly with defense counsel before taking the stand. She speaks no English, and her testimony was presented to the jury via a translator. Sarah Issa lacks formal education, and her affidavit states that she was unacquainted with the American legal system, and in particular the reason she was testifying - to ask the jury to spare her son's life. Sarah Issa was wearing a veil when she testified,

and the jury had not been alerted to that fact before she appeared.

Jamal Issa also came from Jordan and testified at Issa's sentencing hearing. His affidavit states that he was not told that he had to testify, as Issa's mitigation specialist had faxed a request to the family simply asking which members would "go to the United States." Originally the family decided that Sarah, Jamal and Abdullah (another brother) would come, but Abdullah was denied an exit visa. Jamal met briefly with the attorneys before the hearing, and said that he and his mother were never asked questions about the crimes even though Sarah was in Cincinnati and staying with Issa at that time.

The affidavits of Sarah and Jamal do not appreciably add to the testimony they provided at Issa's trial, or establish that calling additional Jordanian family members would have altered the result. Regarding testimony from Issa's American ex-wife's grandmother and uncle, Issa contends they should have been called to "Americanize" him and his Jordanian family. Even assuming that "American" witnesses may have blunted in some fashion the presumed negative effect on the jury of the veiled appearance of Issa's mother, this is a highly speculative assumption and does not establish that the outcome of Issa's trial would have been different. And in any event, the statements of these witnesses are untested. Even assuming that trial counsel was deficient in failing to do additional investigation and not interviewing these individuals, Issa has not demonstrated any actual prejudice - that he would have received a sentence less than the death penalty if they had testified.

Recent Supreme Court decisions confirm that the state court's decision on these claims was not contrary to federal law. In *Bobby v. Van Hook*, 558 U.S. 4 (2009), the Court vacated the Sixth Circuit's grant of habeas relief to petitioner Van Hook, which had been based on a claim of ineffective assistance of counsel for failing to conduct a more thorough mitigation investigation. Even under pre-AEDPA review standards, the Court noted that "it was not unreasonable for his counsel not to identify and interview every other living family member. This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, ... or would have been apparent from documents any reasonable attorney would have obtained." *Id.* at 19 (internal citations omitted).

In contrast is *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447 (2009), decided a few weeks after *Van Hook*. There, the Court affirmed a district court's grant of habeas relief based on ineffective assistance of counsel at sentencing. Porter killed his former girlfriend (and her new boyfriend) after he spent the night drinking with a friend. His lawyer presented one mitigation witness, Porter's ex-wife, and read part of a deposition. This evidence consisted of descriptions about his behavior while intoxicated, and his good relationship with his son. The lawyer told the jury that Porter was not "mentally healthy" and had "other handicaps," but no evidence of any of that was introduced. At an evidentiary hearing in his state post-conviction proceeding, Porter presented extensive testimony about his abusive childhood, including that his father was very violent toward him and shot at him once for coming home. His

father also regularly assaulted his mother. Porter enlisted in the Army at age 17 to escape his violent family, and served in the Korean War under extremely difficult conditions. Porter was seriously injured twice, and received several commendations including two Purple Hearts. Porter also suffered symptoms of serious post-traumatic stress syndrome. At that hearing, a neuropsychologist testified that Porter suffered from brain damage that could cause impulsive, violent behavior. That doctor also opined that Porter was substantially impaired in his ability to conform his conduct to law and suffered from an extreme mental disturbance, two of Florida's statutory mitigating circumstances. The state courts denied post-conviction relief, but the district court granted his habeas petition, finding that his lawyer had done almost nothing to advocate on Porter's behalf. The court also found the deficiency prejudicial, concluding that the post-conviction state court had not properly considered the entirety of the evidence Porter had presented.

The Eleventh Circuit reversed, but the Supreme Court affirmed the district court's judgment. It concluded that the lawyer "did not even take the first step of interviewing witnesses or requesting records." *Porter*, 130 S.Ct. at 453. When balanced against the weight of the evidence that was available, the Supreme Court found the decision not to investigate did not reflect reasonable professional judgment, in spite of the lawyer's claim that Porter had been uncooperative with him in preparing for trial. And as to prejudice, the Court observed that this was not a case in which the additional evidence "would barely have altered the sentencing profile presented to the sentencing judge...". *Id.* at 454 (quoting from

Strickland, 466 U.S. at 700). The Court concluded that the Florida Supreme Court's decision that Porter was not prejudiced was unreasonable, especially noting that the state court's decision essentially rendered Porter's heroic military service inconsequential.

Taking these recent cases together, this Court concludes that Issa was not prejudiced by counsel's failure to investigate the additional family members or to call additional witnesses on his behalf. The affidavits of the Jordanian family members are essentially cumulative to the testimony presented at his mitigation hearing. Attorney Agar's evidentiary hearing testimony also supports the state court's conclusion on this claim. Agar believed that "... being an Arab American citizen was a fairly strong negative, especially in a conservative county. [Issa's] background did not supply us with a lot that was very helpful." (Doc. 112 at 97.) She described a conversation she had with Issa's brother to explain the reason for the mitigation hearing. The brother told Agar that if Issa committed the crime he should be executed, but that the family did not believe he had committed the murder. Agar thought this sort of testimony at the penalty phase would not be helpful to Issa. With regard to Issa's American wife, Agar discovered that she filed two domestic violence charges against Issa, and Agar reviewed the wife's affidavits that had been filed with those charges. Based on Agar's review, she concluded it would be unhelpful to call Issa's wife to testify due to the potentially harmful cross-examination from the state that would likely ensue. (Doc. 112 at pp. 99-102.) Even assuming that trial counsel was somehow deficient in failing to talk to all of the potential

witnesses, Issa has not demonstrated any actual prejudice, that he would have received a sentence less than the death penalty if any or all of them had testified.

Issa's fifth ground for relief argues that his trial counsel failed to retain, consult with, and present testimony from a cultural expert. This expert, he asserts, could have explained to the jury certain factors concerning Issa's cultural orientation as a Jordanian national, and his assimilation (or lack thereof) into American culture. He also suggests this expert would have educated the jury about Jordanian/Muslim traditions, particularly concerning his mother's fully veiled appearance and her reticence about speaking in public. During his post-conviction proceedings, Issa submitted an affidavit from a clinical psychologist, Janice Ort, who stated that Issa's cultural background "merits further investigation" because his "assimilation into the American culture is a significant factor in his psycho-social history." (Apx. Vol. III at 11.) The Ohio Court of Appeals rejected this post-conviction claim, holding it did not establish ineffective assistance of counsel "... merely because it presents a new expert opinion that is different from the theory used at trial. This claim involved nothing more than an alternative mitigation theory and did not provide substantive grounds for postconviction relief." *State v. Issa*, 2001 Ohio 3910 at *13 (Apx. Vol. VII at 376-377).

Issa also suggests that a cultural expert could have educated the jury about the issue of tribal customs of retribution. He refers to a document entitled "Tribal Truce on a Right." (Apx. Vol. III, pp.

181-183.) This document, dated September 12, 1998, apparently memoralized an agreement reached between the families, or tribes, of Maher and Ziad Khriss and the Issas. It states that, after debates, "the family of the two late deceased kindly offered a temporary tribal truce (Atwa) on a 'Right', till the case is totally and finally adjudicated into within the jurisdiction of the competent courts in the United States of America." The agreement states that if Issa is convicted, the truce will be renewed and "remaining tribal procedures" taken in Jordan. If Issa is acquitted, the truce would be void and not renewed. It is signed by a number of individuals, apparently members or representatives of the two groups. This document was not discovered by trial counsel or Issa's mitigation specialist until, at the earliest, just before the mitigation phase of the trial. The testimony is unclear about when the defense team actually discovered the existence of this written document.

Jim Crates, Issa's trial mitigation specialist, stated in his post-conviction affidavit that the truce raised an issue of retribution for the Khriss murders:

> From what I could gather from David Shalash, Issa's family and cousins in Jordan believed that as long as Ahmed remained on Death Row, there would be no retribution against them in Jordan by members of the Khriss family. It was my impression that Ahmed Issa's family in Jordan believed that if Ahmed was released from prison, the 'payment' for his crime would be 'taken out of the hide' of Ahmed's Jordanian family

> members by Jordanian members of the Khriss family.

(Apx. Vol. III at 203.) Crates' "impression" is confirmed by some of Issa's family members' post-conviction affidavits. For instance, Issa's mother Sarah asserted:

> The Kreiss [sic] family believes that my son is guilty. They wanted him to implicate Linda, as well. Nidal Kreiss sent a threatening letter to Ahmed while he was at the jail in Cincinnati. The letter told Ahmed that if Ahmed did not say that Linda was involved, that you never can tell what will happen to your brothers and sisters. This letter caused us to go into hiding out of fear. Our family expected the Kreiss family to act under the old custom of Retribution. An intermediary for the Kreiss family approached our family for money to be paid for the deaths of their loved ones. We did not have such a large sum.

(Apx. Vol. IV at 33.) Miriam (Issa's sister) stated that she never felt personally threatened, but that the Issa family

> ... sent an offer to pay the Kreiss family for their loss by way of intermediaries who are notables of the community. My family was afraid when we learned what had happened. In the beginning, we did not know what the Kreiss family would do. After the contract was drawn up, we could relax a little.

(Apx. Vol. IV at 43.) Miriam also mentions the letter from Nidal Kreiss to Ahmed. And Jamal, Issa's

brother who testified at the penalty hearing, stated in his affidavit:

> The behavior of Nidal Kreiss, brother of the victims, is one of the reasons that my family went into hiding after Ahmed's arrest in the US. Nidal had threatened Ahmed, by letter, that we, Ahmed's siblings would be killed if Ahmed did not implicate Linda in the conspiracy. We were afraid of what the Kreiss family would do. While there were no direct threats made, we expected retribution.

(Apx. Vol. IV at 61.)

The Ohio Court of Appeals addressed this issue in Issa's seventeenth claim for relief, claiming that counsel failed to adequately investigate the issue of "family retribution." The court concluded that Issa had not established prejudice: "[The evidence] would not have been admissible in the guilt phase, as it was irrelevant to the issue of whether Issa participated in a plot to kill Maher Khriss. As to the mitigation phase, not one family member stated in their affidavits that they would not have testified on Issa's behalf because of the fear of retribution. To the contrary, they all stated that if defense counsel had asked them, they would have testified." *State v. Issa*, 2001 Ohio 3910, at **14-15.

Issa contends that a cultural expert would have been able to explain this tribal custom of retribution, which in turn would have helped explain to the jury Sarah Issa's reticence in her testimony, and Issa's alleged "shyness" or lack of vigorous assistance to his lawyers. To support this argument, Issa presented testimony at the evidentiary hearing in this case from Dr. Fatima Al-Hayani, a professor of Middle

Eastern studies with extensive experience in Islamic law and cultural traditions, especially in the domestic relations arena. (Doc. 113, Evid. Hrg. Trans. at 76-115.) Assuming that this testimony is admissible, it does not establish that Issa was prejudiced or that his counsel's performance was deficient under *Strickland*. Dr. Al-Hayani described some of the major differences in law and tradition that she believes should have been presented to the jury, to help them understand Issa and the appearance and demeanor of Issa's mother. The concept of a jury trial is unknown in Jordan and the Middle East generally. Women generally do not speak in public, particularly women like Sarah Issa, who is not educated and who did not work outside her home. Dr. Al-Hayani also testified that under Islamic law, Issa could not be convicted of murder because Miles - the actual killer - would be precluded from testifying against Issa, and no other eye witnesses were available. Islamic law requires eye witnesses in order to convict, and it forbids use of circumstantial evidence. Given this law, she surmises that trial counsel's description of Issa as not forthcoming, or not fully engaged in assisting with his defense, is quite understandable as his background would strongly reinforce a belief that he could not be convicted of murder.

Agar testified that her experience with Hamilton County juries is that jurors do not trust "cultural experts." She related an example of an expert who testified about battered woman syndrome on behalf of defendants accused of crimes against their abusive spouses. Agar said that this expert stopped testifying in trials due to several adverse outcomes and the negative juror reactions to the testimony. Agar also

testified (and the record fairly demonstrates) that Issa spoke very good English and seemed very accustomed to American culture. Dr. Al-Hayani, in contrast, never spoke to Issa or to others involved in his trial, so her opinions about Issa's language facility or his cultural assimilation are simply her assumptions.

Agar's testimony is consistent with that of Jim Crates, who testified that he suggested to counsel that a cultural expert be retained, and Agar told him that such an expert would be "too esoteric." (Doc. 113, Evid. Hrg. Trans. at 31.) Agar affirmatively decided not to emphasize Issa's nationality and Middle Eastern background, to avoid any possibility of awakening any juror bias or prejudice against him. Issa argues that an expert's description of his background, his mother's reticence, or his father's untimely death, would have "made a difference." But his brother and his mother testified about Issa's family and the move from Kuwait to Jordan, Issa's education and his effort to support his family after his father died. (Trial Trans. at 1546-1571.) Having an "expert" reiterate that information to the jury does not, in the Court's opinion, establish a **reasonable** probability of a different outcome.

Dr. Al-Hayani also testified that the tribal truce could have been presented to Issa's jury in a favorable way, especially the fact that the Khriss family would have accepted a sentence of something less than death in lieu of receiving any retribution (such as "blood money") from the Issa family. (Doc. 113 at pp. 97-98.) But the question before the Court is not whether counsel "could have" presented this evidence; it is whether the failure to do so establishes

a reasonable probability of a different outcome. Agar's testimony was quite clear that she decided not to employ a cultural expert and to avoid emphasizing Issa's Jordanian heritage and background. Moreover, Agar was aware of the retribution issue even before Linda Khriss' trial. She testified that she learned from someone (perhaps Issa's cousin who acted as the family translator) that if Issa would testify against Linda Khriss, there would be no retaliation taken against Issa's family. Agar said that there were never any direct threats from the Khriss family that she was told about. Agar also stated that none of Issa's Jordanian family members ever raised the subject prior to Issa's trial, and no one ever expressed any concern for their personal or family safety. (Doc. 112, Evid. Hrg. Trans. at 111-115.) Agar's testimony is confirmed by some of the family members' affidavits which described a fear of retribution, but confirmed that no threats had been made against the family. There is simply no evidence that any family member did not assist Issa or his lawyers because of a fear of retribution.

Evidence or expert testimony concerning the tribal custom of retribution, and its purported effect on the demeanor of the Issa family witnesses, does not in the Court's view rise to the level of the sort of "potentially powerful mitigating evidence"[3] that any reasonable attorney would have discovered and would have introduced at Issa's trial. Nor does this evidence raise a reasonable probability that Issa's jury would have imposed a lesser sentence if they had been aware of this information. Counsel's tactical or strategic decisions concerning the

[3] *Bobby v. Van Hook*, *supra*, 558 U.S. at 19.

presentation of mitigation evidence, including her decision not to present testimony from a cultural expert, are presumed to be within the realm of constitutionally-acceptable representation. Even giving Issa the benefit of the doubt that the failure to retain an expert simply to facilitate communications with the family was deficient performance, Issa has not demonstrated that the result of his trial would likely have been different. The state court's rejection of this ground for relief was therefore neither contrary to, nor an unreasonable application of, federal law as articulated in *Strickland*.

For all of the reasons discussed above, the Court therefore denies Issa's Third, Fourth and Fifth Grounds for relief based on ineffective assistance of counsel.

Sixth Ground for Relief

Issa's sixth ground for relief contends that the trial court violated his constitutional rights when the court admitted hearsay statements made by Andre Miles about Issa's involvement in Maher's murder. The trial court, over Issa's objections, permitted Bonnie and Joshua Willis to testify about Miles' statements to them about the murders.

Andre Miles was subpoenaed by the state to testify in Issa's trial. Miles himself had not yet stood trial for the murders.[4] He appeared at Issa's trial with his lawyer and refused to testify. (Trial Trans. Vol. IV at 937-942.) The following exchange took

[4] He was later convicted and sentenced to life imprisonment without the possibility of parole. See *State v. Miles*, 2000 Ohio App. LEXIS 560 (Ohio Ct. App., Feb. 18, 2000), affirming his conviction and sentence.

place between the trial court and Miles, outside the presence of the jury:

> THE COURT: All right.
>
> Mr. Miles, let me make this statement to you. You're here under subpoena to testify as a witness in this case. You do have an obligation to testify if subpoenaed and you have been subpoenaed.
>
> I want to advise you, though, that you do not have to testify as to anything that may tend to incriminate yourself if called to the witness stand to testify. Okay?
>
> Now, with that caution in mind, I want to ask you again are you going to testify in this case?
>
> MR. MILES: I'm not going to testify.
>
> THE COURT: Why not?
>
> MR. MILES: Because I'm not going to testify.
>
> THE COURT: All right. You just simply are refusing to testify, even though I'm informing you [that] you do have an obligation to testify, except to those things that might incriminate yourself?
>
> MR. MILES: Yes.
>
> THE COURT: All right.

(Trial Trans. Vol. IV at 942-943).

After this exchange, and at the state's request, the trial court declared Miles to be "unavailable" under Ohio Evid. Rule 804(A)(2), defining an unavailable witness as one who "persists in refusing to testify concerning the subject matter of the

declarant's statement despite an order of the court to do so." Following this ruling and again out of the presence of the jury, the state argued for the admission of Miles' recorded statement to the police in which he confessed to the murders. The state presented the testimony of Officer Feldhaus concerning the circumstances of Miles' statement to the officers. During this hearing, however, the parties' focus shifted away from Miles' statements and towards Bonnie and Josh Willis, as the state also sought to admit their statements to the police and their testimony about statements Miles made to them. The state then withdrew its motion to admit Miles' recorded statement to the police and his testimony in the Linda Khriss trial, reserving its right to renew those requests if the trial court denied admission of the Willises' testimony about Miles as statements of a co-conspirator. (Trial Trans. Vol. IV at 1002-1003.)

Bonnie Willis was then examined by the state and cross-examined by defense counsel (all without the jury present) about her statement to the police, her grand jury testimony, her testimony in the Khriss trial, and about what Miles told her and Josh about the murders. (Trial Trans. Vol. IV at 1006-1067.) Defense counsel had been given transcripts of all of Bonnie's statements, and the trial court specifically noted several inconsistencies in her testimony. (Id. at 1029.) At the close of her examination, the state argued that her testimony established the existence of a conspiracy, and that Miles told Bonnie Willis "... that he shot the two men. And that would clearly be admissible as a statement against Andre Miles' interest. That alone. And then he gave further details, unspecified details, which led Bonnie Willis

to go to Mike Issa and say, 'Get the gun out of my backyard.' [Issa] responded, 'If Andre doesn't get it, I will. Who else knows?'" (Trial Trans. Vol. IV at 1071.) Issa's counsel argued that a conspiracy had not been shown, and that any admission of Willis' testimony would violate Issa's Confrontation Clause rights.

The trial court ruled on the dispute the next morning, noting that the state was seeking to introduce the Willises' testimony as statements made in furtherance of a conspiracy under Ohio Evid. Rule 801(D)(2)(c). The trial court then held:

> ... Clearly, I think those statements established a conspiracy, and that the statements made by the co-defendant, Miles, to Josh Willis the day before the homicide in trying to recruit Willis are statements in furtherance of a conspiracy.
>
> Whether or not the statements made by the co-defendant, Miles, in regards to the disposing of the weapon, after the homicide being completed, the question whether these statements were made in furtherance of a conspiracy does not have to be answered by this Court. Because of my following ruling, that's going to the co-defendant, Andre Miles's statement made to Josh Willis and Bonnie Willis, under the exception to the hearsay Rule 804(B)(3), Ohio Rules of Evidence [sic].

(*Id.* at 1082) The court cited several cases discussing Rule 804(B)(3) and the admission of statements that implicate the declarant's penal interests. The court noted that Miles was unavailable, and that the statements he made to the Willises were not made in police custody: "They were made by him voluntarily.

They were made to friends of his in their house. There was no reason for Miles to make the statements if they were not true. There was no pressure on him to make the statements. He was not trying to shift blame." Analyzing all of the surrounding circumstances, the court concluded the statements were trustworthy and reliable, and therefore admissible under Rule 804(B)(3). (*Id*. at 1083-1084.) Bonnie and Josh Willis then testified in front of the jury about their conversations with Miles before and after the Khriss murders.

Issa contends that the admission of the Willises' testimony violated his Confrontation Clause rights, because he was deprived of the right to cross-examine the most important witness against him, Andre Miles, whose testimony directly tied him to the crime. He also argues the admission of this testimony violated the Ohio hearsay rules, because the trial court erroneously treated Miles as an "unavailable" witness. Issa argues that the trial court never "ordered" Miles to testify, and thus Miles was "available" under the rule.

Issa raised this claim in his direct appeal to the Ohio Supreme Court as his second proposition of law. The Supreme Court found that, despite the trial court's failure to explicitly "order" Miles to testify, the court had made it abundantly clear that Miles had a duty to do so, and Miles had persistently refused. The Supreme Court concluded there was no error under the Ohio hearsay rule in finding Miles was an "unavailable" witness: "Furthermore, even if the court had expressly threatened contempt proceedings for refusal to obey a court order, the threat would undoubtedly have been unavailing, as

Miles was soon to be tried for murder and the state had strong evidence against him." *State v. Issa*, 93 Ohio St.3d at 59. This determination is clearly one based on Ohio's evidentiary rule, and a challenge to it is not cognizable in federal habeas proceedings absent a denial of fundamental fairness and due process. See, e.g., *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court may not "reexamine state-court determinations on state-law questions").

The Ohio Supreme Court then addressed Issa's Confrontation Clause argument by observing that the central concern of that clause "... is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact[,]'" quoting *State v. Madrigal*, 87 Ohio St.3d 378, 384 (2000), and *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The court primarily relied on the plurality opinion in *Lilly v. Virginia*, 527 U.S. 116 (1999) to find that Issa's constitutional right to confront Miles was not violated.

In *Lilly*, the Supreme Court held that a defendant's right to confront his co-defendant at trial was violated when the co-defendant's statements to the police, implicating himself but also implicating the defendant in the most serious crimes with which the pair was charged, were admitted at trial after the co-defendant invoked his Fifth Amendment right not to testify. The Supreme Court observed that characterizing all such statements as "against penal interest" and thus treating them as voluntary admissions, swept too broadly for meaningful constitutional review. The *Lilly* plurality characterized statements like the one at issue in that

case - evidence offered by the prosecution to establish the guilt of an alleged accomplice through the statement of the co-defendant/ declarant while in custody of the police - as "presumptively unreliable" even when the declarant may have also implicated himself. *Id*. at 131. A similar result on similar facts was reached by the Ohio Supreme Court in *State v. Madrigal*, 87 Ohio St.3d at 384.

In Issa's case, the Ohio Supreme Court specifically noted that Miles was not talking to the police at the time of the challenged statements. The court noted:

> Unlike the declarants in *Lilly* and *Madrigal*, Miles was not talking to police as a suspect when he made the out-of-court statement. Miles's confession was made spontaneously and voluntarily to his friends in their home. Moreover, Miles had nothing to gain from inculpating [Issa] in the crime. In fact, by stating that [Issa] had hired him to kill Maher, Miles was admitting a capital crime, i.e., murder for hire. Furthermore, Miles's statement was clearly not an attempt to shift blame from himself because he was bragging about his role as the shooter in the double homicide.

State v. Issa, 93 Ohio St.3d at 61. The Supreme Court concluded that these circumstances did not render Miles' statements particularly unworthy of belief, citing in particular Chief Justice Rehnquist's concurring opinion in *Lilly*, 527 U.S. at 147, that generally, "confessions to family members or friends" bear sufficient indicia of reliability that they are

admissible without an opportunity to confront the declarant.

While the Ohio Supreme Court did not cite *Ohio v. Roberts*, 448 U.S. 56 (1980), *Lilly* is expressly based upon that case and others subsequent to *Roberts* setting forth the Supreme Court's Confrontation Clause jurisprudence at the time of Issa's appeal. Under *Roberts*, an unavailable witness's statement implicating a defendant is admissible without violating the Confrontation Clause if the court finds the statement bears "adequate indicia of reliability." This test is satisfied if the evidence falls within a "firmly rooted hearsay exception" or if it bears "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. at 66.

The Court has reviewed the challenged testimony of Bonnie and Joshua Willis, and cannot conclude that the Ohio Supreme Court's decision on Issa's Confrontation Clause challenge was **objectively unreasonable** at the time it was made. *Lilly* was the most recent opinion from the U.S. Supreme Court on the confrontation clause at the time of the Ohio Supreme Court's decision. *Lilly's* foundation was later questioned in *Crawford v. Washington*, 541 U.S. 36 (2004), where the Supreme Court overruled *Ohio v. Roberts*. *Crawford* articulated a new rule for "testimonial" statements, and requires at a minimum both the unavailability of the witness **and** a prior opportunity for cross-examination by the accused. *Crawford* also held that non-testimonial statements do not fall within the Confrontation Clause's requirements. *Crawford* does not apply retroactively, however. See *Whorton v. Bockting*, 549 U.S. 406

(2007), and so Issa's claim is governed by the *Roberts/Lilly* standards.

The state subpoenaed Miles to testify, he was brought to the courtroom and appeared with counsel, but he refused to testify after the court instructed him to do so. That was sufficient to satisfy the state's burden of establishing Miles' "unavailability" for purposes of the Confrontation Clause, which requires the state to make a good faith effort to produce the witness. See *Barber v. Page*, 390 U.S. 719, 724 (1968), finding a constitutional violation because the state made **no** effort to secure the presence of the witness at the trial. And under *Roberts* and *Lilly*, there are sufficient indicia of reliability surrounding the statements Miles voluntarily made to Bonnie and Joshua Willis. They were his friends, he had lived with them for a time, and there is nothing in the record suggesting that he was under any compulsion to implicate Issa when he made the statements. See *Anthony v. DeWitt*, 295 F.3d 554, 563-564 (6th Cir. 2002), cited by the Magistrate Judge in his Report, and finding no error in the admission of a wife's testimony about her husband's statements to her that implicated both the husband and the defendant in a murder earlier the same evening. The Sixth Circuit held that "out-of-court statements that do not fit within a firmly rooted hearsay exception do not violate the Confrontation Clause if they possess 'particularized guarantees of trustworthiness.'" *Id*. at 563 (quoting *United States v. Tocco*, 200 F.3d 401, 416 (6th Cir. 2000)). The court applied the factors identified by the Supreme Court that are determinative of trustworthiness:

> (1) whether the hearsay statement contained an express assertion of past fact, (2) whether the declarant had personal knowledge of the fact asserted, (3) whether the possibility that the statement was based upon a faulty recollection is remote in the extreme, and (4) whether the circumstances surrounding the statement make it likely that the declarant fabricated the assertion of fact.

Id. at 563 (quoting *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970)). The court found no error in admitting the wife's testimony implicating the defendant, noting it was unlikely the statements were fabricated because they were made voluntarily by the husband to his wife in the privacy of their home.

The same conclusion applies here: Miles admitted that he was hired to kill Maher, a fact of which he no doubt had personal knowledge. Miles called Joshua hours after the murder, and told him the gun was in the Willises' backyard. And the next morning Miles came to the Willises' home and told them the additional details about the murder. There are no circumstances suggesting that Miles fabricated his story, or that he was under some compulsion to implicate Issa when he made his statements.

For all of these reasons, the Court concludes that the Ohio Supreme Court's decision on Issa's Confrontation Clause challenge was not an unreasonable application of then-existing federal law. Issa's Sixth Ground for Relief is therefore denied.

Seventh Ground for Relief

In this claim, Issa alleges that his conviction for aggravated murder is contrary to the manifest weight of the properly admitted evidence, thereby violating his constitutional due process rights. His Third Amended Petition alleges that once the court strikes the improper hearsay testimony of the Willises, and finds his trial counsel ineffective by failing to call Linda Khriss, and finds that his Vienna Convention rights were violated, there is insufficient evidence to support his conviction. (Doc. 62 at ¶155) Issa raised a sufficiency of the evidence claim in his direct appeal; the Ohio Supreme Court rejected it on the merits, noting the significant evidence apart from the Willises' challenged testimony that tied him to the murder. *State v. Issa*, 93 Ohio St.3d at 66-67.

The Magistrate Judge recommended denying this claim because the grounds for relief upon which it depends also lack merit. This Court has already rejected Issa's First and Sixth Grounds for Relief concerning the testimony of Linda Khriss and of the Willises; and as will be addressed in Issa's Fifteenth Ground for Relief discussed below, the Court rejects his Vienna Convention claim. In his objections to the Magistrate Judge's recommendation, Issa argues that the state did not charge him with conspiracy, and therefore the admission of Miles' statements as a co-conspirator violated his rights. He argues that he was convicted of a crime with which he was not charged, which violated his due process rights under *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court rejects this contention.

As is discussed in Issa's Sixth Ground for Relief concerning the admission of the Willises' testimony, the trial court initially stated that a conspiracy had been established. But the court's ultimate ruling is clear that the admission of the Willises' testimony was premised upon Evid. Rule 804(B)(3), and not upon the co-conspirator rule. The Court concludes that Issa has not shown that the Ohio Supreme Court's decision on that issue was contrary to federal law. The Court therefore denied Issa's Seventh Ground for Relief.

Eighth Ground for Relief

Issa claims that his trial counsel failed to investigate evidence concerning his good behavior in the Hamilton County Jail while awaiting trial. He cites *Skipper v. South Carolina*, 476 U.S. 1 (1986) for the principle that the trial court may not exclude "the testimony of jailers" from the sentencing hearing. (Doc. 62 at 37.) Issa raised this claim in his post-conviction proceeding; the Ohio Court of Appeals rejected it because Issa failed to present any evidence outside the record. (Apx. Vol. V at 148-150.) Issa has presented no evidence to support this claim during this habeas proceeding, other than argument in his traverse brief.

Even assuming the truth of Issa's statement that he demonstrated good behavior during his time in the Hamilton County jail, his failure to produce any substantive evidence dooms this claim for habeas relief, as he has not demonstrated how the lack of this evidence actually prejudiced him. This ground for relief is denied.

Ninth Ground for Relief

Issa claims that he received ineffective assistance of appellate counsel on his direct appeal to the Ohio Supreme Court. He asserts eight instances of his appellate lawyer's failure to preserve claims of trial error by raising them during Issa's direct appeal to the Ohio Supreme Court. This claim was not included in Issa's state post-conviction petition. After filing his initial petition in this action on April 17, 2003, Issa's habeas counsel sought and was granted leave to pursue a *Murnahan* application to reopen his direct appeal before the Ohio Supreme Court. This case was stayed until the Ohio Supreme Court denied his application. The Magistrate Judge then granted leave to amend the habeas petition, and Issa added two grounds for relief: the Ninth Ground, ineffective assistance of appellate counsel, and his Tenth Ground, claiming that Ohio law fails to afford a constitutionally meaningful and sufficient procedure for review of ineffective assistance of appellate counsel claims. (See Doc. 26, Amended Petition filed January 30, 2004.)[5]

Respondent's return of writ argued that both the ninth and tenth grounds were time-barred by AEDPA's one-year statute of limitations. Issa's traverse (Doc. 41, filed September 29, 2004, at 75-76) did not expressly present an equitable tolling argument, but quoted from and obviously relied on the terms of the Magistrate Judge's earlier order staying the case and granting him leave to amend his

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[5] Later on, Issa again returned to state court on a second *Murnahan* application, claiming that his appellate lawyer had an undisclosed conflict of interest; that claim is discussed *infra*, Issa's Twenty-Seventh Ground for Relief.

petition to raise a challenge to Ohio's *Murnahan* procedure.

On November 15, 2007, the Magistrate Judge sua sponte requested the parties to brief the potential impact of *Mayle v. Felix*, 545 U.S. 644 (2005) on its prior order granting leave to amend the petition following the unsuccessful *Murnahan* application. (See Doc. 131.) *Mayle* generally held that for statute of limitations analyses, individual claims must be examined separately to determine whether they arise from the same core facts as timely filed claims, and rejected the contention that "all" habeas claims necessarily arise from a petitioner's trial and conviction, and therefore arise from the same occurrence. Issa argued that *Mayle* did not affect the court's ruling, but again Issa did not expressly present an equitable tolling argument. (Doc. 132) After briefing, the Magistrate Judge issued a December 20, 2007 Report and Recommendation addressing several procedural issues, including Respondent's arguments concerning AEDPA's statute of limitations. (Doc. 134) The Magistrate Judge concluded that *Mayle* substantially narrowed the construction of the phrase "same conduct, transaction, or occurrence" used in Rule 15 with respect to amendments of habeas petitions, and whether amended claims may relate back to the original petition's filing date. The Magistrate Judge then concluded that Issa's Ninth Ground for Relief does not arise from the same core facts as the claims raised in his original "shell" petition. This was so even though his Ninth Claim for ineffective assistance of appellate counsel is premised on counsel's failure to appeal trial errors that Issa **did** raise in his shell petition. While the AEDPA statute

may be tolled for *Murnahan* re-opening proceedings, the application to reopen must itself be filed with the state court before the AEDPA statute runs. And that had not occurred here.

Issa objected to the Magistrate Judge's report, noting that during the very first pretrial conference, Issa's habeas counsel informed the court that he had discovered an unexhausted claim (ineffective assistance of appellate counsel) in his review of the voluminous file that the Ohio Public Defender had finally provided to him only eight days prior to April 17, 2003 (AEDPA's one-year statute expiration date). Issa's counsel sought a stay to seek reopening of his appeal in order to exhaust this claim, which the Magistrate Judge granted. (Doc. 15) The *Murnahan* application Issa actually filed raised eight separate assignments of error, all of which the Ohio Supreme Court summarily denied. Issa argued that he reasonably believed that his amended petition (filed on January 30, 2004) properly preserved this ninth claim. He argues that he had no reason to suspect otherwise until the Magistrate Judge sua sponte raised a concern about *Mayle*, and that his suspicion was confirmed by the Magistrate Judge's first Report. Based on all of these facts, Issa argued that this Court should apply equitable tolling to permit his claim to be reviewed. The Magistrate Judge's final Report rejects Issa's tolling argument because it was not timely raised, and because ineffective assistance of habeas counsel - largely caused by the inexplicable and prejudicial delay of the Ohio Public Defender's Office - is not a basis for equitable tolling when a petitioner cannot establish his own diligence, citing *Howell v. Crosby*, 415 F.3d 1250, 1252 (11th Cir. 2005).

Issa objects to this conclusion. He contends that at the least, the Magistrate Judge should have conducted an evidentiary hearing to determine if equitable tolling applies to this claim. He asks this Court to remand this matter to the Magistrate Judge for that purpose. He notes that he was effectively without counsel for most of the year that lapsed between the final decision of the Ohio Supreme Court, and the filing of his "shell" habeas petition in this case. The letters that the Ohio Public Defender wrote to Issa and to the Jordanian Embassy, assuring them that the Public Defender would seek appointed habeas counsel, do not explain the procedure for doing so, and do not mention any concern about timeliness. Despite the assurances in the letters, it was not until February 18, 2003 that the Public Defender's office filed a notice of intent to file Issa's petition and a motion to appoint counsel in this Court. Although current counsel was appointed promptly, his pleas to the Public Defender for Issa's file went unheeded until eight days before the filing deadline, when he received ten bankers' boxes containing the record. Issa argues that his situation is not an uncommon one among indigent defendants, and is worsened by the fact that he is a foreign national, and unfamiliar with the American legal system and its specific requirements.

After the Magistrate Judge's Report was filed, the United States Supreme Court definitively held that the AEDPA statute of limitations is subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631 (2010). In its prior opinion in *Lawrence v. Florida*, 549 U.S. 327, 336 (2007), the Court assumed that the doctrine would apply if the petitioner demonstrated diligence in pursuing his

claim, and some "extraordinary circumstance" prevented compliance with AEDPA's one-year limitations period. The Sixth Circuit had also recognized that the doctrine may apply in habeas proceedings; see *Allen v. Yukins*, 366 F.3d 396, 400 (6th Cir. 2004), and *Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001), while stressing that application of the doctrine must be determined on a case-by-case basis. See *Griffin v. Rogers*, 399 F.3d 626, 635-636 (6th Cir. 2005)(internal citations omitted). *Dunlap* identified five factors the Court should consider: "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim." *Dunlap v. United States*, 250 F.3d at 1008 (internal citation omitted).[6]

The Magistrate Judge concluded that the record lacked any evidence concerning Issa's diligence, and questioned whether extraordinary circumstances existed such that his own conduct was "reasonable" with regard to timely filing. Issa contends that he did not submit any evidence concerning his diligence because he assumed it was unnecessary to establish the timeliness of his ineffective assistance of appellate counsel claim, based on the procedural history outlined above. At worst, Issa argues he is entitled to an evidentiary hearing to establish his entitlement to equitable tolling. He also cites *White*

[6] See also, *Sherwood v. Prelesnik*, 579 F.3d 581 (6th Cir. 2009), applying equitable tolling in habeas proceeding based on an intervening change in law.

v. Schotten, 201 F.3d 743, 752 (6th Cir. 2000), where the court leveled harsh criticism on the performance of the Ohio Public Defender's Office in capital habeas cases: "... the public defender's office has repeatedly failed to preserve the right of criminal defendants to challenge the constitutionality of their convictions due to its disregard, whether intentional or because of inadequate funding and staffing, of filing deadlines and procedural barriers."

The Court has little doubt that Issa was prejudiced by the Ohio Public Defender's long and unexplained delay in seeking appointed counsel and in turning over the voluminous records pertaining to Issa's case. Because Issa is facing the ultimate penalty, the Court will assume out of an abundance of caution that Issa could show that he was reasonably diligent in pursuing his claims, and that equitable tolling would preserve his Ninth Ground for merits review. The letters from the public defender specifically assured him that a petition would be filed and he would be represented for that purpose. No reasonable suspicion arises from that letter, or from the letter to Issa's embassy, that Issa could not rely on that assurance. The Court will credit Issa's argument that he lacked knowledge of and familiarity with the American legal system, or any constructive knowledge of the fact of the one-year deadline.

To establish ineffective assistance of appellate counsel, Issa must first demonstrate a constitutional error that occurred during his trial. Then he must show that appellate counsel's failure to raise the issue on direct appeal caused prejudice. In *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), the Sixth Circuit

summarized the major considerations relevant to this determination:

> (1) Were the omitted issues "significant and obvious"?
>
> (2) Was there arguably contrary authority on the omitted issues?
>
> (3) Were the omitted issues clearly stronger than those presented?
>
> (4) Were the omitted issues objected to at trial?
>
> (5) Were the trial court's rulings subject to deference on appeal?
>
> (6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
>
> (7) What was appellate counsel's level of experience and expertise?
>
> (8) Did the petitioner and appellate counsel meet and go over possible issues?
>
> (9) Is there evidence that counsel reviewed all the facts?
>
> (10) Were the omitted issues dealt with in other assignments of error?
>
> (11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Id. at 427-428 (internal citations omitted). It is not enough for Issa to show that some trial error was not raised on appeal; he must demonstrate that the error and the failure to appeal that error resulted in a

fundamentally unfair trial, or the imposition of an unconstitutional sentence.

(a) Trial Counsel's Failure to Use Andre Miles' Testimony From the Linda Khriss Trial.

Issa argues that his trial counsel's failure to use Miles' testimony from the Khriss trial, after Issa's trial judge determined that Miles was an unavailable witness, should have been raised as error in his direct appeal. Exhibit 11 from the evidentiary hearing is an excerpt of Miles' cross-examination during the Khriss trial, but his complete testimony is not in the record before the Court.[7] In this excerpt, Miles denied telling Bonnie and Josh Willis about the murders, contradicting the Willises' testimony at Issa's trial. But Miles also testified that Issa had loaned Miles $1,500, and he said it was Issa who told him that Ziad and Maher would be returning to the Safe-Way store the evening of the murders. Miles said he had two conversations with Issa that evening, and that it was Issa who told him where the Khriss house was located. Miles also admitted that it was his "job for $15,000 to kill the owner of the store." (Evid. Hrg. Ex. 11 at 492.)

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[7] Some portion of Miles' testimony was apparently proffered to the trial court by Issa's counsel, during argument concerning another witness, Johnny Floyd, and whether the state would be permitted to introduce Miles' statement to the police if Floyd testified. (Trial Trans. Vol. VI at 1354-56.) The trial court denied the admission of Miles' statement. Floyd then testified that while he and Miles were held at the county jail, Miles told Floyd that Issa had thrown Miles out of the store, and that Miles "wanted to get back at Issa." (*Id*. at 1389.)

From this limited excerpt, the Court cannot ascertain if Miles' testimony in the Linda Khriss trial was so favorable to Issa's defense that the failure to use it amounts to ineffective assistance of counsel. While Miles apparently denied telling Bonnie and Josh about the murders, he also implicated Issa. It is unknown what Miles may have said on the subject in other parts of his testimony, and it would be pure speculation to assume that the rest of Miles' testimony contained nothing harmful to Issa's defense. It is highly doubtful that Issa's trial counsel could have used a limited portion of Miles' testimony, denying that he spoke to the Willises, without opening the door to additional excerpts from his testimony. The Court cannot conclude that trial counsel's failure to use Miles' testimony amounts to constitutional error, such that the failure to raise this issue on appeal was ineffective assistance of appellate counsel.

(b) Failure to Object to the Willises' Testimony Because Issa Was Not Indicted for Conspiracy.

In this subpart of his ninth ground for relief, Issa notes that in seeking the admission of Bonnie Willis' testimony, the prosecutor argued that her testimony would establish "the threshold requirements for a conspiracy." (Trial Trans. Vol. IV at 1068.) Issa's trial counsel objected, arguing that the state had not established the necessary requisites of conspiracy under Ohio law. The trial court then ruled that both of the Willises would be permitted to testify (as is quoted above regarding Issa's sixth ground for relief). Issa argues that appellate counsel should have appealed the trial court's ruling regarding

statements of a co-conspirator. He notes that his indictment charged him with violating Ohio Rev. Code 2903.01(A), aggravated murder with two death penalty specifications. He was not indicted under Ohio Rev. Code 2923.01, which codifies the separate crime of conspiracy to commit aggravated murder.

This issue is related to Issa's Sixth Ground for Relief, claiming that the trial court violated Issa's constitutional rights by permitting Bonnie and Josh to testify. He also raised the conspiracy argument in his objections regarding his Seventh Ground for Relief (weight of the evidence claim), discussed above. The Ohio Supreme Court reviewed the trial court's ruling in Issa's direct appeal, finding no error under Ohio law and no violation of Issa's Confrontation Clause rights. The Court did not expressly address the trial court's initial statement regarding the co-conspirator rule and Miles' statements to Joshua **before** the murders. But the entirety of the Willises' testimony about Miles, both before and after the murders, was clearly placed at issue before the Ohio Supreme Court, which concluded that the admission of their testimony as a whole did not violate Issa's constitutional rights. Even if there was some error in admitting the pre-murder statement by Miles to Josh, the balance of the Willises' testimony was far more damaging, was not admitted under the co-conspirator exception, and clearly implicated Issa in Maher's murder. The Court cannot conclude that the testimony concerning Miles' pre-murder statement to Josh unduly prejudiced Issa's defense, or that the exclusion of this portion of the testimony would have resulted in a different outcome. The Court therefore cannot conclude that appellate counsel's failure to specifically raise the co-

conspirator aspect of the trial court's discussion of the Willis' testimony amounts to constitutionally ineffective assistance of appellate counsel.

(c) Failure to Seek Dismissal of Issa's Indictment Based on the Unconstitutionality of Ohio's Proportionate Review Procedure.

Issa next asserts that Ohio's proportionality review system is constitutionally flawed, because the only comparison by which the appropriateness of a death sentence is measured are other cases where death was imposed. It is not ineffective assistance of counsel to fail to raise a futile issue on appeal. Ohio's death penalty proportionality review procedure has uniformly been upheld by the Ohio Supreme Court. See *State v. Jackson*, 141 Ohio St.3d 171, 221 (Ohio 2014) and cases cited therein. The Supreme Court has consistently held that proportionality and appropriateness review is properly limited to cases in which the death penalty is actually imposed. Moreover, this sub-claim does not rise to the level of constitutional error. In *Pulley v. Harris*, 465 U.S. 37, 50 (1984), the Supreme Court held that a comparative proportionality review is not constitutionally required in every capital case. The Ohio capital sentencing statute, like the California statute at issue in *Pulley*, is not fatally vague in defining aggravating factors, nor "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, ...". *Id.* at 51. This sub-part of Issa's ninth claim is therefore denied.

(d) Trial Counsel's Failure to Retain an Independent Translator for Pre-Trial Preparations.

Issa contends in this sub-part that trial counsel was deficient in relying upon the translating services of Issa's cousin Abraham (or Ibrahim) Issa, who lived in the Cincinnati area. Abraham spoke and understood English but he admitted to Issa's trial counsel that he had some biases against Issa. Issa notes that his trial counsel told the trial court that there were language barriers between counsel and Issa's Jordanian family members, yet counsel failed to retain a professional translator to facilitate discussions with the family. This issue was also mentioned by Jim Crates, Issa's mitigation specialist, who criticized trial counsel for relying on Issa's cousin for assistance in communicating with his family instead of using an independent translator. (Doc. 113, Evid. Hrg. Trans. at 35-38.)

Issa has not produced any evidence demonstrating how he might have actually been prejudiced by his counsel's decision. There is no evidence that Abraham falsely translated anything, or misled anyone in an attempt to harm Issa's defense. Several of the post-conviction affidavits from Issa's family members contend that Abraham falsely told the Khriss family members in Jordan that Issa had confessed to the murder. Whether or not this is true, at the very best it may suggest that Abraham was biased against Issa, which he had freely admitted. Defense counsel Agar testified that she

> ... had spoken to [Abraham] before we ever used him as an interpreter about his potential as a mitigation witness, since he was the only

> person that Mr. Issa had actually informed us of in terms of family in this country, and he was quite candid with us about the fact that he could not supply helpful material for us in mitigation, and that in fact if cross-examined, a good deal of what would come out would be quite unhelpful to Mr. Issa.
>
> He had, however, great respect for Mr. Issa's family and it was very well known to him, especially Mr. Issa's mother, and she was already quite nervous and uncomfortable with being translated into another culture and another country where she didn't speak the language very well of appearing in trial, and he had agreed to assist us in helping in any way he could to prepare her for that even though he himself could not be helpful in that regard.

(Doc. 112, Evid. Hrg. Trans. at 106-107.)

Agar's decision to use a family member to translate, rather than a stranger, was clearly her conscious strategic choice, one that this Court cannot find to be unreasonable nor ineffective assistance of trial counsel under *Strickland*. The failure to raise this issue on appeal is not ineffective assistance of appellate counsel for the same reasons.

(e) Failure to Appeal Prosecutorial Misconduct.

Before Issa's trial began, it was unclear whether Andre Miles would actually testify for the state. Issa filed a motion in limine to exclude any reference by the prosecution to Miles' statements made either to the police or to the Willises, but the trial court had

not ruled on that motion before the trial's start. Just before opening statements, the prosecutor informed the court that she would refrain from mentioning "the details" of Andre Miles' taped statement to the police. (Trial Trans. Vol. III at 683.) Despite this agreement, Issa contends that the prosecutor made several references in her opening statement to Miles' statement to the police as well as his statements to Bonnie and Josh Willis. (Third Amended Petition at 52, ¶214.) The prosecutor told the jury that Miles made a taped statement in the early morning of December 5, 1997, and that he drew the police a map showing where to find the murder weapon. (Trial Trans. Vol. III at 696-697.) She described the statements Miles made to Bonnie and Josh Willis, and that Miles told Josh "I have to kill somebody for Mike for money. Do you want a part of it?" (*Id.* at 698) She also stated that after the murders, Miles told Josh that he "did it" and that the gun he used was hidden in their backyard. (*Id.* at 699) Issa's counsel objected at the first break following opening statements, and the trial court stated that the objection was "noted for the record." (*Id.* at 746-748.) No further mention of the objection was apparently raised with the trial court, and the issue was not raised in Issa's direct appeal.

As discussed previously, even if the prosecutor's challenged conduct was improper or "universally condemned," habeas relief is not available unless the misconduct was so flagrant that it rendered Issa's trial fundamentally unfair. See *Johnson v. Bell*, 525 F.3d 466, 482 (6th Cir. 2008). Assuming that the prosecutor's references to Miles' statement to the police and the map he drew were improper because they violated the state's agreement not to mention

"details," Issa must show that the prosecutor's conduct was flagrant and deprived him of a fundamentally fair trial. This Court cannot agree that he has done so. The references to Miles' statements and to the map did not infect the trial with constitutional error. The references were brief, and came at the beginning of a multi-day trial. The map was later admitted as an exhibit without objection. The references to Bonnie and Josh Willis are harmless in view of the admission of their testimony confirming the prosecutor's description of what Miles had said. Even if the prosecutor's references were **intentional** misconduct, which the Court cannot conclude based on the context in which they were made, the references did not result in a fundamentally unfair trial.

(f) Trial Counsel's Failure to Interview Issa's Mother as a Potential Merits Witness.

At the end of the first day of trial testimony (August 21, 1998), the court inquired of counsel about the anticipated length of the trial. Issa's counsel told the judge that Issa's mother might have relevant information concerning the night of the murders, especially the time period from when Issa left the store, and when he and Souhail Gammoh went to a bar. Counsel said she needed to speak with Issa's mother before resting Issa's case, because she did not know "how much his mother can narrow it down. We might use her simply in terms of whether she observed any weapons, whether she was present on the occasion when other people claimed that he had a weapon in his possession. I haven't had a chance to talk to her personally." Issa's mother was

scheduled to leave Jordan for the United States on August 27. (Trial Trans. Vol. III at 791-793.) The defense rested on the afternoon of August 28, and the jury reached a verdict on September 2. Issa claims here that counsel's failure to speak with his mother before the close of the guilt phase of the trial was ineffective assistance of counsel. This issue was not raised on direct appeal.

The Court assumes that counsel should have and did not follow up on this statement to the trial court, and did not ascertain whether or not Issa's mother may have had any helpful information before resting Issa's case. However, Issa also must show that he was prejudiced by trial counsel's failure to do so, and thus by appellate counsel's failure to appeal on this basis. This he has not done. He simply assumes that his mother's testimony would have been favorable to him in some fashion.

Sarah Issa's post-conviction affidavit stated that she was with Linda Khriss the night of the murders and helped Linda close the store. Issa drove Sarah to his apartment and then took Souhail home; Sarah averred that it "took only 15 to 30 minutes for Ahmed to return from dropping Suheel [sic] off. I was still up when Ahmed returned and we stayed up talking. After a while, we went to bed. I did not notice any behavior out of the ordinary from my son. He was all quite normal." (Apx. Vol. IV at 50.) Sarah also stated that Linda Khriss had told her about Maher receiving threats from his business partner (as Khriss described in her own trial testimony discussed above).

Actual prejudice cannot be presumed. Issa must demonstrate that his trial was unfair and the result

was unreliable. *Hall v. Vasbinder*, 563 F.3d 222, 237 (6th Cir. 2009). In *Bigelow v. Haviland*, 583 F.3d 670 (6th Cir. 2009), the court concluded that Bigelow's counsel unreasonably failed to investigate facts that would have established an alibi defense. Bigelow had given his attorney several names of people he believed could confirm his alibi (that he was working in another city on the day of the crime), and another witness had contacted the lawyer just before Bigelow's trial. The lawyer neglected to speak with this person. Bigelow presented three additional disinterested witnesses at his habeas evidentiary hearing, all of whom saw Bigelow at their job site in a different city on the day of the crime. These witnesses could easily have been discovered by counsel prior to Bigelow's trial, especially the owner of the job site where Bigelow was working that day.

Moreover, the state's evidence of Bigelow's guilt was based entirely upon the victim's questionable identification and even weaker testimony from a bystander. The Sixth Circuit found it reasonable to conclude that the three witnesses could easily have strengthened the inference of reasonable doubt as to Bigelow's presence at the crime scene, and the state court's contrary conclusion in denying Bigelow's post-conviction claim was an unreasonable application of *Strickland*. See also, *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004), granting habeas relief based upon trial counsel's failure to file a notice of alibi, resulting in the trial court's exclusion of the testimony of three witnesses who each would have placed defendant with them in another city on the night of the crime. The resulting prejudice was especially clear due to the "notable weaknesses" in the prosecution's case, which relied entirely upon the

questionable identification testimony from the victim.

Here, Issa does not contend that his mother was an alibi witness whose testimony would establish a likelihood that he was innocent. At best, Sarah's untested affidavit might contradict Souhail's testimony about the exact timing of Issa's return to his apartment later on that evening, or how long the two of them remained at the bar. On the critical issue, the time when neither Sarah nor Souhail was with Issa (during which the prosecution argued that Issa met Miles and drove him away from the scene), Sarah and Souhail do not directly contradict each other. Sarah's affidavit stated that Issa was gone about 15 to 30 minutes; Souhail estimated that Issa did not return to his apartment for about 30-35 minutes.

Moreover, the strength of the other evidence against Issa was considerable: two witnesses saw Issa with a rifle in his apartment. Issa told one of them (Howard) not to tell anyone else about the rifle. Sarah Issa's affidavit is silent on this issue. Andre Miles' statements to Bonnie and Josh Willis clearly implicated Issa, and other witnesses saw Issa with Miles at the store a few hours before the murders. After the murders, Issa told Bonnie Willis to warn Miles not to come to the store. Souhail testified that Issa asked him to tell the police that they were together the entire evening after leaving the store. Hayes saw Khriss hand Issa a large amount of cash before Khriss left for Jordan. The police discovered a rifle shell in Issa's bedroom that matched the rifle used to commit the murders. Given all of this, the potential discrepancy between Sarah and Souhail

about whether Issa went out later that evening, or how long he was gone, does not establish a reasonable probability of a different outcome of Issa's trial. The Court therefore concludes that Issa has not established that he was actually prejudiced by his trial counsel's failure to interview Sarah Issa prior to the close of the guilt phase of his trial. Appellate counsel's failure to appeal this issue therefore does not amount to ineffective assistance of appellate counsel.

(g) Trial Counsel's Failure to Object to Admission of Transcripts of the Willises' Prior Testimony and Statements.

The exhibits admitted at Issa's trial included State's Exhibits 33 and 34, the transcripts of the statements made to the police by Josh and Bonnie Willis; State's Exhibit 35, a transcript of the grand jury testimony of Josh and Bonnie; and Defense Exhibits 3 and 5, transcripts of their testimony during the Linda Khriss trial. No objections were made to the admission of these transcripts, and defense counsel affirmatively sought admission of the Khriss trial transcripts. In this sub-part of his Ninth Ground for Relief, Issa contends that the admission of these transcripts was error that amounted to ineffective assistance of counsel. Since both Bonnie and Josh testified at Issa's trial, Issa argues that the only proper use of these transcripts would have been to impeach them pursuant to Ohio Evid. Rule 613(B).

As discussed above, before Bonnie or Josh Willis testified in front of the jury, the trial court observed that there were inconsistencies among the various statements Bonnie had given. The majority of the cross-examination by Issa's counsel of both Bonnie

(Trial Trans. Vol. V at 1122-1152) and of Josh (*Id*. at 1162-1247) consisted of challenging them about the inconsistencies and discrepancies in their stories. In closing argument, Issa's counsel suggested that the Willises may have told the police about Issa's alleged involvement in Miles' crimes in order to deflect suspicion from themselves. Counsel specifically encouraged the jury to study all of their statements and the inconsistencies in their testimony when considering the state's evidence.

Based upon counsel's obvious cross-examination strategy and closing arguments attacking the Willises' credibility, it is apparent to the Court that counsel's decisions with respect to the transcripts of the Willises' several statements was a strategic one. If the jury had doubts about the accuracy or reliability of their testimony at trial incriminating Issa, given the inconsistencies with their other statements, the jury could have returned a favorable verdict. This strategy is one that clearly falls within the deference this Court must accord to trial counsels' decisions, as *Strickland* requires. The Court therefore cannot conclude that the decision to admit these exhibits at trial amounted to ineffective assistance of counsel. The failure to raise this issue in Issa's direct appeal was not ineffective assistance of appellate counsel.

(h) Failure to Appeal "Continuous and Pervasive" Prosecutorial Misconduct.

In this sub-part, Issa contends that his trial was infected with prosecutorial misconduct. He notes that the lead prosecutor had been sanctioned in one prior case, and that the Ohio Supreme Court sharply criticized her performance in another. (Doc. 62, Third

Am. Pet. at 60, ¶¶242-243.) Issa contends that cumulative misconduct in his trial occurred, specifically the alleged "deal" concerning Linda Khriss, the admission of the Willis transcripts, and the opening argument references to Miles' statements. He also complains about the prosecutor's closing argument, urging the jury to consider both the consistencies and the inconsistencies in the various Willis' statements.

The Court has reviewed these instances of alleged misconduct and found each of them to be without merit. The Court has also reviewed the trial transcript and cannot conclude that the state's prosecutor exceeded the bounds of vigorous advocacy in her closing argument. Moreover, there is nothing improper about bringing to the attention of the jury the **consistencies** in the Willises' statements. Even generously assuming that some intentional misconduct may have occurred, Issa's trial was not rendered unconstitutionally unfair as a result of these incidents, either individually or collectively.

In summary, assuming that Issa would be entitled to equitable tolling in order to reach the merits of his Ninth Ground for Relief, the Court denies his claims.

Tenth Ground for Relief

Issa contends that the Ohio procedure set forth in *State v. Murnahan*[8] and Ohio Appellate Rule 26(B), to prosecute a claim of ineffective assistance of appellate counsel provided on direct appeal, is

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[8] *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992).

unconstitutional. He argues that Ohio's procedure fails to provide a meaningful, adequate and effective review of these issues, as evidenced by the Ohio Supreme Court's cursory rejection of his own *Murnahan* application on this issue.

The Magistrate Judge noted that the applicable law has changed since Issa initially raised this claim for relief. In *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005) (en banc), the Sixth Circuit overruled *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), and held that an Ohio Rule 26(B) application to reopen a direct appeal to raise an ineffective assistance of appellate counsel claim, is a post-conviction proceeding and not an extension of a defendant's direct appeal. The court relied on *Morgan v. Eads*, 104 Ohio St.3d 142, 818 N.E.2d 1157 (Ohio 2004), where the Ohio Supreme Court resolved a conflict among the lower Ohio appellate courts on this question. Because a *Murnahan* petition to re-open is a post-conviction proceeding, there is no federal constitutional right to the effective assistance of counsel to pursue these proceedings. And since no federal constitutional right is implicated, there is no injury cognizable in a habeas corpus proceeding. *Lopez*, 426 F.3d at 353.

Issa has not raised any substantive objections to the Magistrate Judge's cogent analysis. The Court has reviewed that analysis and concludes that this claim cannot be addressed in this proceeding for the reasons explained in *Lopez*. The Tenth Ground for Relief is therefore denied.

Eleventh Ground for Relief

Issa contends that his death sentence is unconstitutionally excessive or disproportionate to the penalty imposed in other cases, particularly the

sentences received by his death-eligible co-defendants Linda Khriss and Andre Miles. He alleges this outcome demonstrates that death penalty cases "are nothing more than a deadly lottery, in which whether a Defendant lives or dies depends on his particular attorneys, judge, prosecutors or jury." (Doc. 62, Third Am. Petition at ¶260.) He argues that his sentence therefore violates the Eighth Amendment's ban on cruel and unusual punishment.

Issa raised this ground for relief in his direct appeal, and the Ohio Supreme Court denied it on the merits. The Court rejected comparing Issa's sentence with those received by Khriss and Miles because neither of them received a death sentence, and because the records of their cases were not before the Court. Citing *State v. Steffen*, 31 Ohio St. 3d 111 (1987), the court held that the proportionality review required by Ohio Rev. Code 2929.05(A) "is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *State v. Issa*, 93 Ohio St.3d at 72.[9]

Issa presents a viscerally appealing argument. This is reflected in his appellate lawyer's testimony that he was "somewhat offended by the fact that there was no rational relationship between what happened to the three people, at least from a penalty standpoint …. But what we have right here is an

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[9] The dissent concluded that Issa's sentence was disproportionate to those of his accomplices, and that the Ohio Supreme Court's proportionality review is unfairly restricted by confining that review to death sentences. *State v. Issa*, 93 Ohio St.3d at 75-76 (Pfeifer, J., concurring in part and dissenting in part).

individual that, in my mind, who was subordinate to the other two people but nonetheless had the most serious consequences imposed upon him." (Doc. 112, Evid. Hrg. Trans. at 28.) But this Court's duty is to determine if the Ohio Supreme Court's decision is contrary to or an unreasonable application of federal law, based upon the record before that court at the time of its decision. As already discussed, the United States Constitution contains no requirement for a proportionality review based upon sentences received by other similarly situated defendants. See *Pulley v. Harris*, 465 U.S. at 42-44.

And in *Getsy v. Mitchell*, 495 F.3d 295 (6th Cir. 2007) (en banc), the Sixth Circuit rejected an Ohio petitioner's claim that he received a disproportionate sentence compared to that received by the instigator of a murder-for-hire scheme. Getsy was the actual shooter in the scheme; he was found guilty and sentenced to death. The instigator of Getsy's scheme, who was tried after Getsy, was found guilty but received a life sentence. Here, the alleged instigator (Linda Khriss) was found not guilty; Andre Miles, who actually shot and killed both victims, received a life sentence while Issa received the death penalty. The Sixth Circuit observed that when Supreme Court has struck down a death sentence based on Eighth Amendment proportionality, it has done so premised upon an evaluation of a specific defendant's culpability for the crime compared with the punishment that defendant received. See *Getsy*, 495 F.3d at 305, and citing several such cases. Moreover, *Getsy* noted that Ohio's statutory proportionality review "actually adds an additional safeguard beyond the requirements of the Eighth Amendment," citing a long line of cases rejecting various constitutional

challenges to Ohio's procedure. *Id*. at 306. See also, *Beuke v. Houk*, 537 F.3d 618 (6th Cir. 2008), citing *Getsy* and rejecting petitioner's habeas proportionality claim that ten other defendants convicted of aggravated murder from the same Ohio county did not receive the death penalty.

Whether or not Ohio's proportionality review would be more "fair" if it considered defendants who did not receive death sentences, or considered sentences received by accomplices and co-defendants, is not before this Court. As the Sixth Circuit noted in *Getsy*, "This is not to say that the incongruous results from the separate trials of Getsy and Santine [the instigator] are not a matter of concern. We share that concern, recognizing at the same time that reasonable people can disagree over the relative moral turpitude of the instigator of an assassination on the one hand and the killer hired to carry out the violent act on the other. Nevertheless, we are not empowered to answer this philosophical question by bypassing the limitations that both Congress and the Supreme Court have placed upon our power to grant relief under the circumstances of this case." *Getsy*, 495 F.3d at 309. This Court must conclude that the Ohio Supreme Court's decision rejecting Issa's proportionality claim is not contrary to federal law, nor is it an unreasonable application of federal law concerning proportionality review. Issa's eleventh ground for relief is therefore denied.

Twelfth Ground for Relief

Issa claims he received ineffective assistance of trial counsel at the penalty phase of his trial, because his lawyers did not communicate with and properly direct the investigation of his mitigation specialist.

The state trial court granted Issa funds to retain this specialist, Jim Crates. Issa argues that his lawyers failed to meaningfully assist Crates in investigating Issa's background and potential avenues of mitigation evidence, particularly the "tribal truce" agreement between the Khriss and Issa families in Jordan, discussed previously.

This claim was raised in Issa's state post-conviction petition, supported by affidavits from Jim Crates and one of the trial jurors. The trial court denied the petition without a hearing, which was affirmed by the Court of Appeals. Regarding evidence of the "tribal truce" and the fact that Crates did not know about it until just before Issa's trial, the Court of Appeals concluded that Issa did not establish any prejudice from the lack of this evidence. The court noted that none of Issa's family members had expressed a specific fear of the Khriss family, or a reluctance to assist Issa by testifying on his behalf. (Apx. Vol. VII at 377-378.)

As the Court held above concerning Issa's Third, Fourth and Fifth Grounds for Relief, juror affidavits concerning perceptions of the trial are incompetent evidence and will not be considered. Moreover, since the Ohio Court of Appeals rejected this claim on the merits and with Crates' affidavit in the record, Crates' testimony at the evidentiary hearing in this case should not be considered under *Pinholster*. But even with that testimony, Issa's claim would fail.

Crates testified that he asked Issa's lawyer to retain a clinical psychologist to examine Issa, but that was not done. Crates did not suggest what a psychologist might have added to the mitigation evidence that was presented. Crates described his

difficulties communicating with Issa's family members in Jordan due to language barriers and time differences. He said that when Issa's mother and brother arrived in Cincinnati, it was clear to him they had no real understanding of why they were there, and only a "marginal understanding" of the procedures of an American death penalty trial. (Doc. 113, Evid. Hrg. Trans. at 21-22.) Crates testified that trial counsel did not participate in his telephone calls with Issa's Jordanian family members, and it was not feasible for any member of the defense team to travel to Jordan to personally interview family members. Crates' time records reflect several telephone calls he made to universities, attempting to locate a cultural expert to assist with presenting a mitigation theory. He said Issa's lawyer rejected the idea of presenting such an expert as "too esoteric" and not necessary to Issa's defense. (*Id*. at 31)

Crates also criticized trial counsel for their failure to use an independent translator to assist with their interviews of Issa's family, rather than rely upon Issa's cousin. Crates asserted that trial counsel had a "hands off" approach to mitigation until just before that phase of trial began, and that he never had a personal meeting with counsel or the defense "team" until the evening prior to the hearing, when Issa's mother and brother were being prepared for their testimony. He was concerned about the family's attitude toward retribution, and the discovery of the "tribal truce" heightened his concern that presenting these witnesses to the jury was akin to walking in a "mine field." (Id. at 45-46.) Crates said that he did not see the actual "tribal truce" document until sometime during Issa's post-conviction proceedings.

As discussed above, *Strickland* cautions that ineffective assistance of counsel claims must be deferentially reviewed, and the Court must make every effort to evaluate a defense lawyer's performance without the "distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. at 694. Much of Crates' testimony amounts to his belief that "more could have been done" to assist him in his investigation, or that he would have "liked" to employ a cultural expert or a psychologist. But Issa must also demonstrate that this failure to do more caused him actual prejudice. He must establish a reasonable probability that his jury would have arrived at a different sentence. As discussed above, the Supreme Court has made it abundantly clear that it is not enough to argue that "more" mitigation evidence or witnesses should have been presented. See *Bobby v. VanHook*, *supra*, 558 U.S. at 18-19. Absent any demonstration of what a psychologist's examination might have revealed, the mere failure to retain a psychologist does not warrant habeas relief. It is not enough to argue that a more comprehensive investigation would have been better or perhaps more helpful. Speculation about additional investigative efforts and whether they might have altered the trial result does not establish actual prejudice. See *Wiles v. Bagley*, 561 F.3d 636, 641 (6th Cir. 2009), rejecting an argument that trial counsel failed to fully investigate petitioner's head injury sustained twelve days before the murder. The Sixth Circuit held that mere speculation of what might have been uncovered by a neurologist or by further psychological testing failed to establish prejudice under *Strickland*.

Crates asserts that the family's fear of retribution was a significant impediment to securing assistance from Issa's family. But his testimony described problems caused by distance, the time zone difference, and the fact that all but one of the Jordanian family members spoke no English. Crates also admitted that he discovered

> ... some disgust on the part of the family that Mr. Issa was allegedly involved in this kind of behavior, and it was suggested to me that, you know, if in fact he was found guilty of this, there would be – you know, he would bring – the family might just throw up their hands and abandon him. So it was a very fine line I was walking to make sure that I was not misleading them in any way, but also being vague enough that they wouldn't make any predeterminations prior [to] my getting them on U.S. soil to testify.

(Doc. 113, Evid. Hrg. Trans. at 38.) While all of these obstacles may have been difficult, they do not reflect any reluctance on the part of the family to assist Crates because of threats of retribution. Moreover, as the Ohio Court of Appeals correctly observed, "not one family member stated in their affidavits that they would not have testified on Issa's behalf because of the fear of retribution. To the contrary, they all stated that if defense counsel had asked them, they would have testified." (Apx. Vol. VII at 378.) Issa does not explain how the earlier discovery of the tribal truce document would have led to any significant and different mitigating evidence that his counsel failed to discover and would have used.

Issa's Third and Fourth Grounds for Relief discussed above contend that counsel failed to adequately investigate and present the available mitigation evidence, grounds which this Court has already rejected. This claim, arguing that trial counsel failed to more significantly interact with his mitigation specialist in order to develop and present mitigation evidence, is also rejected. For the reasons discussed above, the Court finds that Issa has not demonstrated that this alleged failure actually prejudiced his defense.

Thirteenth Ground for Relief

Issa contends in this ground for relief that he was incompetent to stand trial, and therefore his prosecution violated the Sixth and Eighth amendments. He argues that he was unable to understand spoken English, which left him unable to meaningfully consult with and assist his lawyers, and denied him a "rational as well as factual understanding of the proceedings, including testimony, against him." (Third Am. Petition at 68, ¶279.) Issa raised this claim in his direct appeal, and the Ohio Supreme Court addressed his language ability in the context of Issa's ineffective assistance of counsel claim, based on his lawyer's failure to raise the competency issue in the trial court. The Supreme Court noted that Issa's unsworn statement to the jury

> ... demonstrated that he understood and could speak English well. Furthermore, [Issa] was clearly intelligent, having completed two years of college in Jordan before emigrating to the United States. For these reasons, [Issa] was clearly capable of understanding the

> nature and objective of the proceedings against him and assisting in his own defense.

State v. Issa, 93 Ohio St.3d at 67-68. Issa also raised this issue in his post-conviction petition but the Court of Appeals did not address it, finding it was barred by Ohio's res judicata rule. (Apx. Vol. VII at 378.)

This Court agrees with the Magistrate Judge's conclusion that the Ohio Court of Appeals misapplied Ohio's res judicata rule, because the substantive question of Issa's competency to stand trial differs from his ineffective assistance of counsel claim based on a failure to challenge his competency. See, e.g., *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005), finding that where two similar claims are based on different legal theories, exhaustion of one does not exhaust the other, and citing *Prather v. Rees*, 822 F.2d 1418, 1421 (6th Cir. 1987). The competency claim which Issa raised on direct appeal but was not specifically addressed by the Ohio Supreme Court is therefore preserved for review here.

However, the record fails to support the merits of this claim. The only evidence suggesting that Issa lacked an adequate understanding of English is his own post-hoc, unsworn affidavit. The Ohio Supreme Court cited his unsworn statement to the jury during the mitigation hearing as further evidence of his English-speaking abilities. The Court has reviewed that statement (see Trial Trans. Vol. VII at 1574-1580), and agrees with that conclusion. Moreover, Issa's education records submitted with his post-conviction petition show that he studied English in Jordan and received passing grades. (Apx. Vol. III at 184-187.) And in this proceeding, his trial counsel,

his appellate counsel, and his mitigation specialist all testified that they had no problems communicating with him in English. Issa has not shown that he was incompetent due to a lack of English comprehension, and this ground for relief is therefore denied.

Fourteenth Ground for Relief

Issa contends that his trial lawyers were ineffective by failing to conduct an adequate and reasonable investigation into juror bias during voir dire, and by failing to present evidence and arguments that would counterbalance those biases. He contends that his constitutional rights under the Fifth, Sixth and Eighth Amendments were violated as a result. Issa raised this claim in his post-conviction petition and the trial court rejected it, noting that trial counsel did question the jury venire about potential biases against Muslims and Arabs. (Apx. Vol. V at 310.) The court of appeals affirmed, noting that "[Issa] did not demonstrate that any particular juror was biased against him because of his nationality. Generalized assertions in an affidavit that American jurors in general have biases against Arabs are insufficient to demonstrate prejudice." (Apx. Vol. V at 379.)

There is a fundamental constitutional right to a neutral and impartial jury. In *Ham v. South Carolina*, 409 U.S. 524 (1973), the Court vacated a defendant's drug possession conviction because the trial court had refused his request to question the jury about racial bias. The defendant was a lifelong resident of Florence County, South Carolina (described in the Court's opinion as "a young, bearded Negro"). He was well known for his civil

rights work with the Southern Christian Leadership Conference and a local civic committee, and had never been convicted of a crime. He argued that local law enforcement officers "set him up" on drug possession charges because of his civil rights activities. He requested the trial court to ask the jury venire two questions on the subject: "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" *Ham*, 409 U.S. at 526 n. 2. The trial court refused his request, and the jury convicted him of possession of marijuana. The Supreme Court reversed Ham's conviction, citing *Aldridge v. United States*, 283 U.S. 308 (1931), which recognized a right of a "negro" defendant accused of killing a white policeman to have the trial court question the jurors about racial prejudice. The Court found that an inquiry into racial prejudice is firmly grounded in the Fourteenth Amendment.

In *Ristaino v. Ross*, 424 U.S. 589 (1976), a black defendant was charged with armed robbery, assault and battery of a white security guard. The trial court denied his request to inquire about racial prejudice, finding that standard instructions and the juror's oath both required impartiality. At least one prospective juror admitted to racial bias during voir dire, and was excused. After defendant's conviction was affirmed, he was granted habeas relief because the trial court refused to question the entire panel about bias. The Supreme Court reversed, holding that *Ham* did not announce "a requirement of universal applicability," and rejecting a per se rule requiring voir dire on racial prejudice any time the

race of a victim and a defendant differed. The Court did note that "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." *Id*. at 598, n.9.

And in *Turner v. Murray*, 476 U.S. 28 (1986), the Court considered a claim by a black defendant sentenced to death for the murder of a white storekeeper. The trial court refused the defendant's request to question the jury venire about racial prejudice, because the prospective jurors did not know the race of the victim. The Supreme Court reversed the lower courts' denial of habeas relief, noting that capital sentencing proceedings may create a "unique opportunity for racial prejudice to operate but remain undetected." *Id*. at 35. The majority opinion noted that there is plainly a risk of racial prejudice whenever a crime involves interracial violence, and that "the only question is at what point that risk becomes constitutionally unacceptable." *Id*. at 38, n.8. The Court held that the trial court's denial of defendant's request to ask the prospective jurors about racial prejudice violated the defendant's constitutional right to an impartial jury.

Here, Issa is a step removed from the defendants in *Ham*, *Ristaino*, and *Turner*. He does not assert an error by the trial court: he asserts ineffective assistance of counsel because his lawyer did not ask the trial court to question the venire about bias, and did not voir dire the potential jurors in a manner he believes was sufficient to uncover any such bias. Thus the issue is not only whether the circumstances of the case demonstrate a likelihood of juror bias against Issa; the Court must also apply *Strickland* to

determine if counsel's lack of questioning resulted in actual prejudice.

In his amended petition, Issa contends that potential juror bias was clearly a danger based upon his nationality; a bomb scare that apparently required evacuation of the county courthouse on the first day of his trial; and the terrorist fears that existed nationally at the time of his trial. The 1998 American embassy bombings in Kenya and Tanzania occurred just two weeks before his trial started, and the courthouse bomb threat took place when prospective jurors were completing their questionnaires. He contends that any juror's general statement about his or her ability to remain impartial is plainly insufficient against that backdrop of factors. And he contends that his trial counsel ignored all of those events, as well as his "stereotypical" appearance, during voir dire. He cites repeated references by both the prosecutor and his own lawyer to "Arabian" nationality, race, culture or countries, even though the term is a misnomer.[10] He argues that his trial counsel made no attempt to acquaint the jury with the rich cultural history of both Middle Eastern culture and the Islamic religion.

During voir dire, one juror described spending two weeks in Gaza with a medical relief operation. She described her time in Gaza as a "... real eye-opener. I have never traveled abroad before. I led a sheltered life. It was very different, but if I did or didn't agree with things, I had to respect them; that's

[10] Issa's family is Palestinian, originally from Gaza; his parents left Gaza some years ago and eventually settled in Jordan.

their culture. It's not for me to say that it is right or wrong. That's their culture, their religious beliefs and their political beliefs." (Trial Trans. Vol. II at 459.) Issa complains that his lawyer did not ask follow-up questions after these statements, to probe whether the juror's statements regarding "their" beliefs or "their" culture indicated some bias that might cause this juror to treat Issa differently.

The state questioned the potential jurors about anti-Arabian or anti-Jordanian bias. (Trial Trans. Vol. II at 342-343.) The prosecutor asked if they all agreed that an Arabian national should be tried under the same laws as everyone else, and no one disagreed. (*Id.* at 366.) Defense counsel also asked the entire panel:

> Do you understand that there is still some unconscious association that people make in their mind and in giving everything a word association: With the word "Arab," how many do you think would say "terrorists," a word that pops into your mind especially with some things we have had in the news lately. Those kind of things we don't think about consciously, but then, we would condemn them. If somebody else says that all Arabians are terrorists, they should be thrown out of the country, it is still very important to the way you think about something.
>
> Do you think that the fact that Mr. Issa is a Jordanian makes you more likely to carry an automatic weapon? [sic]
>
> Prospective Juror: No.

> [Defense counsel]: Do you think that that should be taken into account at all?
>
> [Prospective juror]: Being an Arab? [Defense counsel]: Yes.
>
> [Prospective juror]: No.

...

Defense counsel then questioned another juror about comments about Arabs being "extreme." The juror responded:

> ... their culture is so different from ours, maybe they have started on a different base line than I do. I don't feel from what I have heard so far it really matters that much.
>
> [Defense counsel]: There's no allegations here that this is a terrorist act or there's any political or religious motivations. Do you understand that?
>
> Do you understand that it would not be fair to allow those feelings and beliefs in, in light of the press coverage we have seen in some of the cases. These are very legitimate feelings and something that might be in the back of the mind with a lot of people; but this particular case, and this particular individual, you have to judge on the evidence from the witness stand and the evidence presented in this courtroom and not on the stories on the five o'clock news whether it be about that case or whether it be about something else in general, about a particular nationality or race or religion. …

(*Id*. at 437-438.)

Strickland sets a high standard Issa must meet to sustain this claim of ineffective assistance. In view of the extent of voir dire that was actually conducted, the Court concludes that Issa has not shown that the state court's decision on this issue was an unreasonable application of federal law. And assuming that the evidentiary hearing testimony in this case should even be considered, defense counsel Agar's testimony makes it clear that her decisions with respect to voir dire were strategic ones. She testified that she believed being an Arab citizen is "a fairly strong negative" especially in a "conservative county" like Hamilton County. (Doc. 112, Evid. Hrg. Trans. at 97.) When she was asked how she would have more thoroughly prepared the jury panel for the fact that Issa's mother did not speak English and would be wearing traditional garments and a veil, she responded:

> Apart from the fact that the jury was aware of the fact that all of the people involved here, not just Mr. Issa but almost all of the witnesses, the victims and the prosecutor's witnesses were Arab-Americans, I don't know how else we would have prepared them for that fact. **We certainly didn't want to spend a great deal of time in voir dire in a discussion of the Arab culture and terrorism and bombings and things like that because we thought all that was going to do was reemphasize to the jury the differences**.

Id. at 152 (emphasis added). Counsel's reasoned and considered decision not to further question the panel

is entitled to deference under *Strickland*. This claim is therefore denied.

Fifteenth Ground for Relief

For his fifteenth ground, Issa contends that his rights under Article 36 of the Vienna Convention on Consular Relations were violated, because law enforcement authorities failed to contact the Jordanian Consulate after his arrest. He argues this failure amounts to structural error that violated his constitutional rights. Article 36 of the Vienna Convention states that law enforcement authorities "shall" inform "without delay" an arrestee who is a foreign national of his rights to freely communicate with and seek the assistance of his Consulate.

Issa raised this issue as his first claim in his direct appeal to the Ohio Supreme Court, arguing that the treaty violation rendered his post-arrest statement to the police inadmissible. The Ohio Supreme Court assumed that a treaty violation occurred. But because Issa failed to raise the issue before trial, the court reviewed only for plain error. Under that standard, the court found that the testimony of Cincinnati Police Officer Feldhaus about Issa's post-arrest statement did not affect the outcome of the trial, and its admission was harmless. Officer Feldhaus questioned Issa after his arrest; he testified that Issa had denied any involvement in the murders, and told Feldhaus that after closing the store that night, he put Maher's keys under his truck, drove his mother home, and then went with Souhail Gammoh to a bar. Gammoh testified that Issa told him not to tell the police that approximately 30 minutes elapsed between the time Issa dropped Gammoh off at his apartment, and the time that Issa

returned to pick him up to go to the bar. The Ohio Supreme Court noted that the jury could have found that Gammoh's testimony suggested that Issa was being deceitful with Feldhaus, and not simply mistaken about the timeline of events that evening. The court also held that the rest of the evidence was so strong that it could not conclude that the outcome would have been different if Issa's statements to Feldhaus had been excluded. See *State v. Issa*, 93 Ohio St.3d at 56-57.

The Ohio Supreme Court also rejected the argument of the National Association of Criminal Defense Lawyers (which filed an amicus brief on Issa's behalf), that the Jordanian consulate would have offered more substantial assistance with mitigation evidence by providing more complete educational records, or by procuring a Jordanian exit visa for Issa's other brother. The court found that this information would not have added significantly to the weight of the mitigating evidence that was before the jury.

In his habeas petition, Issa urges this Court to adopt an exclusionary remedy for the treaty violation which the Ohio Supreme Court assumed occurred. He relies in particular on the dissent in his direct appeal, which would have held that the treaty violation was tantamount to structural error that infected Issa's entire prosecution and trial. *State v. Issa*, 93 Ohio St.3d at 76 (Lundberg Stratton, J., dissenting).

The Magistrate Judge concluded that this claim was procedurally defaulted, as the Ohio Supreme Court reviewed only for plain error and enforced Ohio's res judicata rule. (See Doc. 134 at 8-11) Issa

initially did not object to this conclusion. (Doc. 138 at 1) However, in his objections to the Magistrate Judge's final corrected report (Doc. 148 at 69-83), Issa contends that the Ohio Supreme Court's statement that "each" of his claims was reviewed and that none justified reversal of his conviction, is effectively a ruling "on the merits" of each and every one of his claims. This Court disagrees; the paragraph Issa relies on from the court's opinion summarizing the ultimate outcome of Issa's appeal is just that, a summary; it is not a discussion of the merits of any of his claims. The court simply stated that none of the claims "justifies reversal" of Issa's conviction. See *State v. Issa*, 93 Ohio St.3d at 54.

Issa then argues that while the Supreme Court used the term "plain error review," in reality the Court reviewed this claim on the merits. In reviewing a claim of error that was not brought to the attention of the trial court, Ohio law

> ... places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial: (1) there must be an error, i.e., a deviation from a legal rule, (2) the error must be plain, so that it constitutes an obvious defect in the trial proceedings, and (3) the error must have affected substantial rights such that the trial court's error must have affected the outcome of the trial.

State v. Barnes, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002) (internal quotations omitted). The decision to correct a plain error is discretionary and should be made "with the utmost caution, under exceptional circumstances and only to prevent a

manifest miscarriage of justice." *Id.* (internal citation omitted). The Ohio Supreme Court cited this rule and assumed that an appropriate remedy for the treaty violation would have been the exclusion of Issa's statement to Feldhaus. Given those assumptions, however, the Court found that any error in admitting the testimony did not affect the trial's outcome, especially in view of the weight of the other evidence against Issa.

While the Supreme Court discussed the issue in some depth, the Court cannot conclude that the court ignored Ohio's well-established plain error rules and the res judicata doctrine it specifically cited in its opinion. The concurring justices' opinion supports this conclusion, as they would have rejected even plain error review, citing *United States v. Olano*, 507 U.S. 725 (1993). Ohio's res judicata rule has been upheld as an independent and adequate state procedural ground for denying habeas relief, absent cause and prejudice. See *Coleman v. Mitchell*, 268 F.3d 417, 427 (6th Cir. 2001). And a state court's plain error review does not amount to a waiver of procedural default rules. See *Cooey v. Coyle*, 289 F.3d 882, 897 (6th Cir. 2002).

Issa does not demonstrate cause for the default of this issue, nor does he articulate any resulting actual prejudice. He suggests that ineffective assistance of his trial counsel caused the default, but that claim is not preserved for habeas review. It was not raised in his direct appeal nor in his post-conviction petition, and he does not assert this failure as a ground for relief with his other ineffective assistance of trial counsel claims included in this proceeding.

In any event, as the Magistrate Judge noted, Supreme Court precedent forecloses Issa's claim. In *Breard v. Greene*, 523 U.S. 371 (1998), the Supreme Court held that a similar claim brought by a foreign national defendant was procedurally defaulted, based on the general rule that treaties are subject to the procedural rules of the forum state. This holding was reaffirmed in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), where the Court held that neither the terms of the Convention, nor a subsequent opinion from the International Court of Justice,[11] holding that the United States violated the Convention which precluded the application of state procedural default rules to 51 convicted Mexican nationals, justified revisiting *Breard*. The Supreme Court observed that procedural default often bars a habeas petitioner from raising federal constitutional claims, and the defaulted petitioner in that case offered no cogent reason to analyze treaty claims differently.

The Court then addressed petitioner Sanchez-Llamas' treaty claim, because unlike the other petitioner, he had timely raised his Vienna Convention claim in a motion to suppress filed in the state trial court. The court assumed without deciding that Article 36 granted individual rights to Sanchez-Llamas that had been violated by the state. But the court held that it had no authority to impose an exclusionary remedy for such a violation upon the states, absent a self-executing treaty that was binding under the Supremacy Clause. It also found

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[11] *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U. S.*), 2004 I.C..J. 12 (hereinafter "Avena").

that suppression of the defendant's statements given without consular notification would be inappropriate:

> Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants any assistance at all. The provision secures only a right of foreign nationals to have their consulate informed of their arrest or detention--not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

Sanchez-Llamas, 548 U.S. at 349.[12]

And in *Medellin v. Texas*, 552 U.S. 491 (2008), the Court again considered a Vienna Convention claim, this time brought by a state death penalty habeas petitioner. Medellin had first raised his treaty claim in his state post-conviction application, where it was denied as procedurally defaulted under state law. His habeas claim was denied on the same basis, and the Fifth Circuit affirmed, relying on *Breard*. While Medellin's habeas appeal was pending, the ICJ issued its *Avena* decision. Medellin was one of the 51 Mexican nationals specifically discussed in *Avena*.

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[12] The Court also observed that shortly after the ICJ's decision in *Avena*, the United States withdrew from the Optional Protocol concerning disputes under the Vienna Convention. That Protocol, ratified in 1969 along with the Convention, states that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction" of the ICJ.

After *Avena*, President Bush issued a memorandum to his Attorney General, directing that the United States would "discharge its international obligations ... by having State courts give effect" to the decision in *Avena* in each of the 51 cases involving Mexican nationals. (*Id*. at 503.) Medellin then filed a second state post-conviction application, which the Texas state court dismissed, holding that neither the ICJ's decision in *Avena* nor the Presidential Memorandum was "binding federal law" that trumped the state's procedural rules. The Supreme Court granted certiorari and affirmed, concluding that neither *Avena* nor the President's Memorandum were directly enforceable federal law that would prevent the application of state procedural limits on filing successive habeas petitions.

Given these recent Supreme Court decisions, this Court must conclude that Issa's Vienna Convention claim is procedurally defaulted. Assuming that Issa has individual rights under Article 36 that were violated, those rights cannot be enforced by this federal habeas court when doing so would trump state procedural law that is consistently applied by the Ohio courts, and was actually applied during Issa's appeal. For the same reasons, the Court rejects Issa's contention that the treaty violation amounts to structural error. Structural errors are those that "defy analysis by harmless error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (internal quotations and citations omitted). Such errors include the denial of legal representation; the denial of a public trial; or giving a jury defective reasonable-doubt instructions.

Id. (citing cases). Issa's treaty violation claim does not rise to that level of constitutional error. Nor does it defy analysis under plain error standards, as the Ohio Supreme Court found. That decision was not an unreasonable application of federal law, and this ground for relief is therefore denied.

Sixteenth Ground for Relief

Issa contends he was denied the effective assistance of trial counsel because they failed to retain an independent firearms expert, a criminal investigator, and a crime scene expert. He also contends that his trial counsel failed to file a motion to suppress the evidence found in his apartment, one bullet of the same caliber as that used in the murder weapon.

Issa argued on direct appeal that he had been unable to adequately defend himself because a lack of funds prevented him from retaining investigators and a forensic pathologist. The Ohio Supreme Court noted that the trial court granted Issa's request for funds to retain a mitigation specialist, a translator, and for travel and lodging expenses for Issa's family members who came from Jordan. But no request had been made to the trial court for the experts he argued on appeal were necessary. Since no request had been made, the Supreme Court reviewed for plain error. Under that standard, Issa failed to establish that (1) there was a reasonable probability that the additional experts would have aided his defense, and (2) a lack of funds resulted in an unfair trial. Even if a request for funds had been timely made, the court held that the trial court would have been justified in denying it. The court also rejected his ineffective assistance of trial counsel claim on

this ground for the same reasons. *State v. Issa*, 93 Ohio St. 3d at 63, 68.

Counsel's failure to file a motion to suppress was also raised on direct appeal. The Supreme Court noted that because the issue had not been raised in the trial court, the record was silent as to the basis for the search warrant for Issa's apartment. But the court found that by the time police executed the search, "… they had probable cause to do so. By that time, police had talked to Bonnie and Joshua regarding Miles's confession implicating [Issa], arrested Miles and obtained his confession, and recovered the murder weapon and ammunition clip." *State v. Issa*, 93 Ohio St.3d at 68. The court alternatively concluded that even if the bullet had been excluded, the result would not have been different because other more compelling evidence linking Issa to the murder weapon was introduced through the testimony of Howard, who saw Issa with a rifle, and through the testimony of Bonnie and Josh Willis.

This ground for relief was not included in Issa's state post-conviction petition, and thus no evidence dehors the record was presented to the state court, such as an affidavit from a firearms expert, a crime scene expert, or some facts demonstrating that a motion to suppress the search warrant may have had merit. Issa does not present any evidence on these issues in this case. Any meaningful assistance these additional experts might have provided, and the absence of which resulted in an unfair trial, is a matter of pure speculation. The same conclusion applies with respect to the failure to file a

suppression motion. The Court therefore denies this ground for relief.

Seventeenth and Nineteenth Grounds for Relief

In his seventeenth claim, Issa contends that the indictment against him was returned by an improperly constituted grand jury due to its discriminatory racial composition. His nineteenth claim argues that the selection process for grand jury foremen in Hamilton County, Ohio is biased geographically, racially, and socio-economically. Issa raised these claims in his direct appeal, and the Ohio Supreme Court held they were waived because they had not been raised at trial, citing *State v. Williams*, 51 Ohio St.2d 112, 364 N.E.2d 1364 (Ohio 1977). The Court also observed that the argument would fail even if it had been preserved, because the use of voter registration lists to select grand jurors was found to be constitutional in *State v. Moore*, 81 Ohio St.3d 22, 689 N.E.2d 1 (1998). With respect to the grand jury foremen selection process, the Court held that the claim was not supported by any evidence in the record. See *State v. Issa*, 93 Ohio St.3d at 61-62.

Issa also raised the grand jury foreman claim in his state post-conviction proceeding as his twenty-first claim for relief. The Ohio Court of Appeals held that the statistical evidence he provided to support this claim existed at the time of trial and could have been presented to the trial court. Therefore, applying *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), Ohio's res judicata rule barred review of the question.

Issa's Traverse Brief argued that any default or res judicata bar on both of these issues was due to

ineffective assistance of trial counsel. But that contention has not been preserved for review, because Issa did not raise an ineffective assistance claim on these grounds in **any** prior proceeding. He also suggests that the Ohio Supreme Court did not actually enforce the procedural rule, and addressed his grand jury claims on the merits. This Court disagrees: the Supreme Court explicitly held that Issa had "waived" both of these claims. The Court's alternate, "even if" discussion (referring to *State v. Moore* and observing that Issa lacked evidence to challenge the foreman selection process) cannot be considered a decision on the merits. These claims are not properly preserved for habeas review.

Even if this court were inclined to find that the claims are not waived because the state court briefly addressed them, Issa has not demonstrated a basis for relief. The materials submitted with Issa's post-conviction petition include a June 29, 1998 affidavit of Kimberlee Gray, a private investigator who previously worked for the Ohio Public Defender's office. She states that in twenty-one cases involving Hamilton County death penalty prosecutions, 19 of 21 grand jury foremen were white, and 2 individuals could not be located. (Apx. Vol. V at 68-71.) Issa submitted voluminous pages of lists of county grand jurors from January 1985 through December 1990, but with no analysis of how these individuals were chosen. (Apx. Vol. V at 72-303.) He submitted a Spring 1998 report from the NAACP Legal Defense and Education Fund on death row inmates by race and gender, along with state-by-state statistics on the imposition of the death penalty; and a 1997 Annual Report from the Ohio Public Defender's Office along with several 1993 newspaper articles,

noting that Hamilton County sent more individuals to "death row" than any other county in the state. (Apx. Vol. V at 349-383.)

None of these materials support a proper constitutional challenge to the selection of the grand jury that actually returned the indictment against Issa. In order to establish a presumption of a discriminatory selection process, Issa must come forward with some evidence establishing under-representation of his identifiable group. See *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). See also, *Jefferson v. Morgan*, 962 F.2d 1185, 1191 (6th Cir. 1992), holding that a defendant must show under-representation and a potentially discriminatory selection process, or systematic, long-term under-representation. Statistics concerning Hamilton County's rate of death penalty convictions do not establish any discriminatory grand jury selection process, nor suggest a systematic or long-term under-representation of minorities in general or of Arab-Americans in particular. Issa has failed to satisfy either prong of the *Jefferson* test, and his claim would be denied even if it had been properly preserved.

Eighteenth Ground for Relief

Issa's eighteenth ground for relief argues that prejudicial publicity both before and during his trial violated his constitutional rights to a fair trial and sentencing hearing. This claim was presented on direct appeal, but the Ohio Supreme Court found it had been waived by Issa's failure to move for a change of venue prior to trial, citing *State v. Campbell*, 90 Ohio St.3d 320, 336, 738 N.E.2d 1178 (2000). The Court also noted that there was nothing

in the record to support his claim. Only one juror stated during voir dire that he recalled some publicity about the crimes. On one occasion during the trial, the trial court specifically inquired if anyone on the jury had obtained any information about the case other than in the courtroom, and no juror responded affirmatively. (Trial Trans. Vol. V at 1085.) The trial judge also repeatedly admonished the jurors to avoid reading or hearing about the case.

As with the other defaulted claims discussed above, the Court concludes this claim is not properly preserved for habeas review. Even if it were preserved, Issa offers no evidence of the allegedly prejudicial pre-trial publicity. He suggests that "widespread" media coverage "saturated" the community prior to his trial, but there is simply no evidence in the record supporting this assertion. This claim is therefore denied.

Twentieth Ground for Relief

Issa contends that his constitutional rights to a proper defense were infringed by the trial court's failure to provide funds to hire additional investigators to assist him. He notes that numerous law enforcement officers and the county medical examiner testified for the state, but that he lacked funds for appropriate investigators who could uncover evidence to challenge their testimony. Issa raised this claim as his ninth claim on direct appeal. The Ohio Supreme Court rejected it, first noting that Issa did not ask the trial court for funds for any investigator. The Court also stated:

> Moreover, in *State v. Mason* (1998), 82 Ohio St. 3d 144, 694 N.E.2d 932, syllabus, we held that due process "requires that an indigent

> criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." The circumstances surrounding this case do not support [Issa's] assertion that the lack of these experts resulted in an unfair trial.
>
> The cause of Maher's death was clear, and the crime scene evidence did not suggest justifiable homicide. In addition, the fact that Miles was the actual killer was not in question. Moreover, the record reveals a thorough, professional, and well-documented autopsy and police investigation. For these reasons, [Issa] would have been unable to make the particularized showing required by *Mason*. Thus, if [Issa] had filed a motion for funds for these experts the trial court would have been justified in denying it.
>
> For the foregoing reasons, [Issa's] ninth proposition of law is overruled.

State v. Issa, 93 Ohio St.3d at 63.

As the Magistrate Judge concluded, this discussion leaves some doubt as to the basis for the Supreme Court's decision. In contrast to other claims that the Court clearly and explicitly stated had been waived and which were reviewed for plain error, here the Court cited the substantive due process analysis from *State v. Mason*, and actually applied that

analysis. The Court did not clearly and expressly rely on waiver or res judicata.

Assuming the claim is reviewable here, Issa has failed to adequately demonstrate how the absence of these additional investigators actually hampered his defense. He suggests that an investigator would have interviewed Linda Khriss, or taken pictures of the Willis' backyard (perhaps to test their assertion that they saw a white plastic bag through a window in their home). He suggests that a crime scene investigator could have determined the manufacturer of the gun, or of the six cartridges found at the murder scene. But Issa does not explain what these efforts would have yielded with respect to his defense or his sentence. As the Supreme Court noted, the cause of Maher's death was clear, and the identity of the gun manufacturer would have been irrelevant to Issa's guilt or innocence. Issa did not submit any evidence dehors the record on this issue with his state post-conviction petition, such as photos of the Willis' backyard, or any suggestion that an investigator's interview of Linda Khriss would have yielded helpful evidence. And he presented no evidence on this issue in this proceeding.

Therefore, this Court cannot conclude that the Ohio Supreme Court's decision is contrary to or an unreasonable application of federal law. This claim for relief is therefore denied.

Twenty-First Ground for Relief

Issa contends that the trial court's admission into evidence of "gruesome, inflammatory and cumulative photographs" prejudiced his defense and denied him a fair trial. He raised this issue on direct appeal; the Ohio Supreme Court reviewed the photographs of the

murder victims that were admitted in Issa's trial, most taken at the crime scene and a few at the morgue. The court described the photos as showing the victims in the parking lot, lying on their backs with bare chests visible. Trial Exhibits 3, 4, 5, 6, 30 and 31 were described as having been taken several feet away from the bodies, and the court found they were not gruesome. Two of the photographs, Trial Exhibits 7 and 8, were close views of Maher's body. Issa's counsel objected to the admission of both of these, arguing that No. 8 was a particularly gruesome photo: "It does not depict the body in the way it was when [police medics] arrived on the scene. There is obvious signs of treatment [sic], because an airway is placed in the mouth and some other apparatus apparently on the chest. ... It is rather gruesome... ." (Trial Trans. Vol. VI at 1334.) The trial court overruled this objection, because the photo in question showed a gunshot wound to Maher's hand that several witnesses had testified about, and because the photograph had already been used during the coroner's testimony to the jury. The Ohio Supreme Court affirmed the trial court's ruling, finding the photo also assisted the jury in evaluating Issa's theory (argued in closing by his lawyer) that the location of the fatal wound demonstrated that Miles could not have been intent on killing Maher. *State v. Issa*, 93 Ohio St.3d at 65.

These photographs are not in the record before this Court. Based on the descriptions provided by Issa's counsel in the trial transcript and in the Supreme Court's opinion, Exhibits 7 and 8 may have been disturbing or shocking. But Issa has not directly addressed the Supreme Court's conclusion that their admission did not prejudice his defense,

and that the photos assisted the jury in applying and understanding some of the trial testimony. Claims of erroneous admission of evidence are not generally cognizable in a habeas proceeding "... unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Biros v. Bagley*, 422 F.3d 379, 391 (6th Cir. 2005) (internal citations omitted), affirming the denial of habeas relief based on admission of decidedly gruesome photographs of the victim (whom defendant had killed and then dismembered). The court found that the photographs were relevant to the defendant's contention that he accidentally killed the victim.

Issa has not demonstrated that the admission of the two photographs denied him a fair trial, or that the decision of the Ohio Supreme Court rejecting this claim was contrary to or an unreasonable application of federal law. This ground for relief is therefore denied.

Twenty-Second Ground for Relief

Issa contends that the Ohio death penalty sentencing procedure, under which a capital defendant must prove the existence of a mitigating factor by a preponderance of the evidence, is unconstitutional. He argues that "all relevant mitigating evidence" should be weighed against the statutory aggravating circumstances. The Ohio Supreme Court summarily rejected this argument in Issa's direct appeal, citing *Delo v. Lashley*, 507 U.S. 272, 275-276 (1993), and *State v. Jenkins*, 15 Ohio St.3d 164, 171, 473 N.E.2d 264 (1984). Issa admits that the preponderance standard was found to be constitutionally acceptable by the United States

Supreme Court in *Delo*. His petition states that he wishes to preserve this issue in the event the United States Supreme Court should reconsider or revisit this question. (Doc. 62, Third Am. Pet., p. 88 at ¶360.) This ground for relief therefore needs no extended discussion, and it is denied.

Twenty-Third Ground for Relief

Issa contends that the trial court's instructions to the jury in the sentencing phase of his trial created an unconstitutional presumption in favor of death. Issa's trial counsel did not object to the instructions on this basis, and this claim was not raised on direct appeal. Issa's post-conviction petition raised this claim, and both the trial court and the Court of Appeals found it was barred by Ohio's res judicata rule.

The Court must conclude that this claim of error in jury instructions is defaulted, as the Ohio Court of Appeals plainly concluded. The Court notes that the Magistrate Judge's initial Report and Recommendation on procedural issues analyzed at length the procedural default issue, and rejected Issa's assertions that the claim was preserved. (See Doc. 134 at 17-20.) The Court has carefully reviewed that analysis and adopts it here. Issa failed to timely raise this claim on direct appeal, and he may not argue ineffective assistance of counsel in this case in an attempt to resuscitate it. And even if the claim is not defaulted, Issa has failed to demonstrate a basis upon which habeas relief might be granted. To support this claim, Issa submitted a September 1994 affidavit of Michael Geis with his state post-conviction petition. (Apx. Vol. III at 217-252.) Geis, a Professor of Linguistics, offered a lengthy exposition

on what he asserts are shortcomings in the standard Ohio Jury Instruction on aggravating and mitigating factors. There is nothing in the Geis affidavit that ties his general critique to the facts of Issa's case, and most of his observations are very broad and somewhat vague. As but one example, Geis states that a prosecutor "may" draw the attention of the jury to improper considerations. (*Id.* at 220-221.) But neither Geis nor Issa contend that this actually occurred during Issa's trial.

Issa also cites Geis' critique of the "catchall" factor of Ohio Rev. Code 2929.04(B)(7), which states that the jury shall consider "any other factors that are relevant to the issue of whether the defendant should be sentenced to death." Geis opines that this phrase encourages juries to consider negatives that would support the death penalty, instead of mitigating factors that would support life. It is not at all obvious to the Court that a reference to "any other factors" is an invitation, much less a directive, to a jury consider only "negative" factors, especially when counsel is fully able to argue in favor of the positive, mitigating factors presented to the jury. Professor Geis provided no curriculum vitae, he did not testify in any proceeding, and the Court lacks any evidence by which to determine if his general opinions would qualify as expert linguistic testimony. This ground for relief is therefore denied.

Twenty-Fourth Ground for Relief

Issa contends that Ohio's statutory definition of "reasonable doubt" is a constitutionally inadequate basis upon which to impose the death penalty. Issa raised this claim on direct appeal and it was summarily denied: "In his fourteenth proposition of

law, [Issa] argues that Ohio's statutory definition of reasonable doubt is unconstitutional when applied to the penalty phase of a capital case. We reject this argument on the authority of *State v. Goff* ...". *State v. Issa*, 93 Ohio St.3d at 69.

In *State v. Goff*, 82 Ohio St.3d 123, 694 N.E.2d 916 (1998), the Ohio Supreme Court considered a challenge to a penalty phase jury instruction which stated:

> Reasonable doubt is present when after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge.
>
> Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is a doubt -- reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral courage -- on moral evidence is open to some possible doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

Id. at 131-132. In an earlier case, the Supreme Court had questioned whether a similar instruction was "fully appropriate" for use in the penalty phase. Goff clarified that the prior case question was not tantamount to a holding that the instruction was constitutionally unsound. Rather, the Court held that an appropriate penalty phase reasonable doubt instruction "should convey to jurors that they must be firmly convinced that the aggravating circumstance(s) outweigh the mitigation factors(s), if

any." Considering all of the instructions that had been given in that case, the *Goff* court found no prejudicial or constitutional error in giving the challenged instruction.

Here, the challenged instruction given in Issa's penalty phase trial stated:

> Reasonable doubt is present when after carefully considering and comparing all the evidence you cannot say that you are firmly convinced that the aggravated circumstance outweighs the factors in mitigation. Reasonable doubt is present when you are not firmly convinced that death is the appropriate punishment. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely upon it and act upon it in the most important of his or her own affairs.

(Trial Trans. Vol. VII at 1614-1615.)

This instruction is legally indistinguishable from that discussed and approved by the Ohio Supreme Court in *Goff*. Moreover, it clearly instructs the jury that the aggravating circumstance must outweigh the mitigation factors. The Sixth Circuit has addressed and rejected due process challenges to essentially the same instruction on several occasions. See *White v. Mitchell*, 431 F.3d 517, 533-534 (6th Cir. 2005), noting that jury instruction errors must be "so egregious that they render the entire trial

fundamentally unfair." See also, *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001), and *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001), both cited in *White*.

Issa does not articulate any basis upon which to find that the state court's decision on this claim is contrary to or an unreasonable application of federal law. This ground for relief is therefore denied.

Twenty-Fifth Ground for Relief

Issa argues that Ohio's death penalty laws are constitutionally defective, and violate the Eighth Amendment's prohibition of cruel and unusual punishment. This ground for relief levels a number of broad attacks on Ohio's statutory scheme. (See Doc. 62, Third Am. Pet. at 97-111.) Issa contends that the statute vests virtually uncontrolled discretion in state prosecutors, leading to the imposition of the death penalty in a racially discriminatory manner. He argues that the death penalty is neither the least restrictive nor most effective means of deterring crime. He claims that instructing juries that aggravating circumstances must "outweigh" mitigating factors invites arbitrary decisions, and that the statutory mitigating factors are unconstitutionally vague. Ohio law requires proof of an aggravating circumstance in the guilt phase trial, which Issa contends is unconstitutional because it prevents a sufficiently individualized sentencing determination. He also notes that a capital defendant who pleads guilty may benefit from Ohio Rule of Criminal Procedure 11(C)(3), granting the courts discretion to dismiss death penalty specifications "in the interest of justice." But a defendant who exercises the right to stand trial has no similar

opportunity, a distinction noted in the concurring opinion in *Lockett v. Ohio*, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring).[13]

Issa also attacks Ohio's felony-murder sentencing laws, arguing that felony murderers are treated more harshly than intentional murderers. He asserts that a "killer who kills with prior calculation and design is treated less severely, which is nonsensical because his blame worthiness or moral guilt is higher, and arguably the ability to deter him [is] less." (Doc. 62 at ¶430.) He contends that Ohio lacks an adequate system of data tracking concerning the imposition of the death penalty, which prohibits constitutionally adequate appellate and proportionality reviews. He argues that the Ohio Supreme Court's appropriateness and proportionality reviews are cursory, as he claims it was in his own direct appeal, and fail to adequately distinguish between those defendants deserving of death and those who are not.

Issa raised this panoply of challenges on direct appeal. The Ohio Supreme Court summarily rejected all of his arguments, relying on several of its prior decisions. See *State v. Issa*, 93 Ohio St.3d at 69. Issa does not present facts or law upon which this Court could conclude that the Ohio Supreme Court's decision was contrary to, or an unreasonable application of, federal law. His arguments with respect to arbitrary prosecutorial discretion fail in light of *Buell v. Mitchell*, 274 F.3d 337, 367 (6th Cir. 2001), rejecting a similar argument that Ohio's

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[13] The concurring opinion would have found an unconstitutional disparity resulting from this different treatment, a position not adopted by the majority.

statute violates due process or equal protection, and finding that it does not run afoul of any constitutional right. The Supreme Court has never, to this Court's knowledge, required that a state must demonstrate the **absence** of mitigating factors in order to impose a death sentence, and Issa does not cite any such authority. In *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988), the Supreme Court held that the trier of fact must find one aggravating circumstance at **either** the guilt or penalty phase, in order to convict a defendant of death-eligible murder. The Ohio statute plainly requires that one statutorily-defined aggravating circumstance be specified in the indictment and proved beyond a reasonable doubt; see Ohio Rev. Code 2929.04(A).

Lowenfield also disposes of Issa's arguments about the death penalty's overbreadth, and about the disproportionately harsh treatment of felony murderers. With respect to Issa's contention that the sentencing statute's mitigating factors are vague, the Court cannot meaningfully evaluate that claim because he does not identify any specific factor he alleges is unconstitutionally vague. His attacks on the aggravating and mitigating factor weighing process and statutory definitions fail in light of *Tuilaepa v. California*, 512 U.S. 967, 973 (1994), which held that a mitigating factor must have some "common-sense core of meaning" that juries are capable of understanding, in order to pass constitutional muster. *Tuilaepa* rejected a vagueness challenge to a statutory sentencing factor requiring the jury to consider "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

The court found that this language used conventional terms, and essentially required the jury to determine whether a certain event had occurred or not. It did not require a forward-looking or vague and broadly-worded inquiry, such as whether the defendant was a "continuing threat to society." *Id.* at 976-977. In contrast, in *Maynard v. Cartwright*, 486 U.S. 356, 363-364 (1988), the Supreme Court concluded that an aggravating factor requiring the jury to determine if a killing was "especially heinous, atrocious, or cruel" was unconstitutionally vague, because it failed to properly channel the jury's discretion in making that determination.

Ohio's statutory mitigating factors set forth in Ohio Rev. Code 2929.04(B)(1)-(7) do not suffer from the type of impermissible vagueness found in *Maynard*. Rather, the statute lists factors that the Supreme Court has specifically approved, such as whether the victim induced the offense, whether the offender was under duress, coercion or provocation, or the offender's lack of criminal history. These factors are not constitutionally infirm or vague. For similar reasons, the Court rejects Issa's contention that Ohio Rev. Code 2929.03(D)(1) renders the statutory mitigation factors unconstitutionally arbitrary. (See Doc. 62 at 107-108.) Section 2929.03(D) sets forth the procedure to be followed for a death-eligible aggravated murder defendant, including the requirement of a pre-sentence investigation and mental examination if requested by a defendant. It provides that the trier of fact shall hear relevant evidence concerning the nature and circumstances of the aggravating factors, and any evidence in mitigation of a death sentence. The defendant "shall be given great latitude in the

presentation of evidence of the mitigating factors set forth in [Section 2929.04(B)] and of any other factors in mitigation of the imposition of the sentence of death." This statute does not impermissibly skew the weighing process required under Section 2929.04.

Issa also argues that Ohio law does not require the trier of fact to specifically identify any mitigating factors that would lead to imposition of a life sentence, rather than a death sentence. Without a requirement of specific findings on mitigation, Issa argues that no significant comparison of the two types of sentences is possible. This lack of specific findings, he claims, hinders the appellate court in performing its duty to determine the appropriateness of the death penalty in each case, as required by Ohio Rev. Code 2929.05(A), and renders Ohio's proportionality review procedure unconstitutional. (See Doc. 62 at 109-110.) As was noted above with respect to Issa's eleventh ground for relief, there is no federal constitutional right to sentencing proportionality review in every case. In *Buell v. Mitchell*, 274 F.3d 337, 369 (6th Cir. 2001), the Sixth Circuit noted that a state has "great latitude" in conducting proportionality review, and choosing which sentences will be considered as part of that review. The Ohio statute does not require a jury to make a specific finding on each and every mitigation factor presented by a defendant, or to determine if each such factor supports life or death. This procedure falls comfortably within the "great latitude" accorded to the states.

The Court also rejects Issa's argument that the Ohio Supreme Court gives only "cursory" consideration to its statutorily-required

proportionality review. In Issa's case, the Supreme Court discussed in some detail the facts concerning the aggravating factor found by the jury (murder for hire), as well as a lengthy review of Issa's mitigation arguments. See *State v. Issa*, 93 Ohio St. 3d at 70-72. This can hardly be described as a "cursory" treatment of Issa's arguments. Ohio's proportionality review procedure, limited to defendants who have received the death penalty, is not unconstitutionally infirm.

For all these reasons, the Court denies Issa's twenty-fifth ground for relief.

Twenty-Sixth Ground for Relief

Issa contends that he received ineffective assistance of trial counsel during the penalty phase because his lawyers failed to present testimony from two jail inmates, Rayshawn Johnson and Gary Hughbanks. Andre Miles, Johnson and Hughbanks were incarcerated together. Johnson and Hughbanks submitted affidavits in Issa's post-conviction proceeding, stating that Miles told each of them that Miles murdered Maher and his brother during a robbery. Miles said he implicated Issa because Miles and Issa had a disagreement about money, and Miles wanted revenge. During the guilt phase of Issa's trial, another inmate, Johnny Floyd, testified to the same effect. Issa contends that Floyd was not recalled during Issa's penalty phase, and neither Johnson nor Hughbanks ever testified in Issa's trial.

Issa raised this claim in his post-conviction proceeding, and the Court of Appeals rejected it:

> The decision whether to call a witness involves trial strategy, and, absent prejudice,

> the failure to call a witness does not constitute ineffective assistance of counsel. In this case, counsel presented the testimony of another witness who testified to the same facts. The presentation of additional witnesses on the issue would have been cumulative, and Issa did not demonstrate that the failure to call these witnesses prejudiced the defense.

State v. Issa, 2001 Ohio 3910 at *18.

Trial counsel's decision whether to recall Johnny Floyd in the penalty phase was clearly a strategic choice that was made. Counsel clearly knew who Floyd was and where he could be found. The jury had already heard and considered his testimony, and obviously concluded it was insufficient to establish Issa's innocence. There would have been obvious risks in recalling Floyd to repeat that testimony during Issa's penalty phase.

Regarding Gary Hughbanks, his affidavit states that Miles told him he intended to rob Maher Khriss, but then he shot and killed both Maher and Maher's brother. Miles also told Hughbanks that he blamed his incarceration on Issa. None of Hughbanks' statements suggest that Issa was actually innocent, or that Miles "set him up." Miles might well "blame" Issa because Issa involved Miles in the scheme. Taking Hughbanks' affidavit at face value, the failure to call him as a witness in any part of Issa's trial did not clearly prejudice Issa's defense, because the Hughbanks affidavit does not establish a reasonable probability of a different outcome.

Rayshawn Johnson testified at the evidentiary hearing in this case. Even if his testimony should be

considered at this juncture, it does not support Issa's claim. Johnson said he had many conversations with Andre Miles, all of which were more or less "... that he done the crime and, you know, he wanted to bring Ahmad Issa and Linda Khriss into it because he got – he didn't want – he got caught, he didn't want to go down by himself." (Doc. 112, Evid. Hrg. Trans. at 58-59.) Johnson was also shown a hand-written letter (Evid. Hrg. Ex. 4) which Johnson believed Miles wrote to him, although the circumstances of his receipt of the letter are somewhat murky. (Johnson said that "someone" gave it to him in prison and it did not come through the normal mailroom.) In the letter, which was clearly written after Miles' trial, Miles states: "I think the whole Legal system is messed up. I should be there and not Mike. Look if I could do anything for Mike I would. In his letter I told him, that all he has to do is say so." Issa's nickname is Mike.)

Whatever relevance this letter may have, it clearly was not in existence at the time of Issa's trial, so trial counsel could not have discovered it. And Johnson's testimony about Miles' jailhouse statement does not suggest that Miles was telling Johnson that Issa was **innocent**. Miles' letter claims that Miles "should be there and not [Issa]." This is hardly persuasive evidence that Issa was not involved in Maher's murder. As this Court views it, the import of Johnson's testimony and post-conviction affidavit was that Miles did not want to face punishment by himself. Miles did not tell Johnson that he had "set up" Issa. And even assuming that Johnson's testimony might suggest that fact, Johnson's testimony would have clearly been cumulative to that offered by Johnny Floyd. The same potential

risks that counsel would have faced by putting Floyd back in front of the jury to suggest that Issa was innocent after the jury had found otherwise, would apply with equal force to Johnson.

For these reasons, the Court cannot conclude that the Ohio Court of Appeals' decision with respect to this ground for relief was contrary to or an unreasonable application of *Strickland*. This claim is therefore denied.

Twenty-Seventh Ground for Relief

One of Issa's two appellate lawyers who represented him in his direct appeal also represented Andre Miles in his direct appeal of his conviction. Issa contends that his lawyer, Herbert Freeman, had an irreconcilable conflict of interest in separately representing both Issa and Miles. Issa alleges that he was prejudiced by this conflict, relying on his claims of ineffective assistance of appellate counsel raised in his Ninth Ground for Relief, all of which he suggests were caused by Freeman's conflict of interest. Issa contends that he was unaware of Freeman's representation of Miles until the spring of 2005, during the pendency of this proceeding. Issa had been granted leave to depose Freeman, and during his deposition, Freeman disclosed that he had a file at home regarding Issa's case. In that file was a letter Freeman wrote to Issa's appellate co-counsel, stating in pertinent part:

> Enclosed please find a photocopy of the rough draft of the "Statement of Facts" from the appellate brief of Andre Miles. You will recall that he was a codefendant to Mr. Issa, although he was tried separately. I am sending it to you, because I am lead counsel

> appealing Miles' case in the Court of Appeals (he was the "shooter," but he avoided the death penalty). It will be in many ways virtually the same as the testimony elicited against Mr. Issa.

(Doc. 139, Supplemental Appendix at 32.) After the letter was discovered, Issa was granted leave to file his Third Amended Petition to include this ground for relief, and the Magistrate Judge held this case in abeyance while Issa exhausted the claim by filing a *Murnahan*/Rule 26 motion before the Ohio Supreme Court. (Doc. 64) That court denied Issa's motion because it was untimely "... and because second or successive applications for reopening are not permitted under the rule." *State v. Issa*, 106 Ohio St.3d 1407, 2005 Ohio 3154 (June 29, 2005).

Initially, the Court must determine if this claim is reviewable, because the Ohio Supreme Court enforced its procedural rule by finding Issa's *Murnahan* motion to reopen untimely. The Magistrate Judge concluded that Issa's application to reopen "was futile from the beginning," and that Issa did not discover the factual predicate for this claim until the proceedings in this case. (Doc. 146 at 85-86) The Magistrate Judge cited *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2006), where the Sixth Circuit reviewed the background of *Murnahan* and the adoption of Ohio Rule 26(B)'s time limitations on such motions. The court found that the "Ohio Supreme Court has been erratic in its handling of untimely Rule 26(B) applications in capital cases," and citing a group of cases in which the Rule's time requirements were enforced, and a group of other cases where untimely applications were reviewed on

the merits. *Id.* at 420-421. While consistent enforcement of the Rule apparently began again around the time that Issa filed his Rule 26 motion on April 22, 2005, the Sixth Circuit stated that the resumed "pattern" was demonstrated by only three cases. In view of this history, the court held that Rule 26(B)'s time bar was not an adequate and independent state rule that was regularly followed and enforced by the state courts at the time of the petitioner's proceeding. And in *Hoffner v. Bradshaw*, 622 F.3d 487 (6th Cir. 2010), the petitioner had filed his Rule 26(B) application to reopen on June 6, 2006; the court of appeals denied it because it was untimely and on the merits of his claims. The Ohio Supreme Court affirmed solely on the basis of untimeliness. In his subsequent habeas case, the Sixth Circuit found his claims procedurally defaulted because Rule 26(B)'s time requirements were firmly established and regularly followed by the Ohio courts in June 2006.

This Court agrees with the Magistrate Judge's conclusion that when the Ohio Supreme Court denied Issa's April 2005 *Murnahan* motion to reopen as untimely, the court was not yet regularly adhering to a "firmly established" rule regarding timeliness of Rule 26(B) petitions. The Court also agrees that this ground for relief is not time-barred by AEDPA's one-year statute of limitations. Issa has demonstrated that he did not discover the fact of Freeman's representation of Miles until he conducted discovery in this case. While the fact of Miles' representation might have been uncovered, there is no evidence that Issa failed to exercise due diligence in attempting to discover this fact. The Court finds that this claim is timely, as it was asserted within one year of Issa's

discovery of the fact of Freeman's representation of Miles.

Attorney Freeman testified at the evidentiary hearing in this case. He was asked to compare several sections of an unrelated appellate brief he had prepared with the brief he filed for Issa, which demonstrated an overlap of several issues. Freeman could not recall the details of the dispute concerning Linda Khriss' testimony, nor whether Issa's trial counsel had requested funds for a cultural expert. Freeman believes that defendants who are foreign nationals or from another country, regardless of whether they have become citizens, need a cultural representative

> ... as much, if not more, than they need a lawyer. The lawyer is often seen as someone who is another middle-aged white person who is working for the government, and it's hard for foreigners, especially from countries where the government is all seen as one entity and seen as the other side, to differentiate the role of a defense lawyer from the role of a prosecutor or the role of a judge.

(Doc. 112, Evid. Hrg. Trans. at 12.) Freeman testified that he believed the process of helping Issa's jury understand his mitigation evidence would have been improved by using a "cultural interpreter." But Freeman also said that whether the failure of trial counsel to do so amounted to ineffective assistance of counsel was hard to analyze, and he was not sure that it was. Freeman also stated that he did not omit any issues from Issa's appeal due to his representation of Miles.

Issa was entitled to constitutionally effective representation for his direct appeal that was free of any conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). Issa must demonstrate the existence of a conflict, and that the conflict in Freeman's representation of Miles caused some adverse effect on his direct appeal. Possibilities and conjectures about potential harm that might have resulted are insufficient to meet this burden.

In *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004), the Sixth Circuit affirmed the grant of habeas relief to petitioner based on her attorney's conflict of interest. Petitioner and her daughter had been convicted of drug offenses, and one lawyer had represented both of them. Although they were tried separately, their trials took place on the same day before different judges. The Sixth Circuit observed that petitioner's "best defense" would have been to argue that the drugs, which had been found in a locked bedroom in the house they shared, belonged to her daughter and not to her. Despite strong evidence adduced at the daughter's trial that the drugs did in fact belong to the daughter, the petitioner's lawyer failed to cross-examine the prosecution witnesses about that evidence during petitioner's trial. Of course, if the lawyer **had** argued that the daughter was the guilty party, he clearly would have violated his ethical duty to the daughter. Because the conflict was clear and the adverse effect of that conflict on the mother's defense was undeniable, the district court's grant of habeas relief was affirmed.

Here, in contrast, Issa does not identify any adverse effect on the prosecution of his direct appeal that resulted from Freeman's appellate

representation of Miles. His Third Amended Petition merely alleges that the purported conflict provides an "alternative explanation" for the various ineffective assistance of counsel claims that are raised in his ninth ground for relief. (Doc. 62, p. 113 at ¶488.) And he suggests that the difficulties he faced during his own trial that "related to" Andre Miles make Freeman's conflict apparent and sufficient to establish ineffective assistance of appellate counsel.

Issa's ninth ground for relief raised eight instances of his trial counsel's errors which Issa contends Freeman should have raised in his direct appeal and did not. The Court rejected all of these claims. And of those eight instances, only three (subparts (a), (b) and (e), Doc. 62 at pp. 40, 43, and 51) are tangentially related to Andre Miles. Subpart (a) alleges that Freeman should have appealed trial counsel's failure to read Miles' testimony from the Linda Khriss trial. This Court concluded that this claim would fail on the merits, as the excerpts of Miles' testimony are not as favorable to Issa's defense as he suggests. As Issa did not establish actual prejudice, as required under *Strickland*, to maintain his ineffective assistance of trial counsel claim on this basis, the same conclusion applied to his claim of ineffective assistance of appellate counsel. In this ground for relief, Issa does not explain how Freeman's conflict of interest would have prevented Freeman from raising this issue in Issa's direct appeal. Speculation that this is so, or that the result might have been different if Miles or Issa had a different lawyer, is plainly insufficient under *Strickland*.

The Court reaches the same conclusion concerning subparts (b) and (e) of Issa's ninth ground for relief. Subpart (b) deals with the admission of Bonnie Willis' testimony about Miles, and the state's failure to charge Issa with conspiracy; and subpart (e) alleges prosecutorial misconduct in mentioning Miles' statements to police and the Willises during the opening statement. Even assuming that either of these sub-claims amounts to cognizable error in Issa's trial, Issa has not provided any explanation of how the alleged conflict of interest prevented Freeman from raising these claims in Issa's direct appeal. The key question in Issa's trial that related to Miles, whether the testimony of Bonnie and Joshua Willis about Miles' hearsay statements implicating Issa should have been admitted at all, **was** raised in Issa's appeal and was rejected on the merits by the Ohio Supreme Court.

This Court must conclude that Issa has failed to demonstrate that Freeman's conflict of interest resulted in any actual prejudice during the prosecution of Issa's direct appeal. That defect is fatal to this claim of ineffective assistance of appellate counsel. This ground for relief is therefore denied.

Issa's Lethal Injection Claims

On September 17, 2012, while Issa's objections to the Magistrate Judge's recommendations regarding Claims 1 through 27 were pending for decision, Issa sought leave to amend his petition to add two new claims: Claim 28, alleging that Ohio's September 18, 2011 lethal injection protocol and procedures violate the Eighth Amendment; and Claim 29, alleging that the protocol and procedures violate the Equal

Protection Clause of the Fourteenth Amendment. (Doc. 172-1) Issa alleged that the Section 1983 litigation (*In re Ohio Execution Protocol Litigation*) was ongoing and that evidence in that case was relevant to his proposed new habeas claims. (Issa had intervened as a plaintiff in the Section 1983 litigation in November 2011.) But he alleged that the relief he sought in the two cases was different.

The state opposed the motion, arguing that Issa's proposed claims were too vaguely pled to allow the state or the Court to determine if they were properly asserted in this habeas petition, or if they should be pursued under Section 1983. This Court recommitted the matter to Magistrate Judge Merz, who granted leave to amend on January 2, 2013. (Doc. 180) Judge Merz held that Issa's claims are justiciable here "because they assert that the State of Ohio cannot constitutionally carry out a constitutional execution of Petitioner using lethal injection," and citing *Adams v. Bradshaw*, 644 F.3d 481 (6th Cir. 2011). Judge Merz also found that the two new claims were not barred by AEDPA's one-year statute of limitations, because they challenged Ohio's September 2011 protocol and were filed within one year of the state's adoption of that protocol.

The state then filed a motion for judgment on the pleadings, arguing that Issa's lethal injection habeas claims were procedurally defaulted, and were not a proper basis for granting habeas corpus relief. Any stay of this case to allow Issa to exhaust his claims in state court would be futile, because the claims were plainly meritless under clearly established federal law. (Doc. 191) After that motion was fully briefed, the State of Ohio announced its intent to amend its

lethal injection protocol. Issa requested a stay of this case and a decision on the state's motion. (Doc. 196) The Magistrate Judge denied the stay for failure to comply with Local Rule 7.3, but also found the state's motion moot, in light of the impending amended protocol.

Nothing further was filed in the case by February 11, 2014, when the court issued an order to show cause why Issa's lethal injection claims (Claims 28 and 29) should not be dismissed without prejudice as moot. (Doc. 197) Issa conceded that those claims in the Fourth Amended Petition were moot due to the amended October 2013 protocol. But he asked the Court to stay any consideration of his claims until March 17, 2014, after the scheduled execution of Dennis McGuire. McGuire was executed in January 2014 under the October 2013 protocol that specified the use of hydromorphone and midazolam. After McGuire was executed, Governor Kasich postponed the next scheduled execution and an investigation into the execution was in process. The state did not oppose Issa's request, and it was granted. Then on March 17, Issa asked the Court to continue the stay until another scheduled execution took place. (Doc. 199) Issa announced his intent to seek leave to amend his lethal injection claims based upon the evidence collected about these executions. The state did not oppose this request, and it was granted.

Almost a year later, with no further activity in the case, Judge Merz issued a sua sponte order, vacating the stay and ordering Issa to show cause why his lethal injection claims as pled in the Fourth Amended Petition should not be dismissed as moot. Issa responded by seeking leave to amend Claims 28

and 29 and to add eight new claims, all raising challenges to Ohio's lethal injection procedures and policies. (Doc. 210) The state opposed the motion, renewing its Rule 12(c) arguments that the proposed claims are not cognizable in this habeas case. Judge Merz recommended that Claims 28 and 29, directed to the September 2011 protocol, be dismissed as moot. (Doc. 208) Judge Merz observed that Issa's response to the OSC was to submit amended claims, and he failed to show that his pending claims were not moot. He ordered Issa to file a properly supported motion to amend by May 1, and alternatively suggested that Issa file a new habeas case to prosecute his lethal injection claims.

Issa filed a motion for leave to amend (Doc. 210) and objected to the dismissal of pending Claims 28 and 29. (Doc. 211) In a supplemental Report (Doc. 213), Judge Merz again recommended that the pending claims be dismissed as moot. The same day, he issued an order denying Issa's motion to amend. (Doc. 214) Judge Merz noted that in this and other habeas cases, the court had typically allowed amended claims when Ohio adopted new or amended lethal injection protocols. He also noted Issa's objections to filing a new habeas petition, rather than amending his claims in this case; Issa argued that he could be prejudiced because the state of Ohio opposes the concept of new or successive habeas petitions, and the proposal had not been approved by either the Sixth Circuit or the U.S. Supreme Court. Appellate decisions encourage timely and prompt litigation of habeas claims, and Issa could face the dismissal of all of his lethal injection claims if he failed to raise them in this case. But Judge Merz concluded that Issa would not be prejudiced by

denying him leave to amend, citing several appellate decisions reflecting a liberal approach to second or successive habeas petitions that satisfy AEDPA's requirements. Judge Merz also noted that the Ohio Supreme Court had recently set new execution dates, with the first scheduled for May 2019. Issa therefore faces little if any reasonable chance of execution if this case proceeds on his original 27 claims, leaving him to raise his lethal injection challenges separately.

Issa objects to the Supplemental Report and Recommendation, and to Judge Merz's order denying leave to amend. (Doc. 217) He argues that the Court should disregard any potential prejudice to the state caused by delays in resolving this case, because the state alone decides when and how to amend its lethal injection protocol. Issa is not responsible for the problems the state has encountered that have prompted the protocol amendments that have occurred since September 2011. Issa also argues that Claims 28 and 29 of the Fourth Amended Petition, directed to the September 2011 protocol, are not moot. Later amendments changed the drugs used in execution but did not amend other procedures that he challenges in those claims. Issa renews his objection to filing a second or successive petition, noting that it is not a sanctioned process and it could lead to serial amendments every time Ohio amends its protocol. That would be an inefficient manner by which to resolve his claims. He also contends that he should be granted leave to amend his claims again, to specifically address the latest Ohio protocol adopted in June 2015, and the Supreme Court's decision in *Glossip v. Gross*, 135 S.Ct. 2726 (June 26, 2015).

The Court believes that the primary issues raised by the proceedings to date on Issa's lethal injection claims are: (1) whether leave to amend should have been granted; and (2) are any of Issa's lethal injection claims properly litigated in this habeas case?

The question of whether the type of specific challenges to methods of lethal injection that Issa wishes to raise here are appropriately prosecuted in habeas corpus has been the subject of many decisions. Issa notes that many courts in the Sixth Circuit have held that his claims and similar ones are cognizable habeas claims, specifically *Adams v. Bradshaw*, 644 F.3d 481 (6th Cir. 2011), relied on by the Magistrate Judge in 2012 when granting Issa leave to add Claims 28 and 29. Issa also cites a large group of cases in both the Southern and Northern Districts of Ohio that have allowed such claims. (See Doc. 181 at ¶500) He argues that Ohio lacks a forum to litigate method of execution claims, pursuant to *Scott v. Houk*, 127 Ohio St.3d 317, 939 N.E.2d 835 (Ohio 2010); and therefore his claims are not procedurally defaulted. In *Scott v. Houk*, the Ohio Supreme Court answered a certified question from the federal district court by stating:

> The Ohio General Assembly has not yet provided an Ohio-law cause of action for Ohio courts to process challenges to a lethal-injection protocol, and given the review available on this issue through [42 U.S.C. §1983 actions] for injunctive relief against appropriate officers or federal habeas corpus petitions, we need not judicially craft a separate method of review under Ohio law.

> Accordingly, until the General Assembly explicitly expands state review of death-penalty cases by creating a methodology for reviewing Ohio's lethal injection protocol, we must answer the certified question as follows: There is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal injection protocol is constitutional under *Baze v. Rees* … or under Ohio law.

127 Ohio St.3d at 318-319.

Issa further alleges that because Ohio law states that lethal injection is the sole method by which to administer the death penalty, his sentence is unconstitutional, entitling him to habeas relief.

Judge Mertz originally concluded that Claims 28 and 29 were appropriately raised here, relying *Adams v. Bradshaw*. In that case, the petitioner Adams filed his habeas petition in 2006, including a claim that lethal injection violates the Eighth Amendment. The district court denied all of his claims and denied a certificate of appealability on the lethal injection claim. The Sixth Circuit granted a COA on the lethal injection claim, and in February 2009, stayed the appeal and remanded that claim to the district court for factual development of the record. On remand, the state moved to dismiss for lack of jurisdiction, which the district court denied based on the limited mandate on remand from the court of appeals. The Sixth Circuit granted the state's request for interlocutory review and affirmed, relying on *Hill v. McDonough*, 547 U.S. 573 (2006) and *Nelson v. Campbell*, 541 U.S. 637 (2004), which both held that Section 1983 claims challenging lethal

injection methods could proceed under that statute, and should not be exclusively treated as second or successive habeas claims.[14]

In *Nelson*, the inmate challenged a "cut down" procedure the state planned to use to access his severely compromised veins in order to administer the lethal drugs. The lower courts treated his complaint as the "functional equivalent" of a successive habeas petition and dismissed it. The Supreme Court reversed, holding that if the cut-down was mandated in the state lethal injection statute, or if Nelson was "unable or unwilling to concede acceptable alternatives for gaining venous access," his claims would come close to asserting a traditional habeas claim. But Nelson had identified an alternative (a percutaneous central line) that would accomplish lethal injection in a less invasive and safer way. The Supreme Court remanded for an evidentiary hearing to determine whether the cut-down procedure was required, and if so, how to properly characterize and rule on Nelson's claim. The Court specifically expressed concern that method-of-execution challenges brought under Section 1983 not be used to accomplish indirectly what may not be done directly: challenge the imposition of the death sentence without complying with the procedural limitations of the federal habeas statute. *Id.* at 647. (The Court notes that after the case returned to the

[14] After the Sixth Circuit's decision, the *Adams* case returned to district court; a factual record largely taken from the Section 1983 lethal injection litigation was compiled and the case returned to the Sixth Circuit, where it remains pending (Case No. 07-3688). According to the docket sheet, oral argument is scheduled for October 7, 2015.

district court, it was litigated for approximately five years. The inmate apparently died and the case was terminated without a ruling.) And in *Hill v. McDonough*, the petitioners challenged the state's three-drug protocol under Section 1983. The Supreme Court held the case could proceed under that statute, relying *Nelson*.

Then in *Scott v. Houk*, 760 F.3d 497 (6th Cir. 2014), the Sixth Circuit again considered the propriety of habeas claims challenging the constitutionality of Ohio's lethal injection methods. As noted above, the district court had certified a question to the Ohio Supreme Court concerning the state's contention that Scott's lethal injection claims were procedurally defaulted. After the Ohio Supreme Court's decision, the district court held that the claims were not defaulted but they lacked merit, because the death penalty is constitutional, and the Supreme Court upheld Kentucky's lethal injection protocol (which was similar to Ohio's at that time) in *Baze v. Rees*, 553 U.S. 35 (2008). The district court also denied Scott leave to amend to add an equal protection claim, finding it was untimely and that Scott could prosecute that claim in the Section 1983 case. On appeal, Scott argued that lethal injection cannot be constitutionally administered, and therefore he must litigate his claims in his habeas case. The Sixth Circuit agreed that the claims were not defaulted but affirmed the district court's denial of habeas relief:

> Although we understand Scott's point—that the relief he seeks is available only through a federal habeas claim—we decline to grant Scott's request for a remand. As the law

> currently stands, there is no merit to Scott's assertion that his sentence is void because lethal injection is unconstitutional. Simply put, lethal injection does not violate the Constitution per se, and Scott acknowledges as much in his brief. See *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420; *Cooey v. Strickland*, 589 F.3d 210 (6th Cir. 2009).
>
> Therefore, in order to obtain relief from his sentence, Scott would first have to gather facts showing that Ohio is unable to administer lethal injection in a constitutionally permissible manner. And this is precisely the type of discovery that Scott can pursue in his §1983 litigation.
>
> We are assured that Scott's death sentence will not be carried out if, and so long as, a federal court determines that Ohio is incapable of doing so in accordance with the law. The district court properly denied this claim.

Id., 760 F.3d at 512.[15]

The issue arose again in *Frazier v. Jenkins*, 770 F.3d 485 (6th Cir. 2014). Frazier's 2009 federal habeas petition included a claim that lethal injection violated the Eighth Amendment. The district court denied the claim, and on appeal Frazier argued that Ohio's method of lethal injection "could implicate the Eighth Amendment prohibition against cruel and

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[15] The U.S. Supreme Court denied certiorari; *Scott v. Forshey*, 2015 U.S. LEXIS 2093 (March 23, 2015).

unusual punishment." The Sixth Circuit relied on *Scott v. Houk* to conclude that Frazier could pursue those claims in the Section 1983 litigation, and affirmed the district court's denial of habeas relief.

Assuming that Issa's lethal injection claims **could** be raised here (and that they are not defaulted), this Court will deny them. Other cases in this district have reached that result. See *Hill v. Mitchell*, 2013 U.S. Dist. LEXIS 45919 (S.D. Ohio, March 29, 2013)(Sargus, J.), and *Lynch v. Hudson*, 2011 U.S. Dist. LEXIS 110652 (S.D. Ohio Sept. 28, 2011)(Frost, J.). In those cases, the courts held that the petitioner failed to cite any clearly established federal law, as determined by the U.S. Supreme Court, that lethal injection constitutes cruel and unusual punishment, or violates a petitioner's Due Process or Equal Protection rights. Rather, the Supreme Court has repeatedly held that the death penalty is constitutional; and *Baze v. Rees* held that Kentucky's lethal injection protocol did not violate the Eighth Amendment. This Court rejected a lethal injection habeas claim in *Hand v. Houk*, Case No. 2:07-cv-846, 2011 U.S. Dist. LEXIS 14960 (S.D. Ohio, Feb. 26, 2009), which alleged that a previous Ohio protocol using pentobarbital violated the Eighth Amendment. This Court concluded that Hand's claim was barred by the "ground rules" set forth in *Baze v. Rees*, and adopted by the Sixth Circuit in *Cooey v. Strickland*, 589 F.3d 210, 220-221 (6th Cir. 2009), regarding lethal injection claims. Those courts held that "... the Constitution does not allow the federal courts to act as a best-practices board empowered to demand that states adopt the least risky execution protocol possible."

This Court finds that the rationale articulated by the Sixth Circuit in *Scott v. Houk* and reiterated in *Frazier v. Jenkins* fully applies to Issa's claims and proposed claims. In Claims 28 and 29 of the Fourth Amended Petition and in his proposed amended claims, Issa repeatedly alleges that problems and irregularities in Ohio's administration of lethal injection (lack of access to FDA-approved drugs, use of compounded drugs, lack of medical personnel, etc.) prevents the state from carrying out his death sentence in a constitutional manner. Part of the relief he seeks is the right to conduct discovery, to issue subpoenas for witnesses and documents, and to expand the record in this case to support these claims. The Court notes that his proposed Fifth Amended Petition is laced with references to discovery obtained and orders entered in the ongoing Section 1983 litigation pending before Judge Frost in Columbus, in which Issa is a plaintiff. The relief Issa seeks, an injunction prohibiting his execution by some method of lethal injection, has been granted to other plaintiffs in that case. (See, e.g., *Cooey v. Kasich*, 801 F.Supp.2d 623 (S.D. Ohio July 8, 2011), granting preliminary injunction and stay of execution to plaintiff Kenneth Smith; Opinion and Order, Case No. 2:11-cv-1016, January 11, 2012, granting preliminary injunction and stay of execution to plaintiff Charles Lorraine.)

Moreover, **this** case has been pending in this Court for over twelve years. From the standpoint of efficient litigation management - with full recognition of the importance of the issues Issa raises in his claims - it appears to the Court to impose an unnecessary burden on the parties here and upon this Court to permit Issa to engage in the same

discovery that is ongoing in the Section 1983 litigation, to essentially replicate that record here, and to pose the risk of two judicial opinions on essentially the same question: does Ohio's method of execution pass constitutional muster? All the while with no decision regarding Issa's substantive habeas claims.

One district court squarely rejected a habeas petitioner's claims which are essentially identical to those Issa wishes to raise here, based on the concern about duplicative proceedings. In *Treesh v. Robinson*, Case No. 1:12-cv-2322, 2012 U.S. Dist. LEXIS 163601 (N.D. Ohio, Nov. 15, 2012), the petitioner, whose first habeas petition had previously been denied, intervened as a plaintiff in the Section 1983 lethal injection litigation. He then filed a second habeas petition, alleging claims challenging the 2011 lethal injection protocol. The district court found that any "general" constitutional challenge to lethal injection would be barred as a second or successive habeas petition. And with regard to his specific challenges to Ohio's methods of lethal injection, the district court found they were identical to the claims being litigated in the Section 1983 case, and therefore were not cognizable in habeas corpus. As pertinent here, the district court observed: "The pursuit of lethal injection challenges in simultaneous Section 1983 and habeas actions has created confusion for both the courts and the parties. Making sense of the intersecting (and often conflicting) arguments presented in these parallel actions is particularly challenging in light of the lack of clear authority regarding how to analyze method of execution claims generally. This confusion has opened the door to multiple, duplicative actions

pending before various judges in different district courts in this Circuit, creating the potential for conflicting decisions and significant delay." *Id*. at 15-16. The Sixth Circuit denied a certificate of appealability; see *Treesh v. Robinson*, 2013 U.S. App. LEXIS 3878 (6th Cir., Feb. 13, 2013).

This Court concludes that the Sixth Circuit's recent decisions in *Scott v. Houk* and *Frazier v. Jenkins* provide the "clear authority" from the appellate court that the district court in *Treesh* found to be lacking at the time of its decision. Both of the Sixth Circuit's decisions clearly support the Court's conclusion that Issa's lethal injection habeas claims, both the pending Claims 28 and 29 and his proposed amended Claims 28 through 37, should be denied. Issa will have a full opportunity to litigate those claims (and any other claims the plaintiffs intend to raise regarding the most recent June 2015 Ohio protocol) in the Section 1983 litigation. This Court is confident (as was the Sixth Circuit in *Scott v. Houk*) that Issa's death sentence will not be carried out if, and so long as, that court determines that Ohio is incapable of doing so in accordance with the Constitution.

Finally, the Supreme Court's most recent decision regarding lethal injection challenges, *Glossip v. Gross*,___ U.S. _, 135 S.Ct. 2726 (June 29, 2015), supports the denial of Issa's habeas claims (and denying him leave to amend them as futile in this case). There, the Supreme Court rejected several Oklahoma inmates' Section 1983 challenges to that state's protocol which used 500 mgs. of midazolam as the first drug of a three-drug protocol. The Supreme Court reiterated its holding in *Baze*, that in order to

establish an Eighth Amendment claim, a plaintiff must identify a "known and available alternative method of execution." *Id.* at 2738. The petitioner suggested that Oklahoma could use sodium thiopental or pentobarbital, but those drugs are now unavailable to the state despite a good faith effort to procure them. In the absence of an acceptable alternative, the petitioners' Eighth Amendment claims failed. Issa alleges that a sentence of life without parole could be imposed on all Ohio death row inmates, because it "costs less and serves all of the safety interests of the State." (Doc. 210-1, proposed Fifth Amended Petition at 189, ¶862.) This failure to identify an alternative would also support the denial of Issa's Eighth Amendment claims.

Finally, the Court notes a recent Report and Recommendation by Magistrate Judge Merz in *Landrum v. Robinson*, 2015 U.S. Dist. LEXIS 116914 (S.D. Ohio, Sept. 2, 2015). Magistrate Judge Merz recommended that the district court dismiss Landrum's lethal injection habeas claims on the basis of *Glossip*, concluding that its holding is irreconcilable with *Adams v. Bradshaw*: "Insofar as *Adams* reads *Hill* [*v. McDonough*] as permitting an inmate to bring the same lethal injection claim in both 1983 and habeas, it cannot survive *Glossip*." *Id.* at *8. This Report and its cogent analysis further buttress this Court's decision to deny all of Issa's lethal injection claims.

For all of these reasons, the Court dismisses as moot Issa's Claims 28 and 29 as pled in the Fourth Amended Petition. The Court agrees with the Magistrate Judge's Reports (Docs. 208 and 213) on this issue. Even if those claims are not moot, the

Court denies them because they are not cognizable in this case and should be prosecuted in the Section 1983 litigation. The Court denies leave to amend his claims as proposed in his Fifth Amended Petition, as leave to amend would be futile for the reasons discussed above. Issa's objections to the Magistrate Judge's Report and Recommendations (Doc. 217) are overruled.

Nothing in this Order is intended to affect or interfere with Issa's right to fully participate in the Section 1983 lethal injection litigation, *In re Ohio Execution Protocol Litigation*, Case No. 2:11-cv-1016 (S.D. Ohio, Eastern Division).

CONCLUSION

For all of the foregoing reasons, the Court hereby denies Issa's petition for a writ of habeas corpus. Issa moved for a certificate of appealability on Grounds One, Three, Four, Five, Six, Nine, Eleven, Twelve, Fourteen, Fifteen, and Twenty-Seven. (Doc. 159) The Magistrate Judge recommended issuance on Grounds One, Three, Four, Six, Nine, and Twenty-Seven. (Doc. 166) Issa objected with respect to Grounds Five, Eleven, and Twelve. (Doc. 169)

After considering the Magistrate Judge's recommendations (Doc. 166) and Issa's responses, the Court will grant a certificate of appealability on the following grounds for relief: One (failure to interview or call Linda Khriss as a witness); Three and Four (failure to perform adequate mitigation investigation and present additional mitigation witnesses); Five (failure to obtain cultural expert and/or professional translator); Six (admission of Willises' testimony about Miles); Nine (equitable tolling for ineffective assistance of appellate counsel

claim); Eleven (disproportionate sentence); Twelve (failure to utilize mitigation expert); and Twenty-Seven (appellate counsel's conflict of interest). The Court will also grant a certificate of appealability on Issa's lethal injection claims, pending Claims 28 and 29 and proposed claims 28 through 37. The Court specifically finds with respect to each of these claims that reasonable jurists could reach different conclusions on the constitutional issues raised in these claims, and that Issa has made a sufficient demonstration of a constitutional deprivation.

The Court denies a certificate of appealability on grounds for relief Two, Seven, Eight, Ten, and Thirteen through Twenty-Six. Issa may request issuance of a certificate of appealability from the Court of Appeals pursuant to 28 U.S.C. §2253(c), and Fed. R. App. P. 22(b).

SO ORDERED.

THIS CASE IS CLOSED.

Dated: September 21, 2015

s/Sandra S. Beckwith
Sandra S. Beckwith, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Case No. 1:03-cv-280

Ahmad Issa,

Petitioner

vs.

Margaret Bagley, Warden,

Respondent

JUDGMENT

Filed: September 21, 2015

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADUDGED that Issa's petition for a writ of habeas corpus is **DENIED**. Issa's objections to the Report & Recommendation are **OVERRULED**. Issa moved for a certificate of appealability on Grounds One, Three, Four, Five, Six, Nine, Eleven, Twelve, Fourteen, Fifteen, and Twenty-Seven. The Magistrate Judge recommended issuance on Grounds One, Three, Four, Six, Nine,

and Twenty-Seven. Issa objected with respect to Grounds Five, Eleven, and Twelve.

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Dated: September 21, 2015

Richard W. Nagel, Clerk

s/Mary C. Brown
Mary C. Brown,
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:03-cv-280

Chief District Judge Sandra S. Beckwith
Chief Magistrate Judge Michael R. Merz

Ahmad Issa,

Petitioner,

vs.

Margaret Bagley, Warden,

Respondent.

CORRECTED[1] REPORT AND RECOMMENDATIONS

Filed: November 5, 2008

Petitioner, Ahmad Issa, was convicted in Ohio of the aggravated murder-for-hire of Maher Khriss, and sentenced to death. (Appendix, Vol I. at 275.) Issa filed his petition for a writ of habeas corpus (Doc. No. 8), and three amended petitions (Doc Nos. 26, 33, 62[2]). Respondent filed an original and two amended

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[1] Because of a computer error, an uncorrected draft of this Report and Recommendations was filed on November 4, 1008. This Corrected Report and Recommendations replaces it.

[2] For the sake of brevity, all record references to Issa's third amended petition (Doc. No. 62), which is comprehensive of the original, first amended, and second amended petitions, will appear as "Petition, Doc. No. 62." Respondent's amended returns of writ are not comprehensive, and will be cited as

returns of writ (Doc. Nos. 28, 35, 73), Issa filed his traverse (Dox. No. 41), and the case is now ripe.

In his petition, Issa raises twenty-seven grounds for relief as follows:

First Ground for Relief

> Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated because he received the ineffective assistance of counsel during the guilt phase of his capital proceedings. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Second Ground for Relief

> Intentional prosecutorial misconduct in Petitioner's state court trial denied him his right to due process of law and his right to a fair trial protected by the Sixth and Fourteenths [sic] Amendment[s]. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Third Ground for Relief

> Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated because he received the ineffective assistance of counsel during the penalty phase of his

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"First Amended Return of Writ, Doc. No. 35," and "Second Amended Return of Writ, Doc. No. 73."

capital proceedings. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Fourth, Fifth, Eighth, and Twelfth Grounds for Relief

Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated because he received the ineffective assistance of counsel during the sentencing phase of his capital proceedings. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Sixth Ground for Relief

The trial court admitted hearsay statements of Andre Miles as to Petitioner's alleged role in the murder for hire thereby violating Petitioner's right to confront witnesses protected by the Sixth and Fourteenth Amendments to the United States Constitution. The resultant sentence of death violates the Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Seventh Ground for Relief

Appellant's [sic] rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the [j]ury's [v]erdict and the resultant sentence of death because the judgment of conviction on the aggravated murder counts is

unsupported by legally sufficient evidence and is contrary to the manifest weight of the evidence. The resultant sentence violates the Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Ninth Ground for Relief

Petitioner Issa was deprived of the effective assistance of counsel on his direct appeal as of right in violation of the Sixth Amendment and [D]ue [P]rocess [C]lause of the Fourteenth Amendment [to the United States Constitution].

Tenth Ground for Relief

Petitioner Issa's conviction and/or sentence of death are void or voidable because the Ohio death penalty scheme is violative of the Eighth and Fourteenth Amendments to the United States Constitution for the State's failure to provide meaningful direct appeal of Petitioner's claim of ineffective assistance of appellate counsel.

Eleventh Ground for Relief

The Petitioner's rights to be free from arbitrary and capricious State action as protected by the Fifth and Fourteenth Amendments to the United States Constitution have been violated by the imposition of a disproportional sentence of death. The resultant death sentence violates the Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Thirteenth Ground for Relief

Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated because he was incompetent to stand trial as he could not effectively assist his trial counsel in the preparation and presentation of his capital case. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Fourteenth Ground for Relief

Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated because he received the ineffective assistance of counsel during the voir dire, trial and penalty phase[s] of his capital proceedings. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Fifteenth Ground for Relief

There occurred in Petitioner's capital trial structural error which denied Petitioner his right to a fair trial as protected by the Sixth and Fourteenth Amendment[s] to the United States Constitution. The resultant sentence of death violates the Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Sixteenth Ground for Relief

Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated because he received the ineffective assistance of counsel during the voir dire, trial and penalty phase[s] of his capital proceedings. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Seventeenth Ground for Relief

Petitioner's Fifth, Sixth and Fourteenth Amendments [sic] rights to the United States Constitution were violated by the return of an [i]ndictment by an improperly constituted [g]rand [j]ury. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Eighteenth Ground for Relief

The prejudicial publicity, which occurred throughout Petitioner's capital trial, deprived him of his right to a fair trial and a fair and reliable sentencing determination as protected by the Sixth and Fourteenth Amendments to the United States Constitution. The resultant sentence of death violates the Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Nineteenth Ground for Relief

Petitioner's rights protected by the Fifth and Fourteenth Amendments to the United States Constitution were violated when he was denied a fair and impartial grand jury foreman in violation of the Equal Protection Clause. The resultant sentence of death violates Petitioner's right to be free from cruel and unusual punishment.

Twentieth Ground for Relief

Petitioner's rights protected by the Sixth, Seventh, Eighth and Fourteenth Amendments to the United States Constitution were violated by the failure of the court to provide funds necessary for the defense team to hire necessary experts. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Twenty-first Ground for Relief

Petitioner's rights secured by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the admission of gruesome, inflammatory and cumulative photographs that prejudiced Petitioner and denied him a fair trial. The resultant death sentence violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Twenty-second Ground for Relief

Petitioner's rights secured by the Fifth, Sixth, Eighth and Fourteenth Amendments to the

United States Constitution were violated by Ohio's requirement that mitigating factors be proven by a preponderance of the evidence before they can be weighed, which sentencing scheme precludes consideration of mitigating evidence and compels a presumption of death. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Twenty-third Ground for Relief

Petitioner's rights secured by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the definitions which the trial [c]ourt used in its instructions to the jury which misled the jury concerning their deliberations in the sentencing phase, and created an unconstitutional presumption in favor of death. The resultant sentence of death violates Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Twenty-fourth Ground for Relief

The trial court's application of Ohio's statutory definition of reasonable doubt in the mitigation phase of Petitioner's capital trial deprived him of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The resultant sentence of death violated Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Twenty-fifth Ground for Relief

The Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the use of the Ohio [d]eath [p]enalty [l]aws because that [s]tatutory [d]eath [s]cheme does not meet the prescribed constitutional requirements and is unconstitutional on its face and as applied to Petitioner Issa. The resultant sentence of death is a violation of Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

Twenty-sixth Ground for Relief

The Petitioner's Sixth Amendment rights to effective assistance of counsel were violated when defense counsel violated [sic] because he received the ineffective assistance of counsel during the sentencing phase of his capital proceedings.

Twenty-seventh Ground for Relief

The Petitioner's Sixth Amendment rights to effective assistance of counsel were violated when one of his two appellate counsel on his direct appeal labored under a conflict of interest representing both Petitioner in the Ohio Supreme Court and Petitioner's co-defendant Andre Miles in the First District Court of Appeals.

(Petition, Doc. No. 62.)

FACTS

The facts of Issa's case, as found by the Ohio Supreme Court, are as follows:

At approximately 1:30 a.m. on November 22, 1997, Andre Miles, armed with a high-powered assault rifle, confronted brothers Maher and Ziad Khriss in a parking lot in front of Save-Way II Supermarket in Cincinnati, Ohio ("Save-Way") and demanded money. As Maher and Ziad put money on the ground and pleaded for their lives, Miles shot and killed them.

After investigating the shootings, Cincinnati police concluded that Miles had been hired to kill Maher. The police theorized that Maher's wife, Linda Khriss, had offered to pay . . . Issa, to kill Maher. The police believed that [Issa] then enlisted Miles to do the killing, supplied him with the weapon, and arranged the opportunity. [Issa], Miles, and Linda were each charged with aggravated murder.

Prior to the murders, Maher and Linda Khriss owned and operated Save-Way. In addition to Maher and Linda, Renee Hays, Souhail Gammoh, and [Issa] worked at the store. Bonnie Willis and her brother Joshua Willis, who were both teenagers at the time of the murders, lived with their mother approximately one block from Save-Way. Because they often shopped at Save-Way, they were familiar with the store employees. Miles had previously lived with the Willis family and was a close friend of Bonnie and Joshua.

In the two weeks preceding the murders, two witnesses saw [Issa] with a rifle in his apartment. On November 14, Dwyane

Howard, Hayes's husband, went to [Issa's] apartment to wake him for work. [Issa] invited Howard in and showed him a military-style rifle. When Howard asked [Issa] what he was going to do with the rifle, [Issa's] only response was "a little sneer." After the murders, [Issa] called Howard and told him not to tell anyone that he had seen [Issa] with a gun. At [Issa's] trial, Howard identified the murder weapon as being identical to the rifle [Issa] had shown him. No more than two weeks before the murders, [Issa's] coworker and friend, Gammoh, while visiting at [Issa's] apartment, also saw [Issa] with a rifle.

. . .

Linda, Maher, Gammoh, and Hays worked late at Save-Way on the evening of November 21. At approximately 10:00 p.m., Miles arrived at the store and asked for [Issa]. Although [Issa] was scheduled to work at 10:00 p.m., he was not yet there. Linda drove to [Issa's] apartment to wake him, and then she returned to the store. [Issa] arrived around 11:15 p.m. Miles was waiting at the store for [Issa], and when he arrived, [Issa] and Miles went outside together to talk.

Around midnight, Maher left Save-Way with a friend to check on another store that Maher owned. Maher left his truck in the Save-Way parking lot and instructed Linda and [Issa] to put the keys to the truck near the right front tire and that Maher would come back later to get the truck.

At approximately 1:09 a.m. the Save-Way employees closed the store for the night. [Issa] put the keys near Maher's truck as he had been instructed. [Issa's] mother was visiting from Jordan and was with [Issa] at the store when it closed. [Issa], his mother, and Gammoh left the store in [Issa's] car. [Issa] drove his mother to his apartment, and then he drove Gammoh home. When [Issa] dropped Gammoh off at approximately 1:20 a.m., he told Gammoh that he was going back home to check on his mother but that he might come back later and take Gammoh to a bar. Approximately twenty-five to thirty-five minutes later, [Issa] returned to Gammoh's apartment and they went to a bar together. After Gammoh heard about the murders, he asked [Issa] where he went before he returned to Gammoh's apartment. [Issa] told Gammoh, "Don't tell the police. Tell them that we were together all the time."

At approximately 1:26 a.m. on November 22, Sherese Washington was driving near Save-Way when she heard gunshots. Frightened, she stopped her car and turned off the headlights. She then saw a man run from the Save-Way parking lot and down Iroll Street (the street on which Bonnie and Joshua lived). Sherese went home and called 911. Within four minutes of the shooting, Cincinnati police officers arrived at Save-Way and discovered Maher's and Ziad's bodies in the parking lot. Medical personnel arrived shortly thereafter but were unable to revive the Khriss brothers.

. . .

Joshua testified that around 5:00 p.m. on November 22, Miles called him and told him that he had killed Maher and Ziad and that he had put the gun in Bonnie and Joshua's back yard in a white plastic bag. He told Joshua not to touch the gun.

The following day, November 23, Miles . . . told [Bonnie and Joshua] that [Issa] was going to pay him $2,000 for killing Maher but "[s]ince [Maher's] brother also got killed that night he had to throw in an extra $1,500." According to Miles, [Issa] had not paid him yet. Miles told the Willises that, on the night of the shooting, [Issa] gave Miles the rifle, which Miles described as an M-90. . . .

A few days later, Joshua went to Save-Way, and as soon as [Issa] saw him [Issa] asked, "does anybody know?" Joshua said, "No, not that I know of." Joshua then told [Issa], "you're going to have to come and get this gun. I don't want to put my family in this type situation." Although Joshua did not mention Miles, [Issa] replied,

"Okay. I'll talk to Andre . . . and if Andre don't come and get it, I will." After a few days, Joshua noticed the white bag was still in his yard. Joshua again went to the store and confronted [Issa] about it. [Issa] again promised Joshua that either he or Miles would remove the gun. Bonnie also went to the store and told [Issa] that the gun needed to be removed from their yard. [Issa] told her the same thing he had told Joshua. [Issa] also

> told Bonnie to "[t]ell [Miles] not to come around the store because the police were investigating, that he would get in touch with him." A few days later, Miles removed the gun.

State v. Issa, 93 Ohio St. 3d 49, 50-53, 752 N.E.2d 904 (2001). The police eventually arrested Miles, and he confessed to the murders, and drew a sketch which led to the recovery of the murder weapon and its corresponding ammunition clip. *Id*. at 53. A subsequent search of Issa's residence netted a single 7.62 caliber cartridge which matched the murder weapon's caliber, but was from a different manufacturer than were the bullets that killed the Khriss brothers. *Id*. at 53-54.

Issa was convicted of the aggravated murder of Maher Khriss and one death penalty specification, that being that the murder was committed for hire. *Id*. at 54. Following a mitigation hearing, the jury recommended a sentence of death (Trial Tr. at 1642; Appendix, Vol. 1 at 267), which the trial court later adopted (Appendix, Vol. 1 at 271-74).

PROCEDURAL HISTORY

Issa appealed his conviction and death sentence to the Ohio Supreme Court on November 16, 1998, raising fifteen propositions of law. (Appendix, Vol. 2 at 4-6, 52-129.) The state court overruled each of Issa's propositions, independently weighed the aggravating circumstance against the mitigating factors, performed a proportionality review of Issa's sentence, and affirmed his conviction and death sentence. *State v. Issa*, 93 Ohio St. 3d 49, 54, 752 N.E.2d 904 (2001).

While Issa was pursuing his direct appeal in the Ohio Supreme Court, he also petitioned the state court for post-conviction relief on twenty-two grounds. (Appendix, Vol. 3 at 263-398; Vol. 5 at 18-89, 95-166.) After the trial court rejected Issa's claims (Appendix, Vol. 5 at 306-312), he unsuccessfully pursued an appeal to the state court of appeals, *State v. Issa*, No. C-000793, 2001 WL 1635592 (Ohio App. 1st Dist. Dec. 21, 2001)(unreported). The Ohio Supreme Court declined jurisdiction over Issa's subsequent appeal. *State v. Issa*, 95 Ohio St. 3d 1422, 766 N.E.2d 162 (2002)(table).

Issa filed his petition for a writ of habeas corpus on April 17, 2003 (Doc. No. 8), but soon thereafter, this Court held his habeas petition in abeyance while Issa returned to the state courts to litigate an application to reopen his direct appeal (Doc. No. 15). On September 24, 2003, the Ohio Supreme Court denied Issa's application to reopen (Appendix, Vol. 2 at 402), and this Court dissolved the stay of Issa's habeas petition (Doc. No. 20). After Issa filed three amended habeas petitions (Doc. Nos. 26, 33, 62), Issa's habeas proceedings were once again held in abeyance while he pursued a second application to reopen his direct appeal in the state courts (Doc. No. 64). *See State v. Issa*, No. 98-2449, 2005 WL 5353626 (2005) (Application for Reopening). The Ohio Supreme Court denied Issa's application because he had filed beyond the state filing deadline, and because Ohio law does not permit the filing of second or successive applications to reopen a direct appeal. *State v. Issa*, 106 Ohio St. 3d 1407, 830 N.E.2d 342 (2005)(table). This Court's stay was dissolved on July 7, 2005. (Doc. No. 68.) On December 20, 2007, this

Court issued a Report and Recommendations ("R&R") on the procedural and statute of limitations defenses raised by Respondent, and ultimately recommended denial of Issa's ninth, tenth, fifteenth, seventeenth, eighteenth, nineteenth, and twenty-third grounds for relief (Doc. No. 134); this Report and Recommendations addresses the merits of the remaining claims as well as Issa's objections to the earlier Report and Recommendations (*see* Petitioner's Objections, Doc. No. 138).

ANALYSIS

Since Issa filed his petition for a writ of habeas corpus well after the effective date of the Anti-terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the amendments to 28 U.S.C. § 2254 embodied in that Act are applicable to his petition. (*See* Petition, Doc. No. 62.) The Sixth Circuit has summarized the standard of review under the AEDPA as follows:

> Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) . . . , a federal court
>
> > may not grant a writ of habeas to a petitioner in state custody with respect to any claim adjudicated on the merits in state court unless (1) the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" . . . or (2) the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."

Taylor v. Withrow, 288 F.3d 846, 850 (6th Cir.2002) (quoting 28 U.S.C. § 2254(d)).

This standard requires the federal courts to give considerable deference to state-court decisions. *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir.1998) ("[the AEDPA] tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called unreasonable.") (citation and quotation marks omitted).

The first line of analysis under [the] AEDPA involves the consistency of the state-court decision with existing federal law. A state-court decision is considered "contrary to . . . clearly established Federal law" if it is "diametrically different, opposite in character or nature, or mutually opposed." *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (emphasis and quotation marks omitted). Alternatively, to be found an "unreasonable application of . . . clearly established Federal law," the state-court decision must be "objectively unreasonable" and not simply erroneous or incorrect. *Id*. at 409-11.

The second line of analysis under [the] AEDPA concerns findings of fact made by the state courts. [The] AEDPA requires federal courts to accord a high degree of deference to such factual determinations. "A federal court is to apply a presumption of correctness to state court findings of fact for habeas corpus purposes unless clear and convincing evidence is offered to rebut this presumption. The [federal] court gives complete deference to the

> . . . state court's findings of fact supported by the evidence." *McAdoo v. Elo*, 365 F.3d 487, 493-94 (6th Cir.2004) (citations omitted).

Nields v. Bradshaw, 482 F.3d 442, 449 (6th Cir. 2007)(parallel citations omitted). It is with these principles in mind that this Court considers the merits of Issa's grounds for relief.

First Ground for Relief

In his first ground for relief, Issa contends his trial counsel's representation was ineffective because they failed to call Linda Khriss as a witness or introduce her testimony from her own trial which Issa claims would have supported the defense's theory of innocence. (Petition, Doc. No. 62 at 11-14.) Respondent argues the state court's decision rejecting Issa's claim was neither contrary to nor an unreasonable application of federal law as determined by the United States Supreme Court, and that Issa is consequently not entitled to habeas corpus relief. (Return of Writ, Doc. No. 28 at 38-42.) Issa disputes Respondent's interpretation. (Traverse, Doc. No. 41-1 at 18-26.)

The governing standard for effective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984), which states as follows:

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

> Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

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

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

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's

> unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainright*, 477 U.S. 168, 184 (1986); *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998); *Blackburn v. Foltz*, 828 F.2d 1177, 1180-81 (6th Cir. 1987). The merits of Issa's first ground for relief and others asserting ineffective assistance of counsel will be considered with these principles in mind.

Issa raised the instant claim as his fifth ground for relief in his state post-conviction proceedings. (Appendix, Vol. 5 at 116-18.) In support of his claim, Issa submitted his own affidavit which has no bearing on the instant claim and instead relates to his second ground for relief, as well as a portion of the transcript of Linda Khriss' direct testimony at her own trial. (Appendix, Vol. 3 at 99, 106-80.) Khriss testified that she had never conspired with Issa to kill her husband. *Id*. at 154, 178. None of the prosecutor's cross-examination of Khriss was included in the trial transcript excerpt, however.

The post-conviction trial court found that the failure of Issa's trial counsel to call Linda Khriss to testify at his trial, or to introduce the substance of her testimony at her own trial through other means, was a strategic or tactical decision which insulated counsel from Issa's claim of ineffective assistance. (Appendix, Vol. 5 at 308.) When the court of appeals addressed the issue on appeal from the denial of Issa's petition for post-conviction relief, it observed that "[t]he decision whether to call a witness is

generally a matter of trial strategy, and, absent a showing of prejudice, does not deprive a defendant of effective assistance of counsel." *State v. Issa*, No. C-000793, 2001 WL 1635592 at *4 (Ohio App. 1st Dist. Dec. 21, 2001) (unreported), *citing State v. Williams*, 74 Ohio App. 3d 686, 695, 600 N.E.2d 298 (8th Dist. 1991). Finding that Issa had failed to demonstrate prejudice from counsel's failure to call Linda Khriss as a witness, the court of appeals overruled Issa's claim. *Id.* Further appeal was not allowed by the Ohio Supreme Court. *State v. Issa*, 95 Ohio St. 3d 1422, 766 N.E.2d 162 (2002)(table).

Evidence developed at the evidentiary hearing in these habeas proceedings reinforces rather than contradicts the state court's decision. Lead counsel at Issa's trial, Elizabeth Agar, testified that after reading Linda Khriss' testimony in Khriss' own trial, she considered Khriss a "dreadful witness" and a "loose cannon" because of Khriss' outbursts during her trial. (Evid. Hrg. Tr., Doc. No. 112 at 131.) After talking to individuals who had interviewed some of Khriss' jurors, Agar learned that the jurors did not find credible Khriss' testimony that she had not hired Issa to harm her husband. *Id.* at 134, 142. Rather, they returned a not guilty verdict for Khriss because the prosecutors had not proven beyond a reasonable doubt that Khriss intended her husband's death. *Id.* at 134. In addition, Agar's reading of the Khriss transcript and her conversations with prosecutors, others present at Khriss' trial, and Issa himself convinced her that Khriss was a seriously unstable person. *Id.* at 142. Agar testified that the decision not to call Linda Khriss as a witness at Issa's trial was purely strategic based on all of those considerations. *Id.* Co-counsel at Issa's trial,

Terrance Landrigan, also stated in a deposition which was deemed read into the evidentiary hearing record (Doc. No. 112 at 2), that he and Agar did not think Khriss' testimony would be helpful or serve any useful purpose in Issa's trial. (Deposition of Terrance Landrigan, Doc. No. 60 at 19.) Landrigan also characterized the decision not to call Linda Khriss to the stand in Issa's case as one of strategy. *Id*. at 78. Issa's counsel on direct appeal also testified to Linda Khriss' instability, and the high risk that would have been involved in calling her as a witness in Issa's trial. (Testimony of Herbert Freeman, Evid. Hrg. Tr., Doc. No. 112 at 41.)

Issa's trial counsel were aware of the testimony Khriss gave in her own trial. They had spoken to individuals involved in Khriss' case and learned of her emotional outbursts during her trial. Neither considered Khriss a dependable, stable, or controllable witness, and they discussed whether to present her testimony in Issa's trial before they decided not to do so. (Evid. Hrg. Tr., Doc. No. 112 at 131, 142; Depositon of Terrance Landrigan, Doc. No. 60 at 19, 79.) The state court's characterization of Issa's trial counsel's decision not to call Linda Khriss as a witness for their client as one of strategy, therefore, is neither contrary to nor an unreasonable application of federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Consequently, Issa is not entitled to habeas corpus relief on his first ground for relief.

Issa's claim also contends that in the absence of calling Linda Khriss as a live witness in Issa's case, his trial counsel should have moved to admit a transcript of her testimony in her own trial into

evidence in Issa's trial. Such a maneuver would not be possible unless Linda Khriss were declared unavailable. Ohio Evid. R. 804. Issa does not suggest, nor is this Court is willing to suppose a scenario where that might have come to pass, and no further time is devoted to the question of whether Issa's trial counsel could have accomplished what current counsel now suggests.[3]

Furthermore, it is not at all clear that Issa would have been helped by Khriss' testimony. Even if Khriss had testified and conducted her self somberly, her denial that she hired Issa to kill her husband would not have precluded the conclusion that Issa had paid and provided a weapon to Miles for the purpose of murdering Maher Khriss. Thus, Issa has not demonstrated that there is a reasonable probability that outcome of his trial would have been different had his trial counsel called Linda Khriss to testify. *See Strickland*, 466 U.S. at 694.

Issa has presented no evidence that his trial counsel's decision not to call Linda Khriss as a witness was anything other than a strategic decision based upon Khriss' conduct in her own trial, her testimony there, and their conversations with others involved in or present at Khriss' trial. In addition, he has failed to demonstrate prejudice from the alleged error. Consequently, the state courts' resolution of his claim is neither contrary to nor an unreasonable

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[3] It would appear to have been impossible for trial counsel to demonstrate Linda Khriss' unavailability to testify since she showed up in the courtroom as a spectator to part of Issa's trial but was asked to leave by Issa's counsel. (Deposition of Terrance Landrigan, Doc. No. 60 at 18.)

application of federal law, and Issa's first ground for relief should be denied.

Second Ground for Relief

In his second ground for relief, Issa contends the prosecutors in his case engaged in misconduct by striking a deal with Issa's defense counsel that neither side would call Linda Khriss as a witness. (Petition, Doc. No. 62 at 14-17.) Respondent argues the claim is without factual support, and meritless as well. (Return of Writ, Doc. No. 28 at 43-45.)

Issa raised his claim of prosecutorial misconduct as the sixth ground for relief in his state post-conviction petition. (Appendix, Vol. 5 at 119-20.) The trial court misconstrued Issa's claim as one contending ineffective assistance of trial counsel. (Appendix, Vol. 5 at 308.) Likewise, the state court of appeals also failed to distinguish Issa's prosecutorial misconduct claim from his ineffective assistance of trial counsel claim. *State v. Issa*, No. C-000793, 2001 WL 1635592 at *4 (Ohio App. 1st Dist. Dec. 21, 2001) (unreported). The Ohio Supreme Court declined jurisdiction over Issa's subsequent appeal. *State v. Issa*, 95 Ohio St. 3d 1422, 766 N.E.2d 162 (2002)(table). Thus, although Issa presented his claim of prosecutorial misconduct to the state courts, none addressed it on its merits, which requires this Court to address the claim *de novo*. *Vasquez v. Jones*, 496 F.3d 564, 569 (6th Cir. 2007).

The Sixth Circuit has articulated the relevant standard for habeas claims of prosecutorial misconduct as follows:

> On habeas review, claims of prosecutorial misconduct are reviewed deferentially.

> *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To be cognizable, the misconduct must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (citation omitted). Even if the prosecutor's conduct was improper or even "universally condemned," *id.*, we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety if flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial. *See Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000).

Bowling v. Parker, 344 F.3d 487, 512-13 (6th Cir. 2003). In addition, an examination of alleged prosecutorial misconduct is performed in the context of the trial as a whole. *United States v. Beverly*, 369 F.3d 516, 543 (6th Cir. 2004), *citing United States v. Young*, 470 U.S. 1, 12 (1985) and *United States v. Francis*, 170 F.3d 546, 552 (6th Cir. 1999).

Thus, the first question for this Court to answer is whether the prosecutor's conduct was improper. Here, however, there is no proof of the factual allegations upon which Issa's claim rests. The only material Issa has submitted in support of his claim is his own uncross-examined affidavit appended to his

state post-conviction petition. (Appendix, Vol. 3 at 99.) There, Issa stated that when he asked his attorneys why Linda Khriss was not called to testify, they responded that they had made an agreement with the prosecutors that neither side would call Khriss as a witness, and the prosecution also agreed not to use Khriss' statement in Issa's trial. *Id*. At the evidentiary hearing in these proceedings, neither of Issa's trial counsel were asked about the alleged agreement between themselves and the prosecutors respecting the possibility that Linda Khriss might be called as a witness, or the admission of any previous statements she had made. The closest either came to discussing any such agreement was Landrigan's rather vague recollection of a conversation in chambers where the prosecutor stated that if the defense pursued a certain issue or line of questioning at trial, then the prosecution would seek to introduce portions of the Khriss transcript that defense counsel felt were damaging to Issa's case. (Deposition of Terrance Landrigan, Doc. No. 60 at 75.) The prosecutor expressed confidence that the trial court would permit him to introduce the transcript excerpts, and Landrigan stated that he and Agar decided the prosecutor correctly predicted how the court would rule on the evidentiary question. *Id*.

Issa's affidavit, uncross-examined as it is, and with no other evidence to corroborate the allegations it contains, is insufficient to establish the factual predicate of his claim here. In addition, the in-chambers discussion Landrigan mentioned in his deposition includes no acknowledgment of any reciprocal agreement between defense counsel and the prosecution to forego calling Linda Khriss as a witness in Issa's case. Instead, the conversation

alerted defense counsel to an undesirable effect likely to flow from defense counsel's intended strategy, a strategy Issa's counsel modified in time to avoid the anticipated damage. Because Issa has not supported his claim with evidence sufficient to warrant the remedy he seeks, his second ground for relief should be denied.

Third Ground for Relief

In his third ground for relief Issa contends his trial counsel rendered ineffective assistance by failing to adequately investigate or obtain experts to investigate Issa's history, character, and background in preparation for the mitigation phase of his trial. (Petition, Doc. No. 62 at 17-21.) Specifically, he claims his trial counsel failed to perform an adequate mitigation investigation; failed to call available mitigation witnesses, namely Issa's family members other than the two who did testify in mitigation; admitted Issa's mother was biased in favor of her son; failed to prepare a mitigation witness; and failed to present evidence respecting Issa's life through his two ex-wives. Respondent initially argued Issa's claim was procedurally defaulted (Return of Writ, Doc. No. 46), but this Court concluded otherwise in its Report and Recommendations respecting procedural default and statute of limitations issues (R&R, Doc. No. 134 at 3-6), and neither party has objected to that finding (Respondent's Objections, Doc. No. 137; Petitioner's Objections, Doc. No. 138). Respondent also argues that Issa's claim is meritless, however. (Return of Writ, Doc. No. 28 at 47-50.) Issa vigorously disputes Respondent's assessment of his claim. (Traverse, Doc. No. 41-1 at 29-39.)

Issa's primary contention is that his trial counsel should have developed mitigation evidence that would have "Americanized" him for the jury. (Traverse, Doc. No. 41-1 at 31, 38.) Such "Americanization" could have been presented through Issa's former wife, her family members, Issa's former employers, and Issa's second wife and her family member. *Id*. at 38. A large part of the evidence Issa claims his counselors should have presented, however, is found in affidavits appended to his state post-conviction petition; affidavits that are uncross-examined, and contain virtually nothing but hearsay. (Affidavits of Pamela Swanson, Appendix, Vol. 3 at 197-202, 205-210.) Such evidence is of low quality and carries little weight. In addition, this Court granted Issa permission to "call to testify at the evidentiary hearing any person who (1) provided an affidavit for the Post-Conviction Petition (2) purporting to state testimony which would have been offered in mitigation," but denied Issa's request to present the testimony of one of his jurors because such testimony is inadmissible under Fed.R.Evid. 606(b). (Decision and Order Granting in Part and Denying in Part Petitioner's Motion for an Evidentiary Hearing, Doc. No. 78 at 6-7.) Later, Issa proposed to take a perpetuation deposition of his first wife, Bobbie Foreman (Motion for Perpetuation Deposition, Doc. No. 98), but his request was denied because he had failed to explain whether an attempt had been made to assure her presence at the evidentiary hearing (Decision and Order Denying Without Prejudice Petitioner's Motion to Take a Perpetuation Deposition, Doc. No. 99). Issa never renewed his request, nor did he call Foreman to testify at the evidentiary hearing. In the end, none of

Issa's family members, friends, or former in-laws testified at the evidentiary hearing. Consequently, any evidence they could have given in the mitigation phase of his trial is before this Court only through uncross-examined affidavits containing hearsay of what they would have testified to. There is one exception. Betty Fisher, Issa's second wife's grandmother, submitted an affidavit in Issa's post-conviction proceedings in which she stated that Issa was kindhearted, and that he paid for and delivered her medications to her when he was married to her granddaughter. (Appendix, Vol. 3 at 190-91.) Fisher was not called to testify at Issa's evidentiary hearing, however. Issa's own affidavit, submitted to the state courts in his post-conviction proceedings, is also uncross-examined and carries only slightly more weight than those made up of hearsay. (Affidavit of Ahmed Fawzi Issa, Appendix, Vol. 3 at 100-5.)

The Court notes that in his post-conviction proceedings in the state court, Issa also submitted the affidavit of Dr. Mahdi Alosh who apparently participated in translating telephone conversations between Laney Hawkins and Pam Swanson, both of the Ohio Public Defender's Office, and Issa's Jordanian family members in March of 1999. (Appendix, Vol. 4 a6 10-11.) Later, Hawkins presented Alosh with the "affidavits" of several Issa family members which were written in English. *Id*. There is no way of knowing from the record whether those "affidavits" were the product of the telephone calls Alosh mentioned. For whatever reason, and rather counterintuitively, Hawkins asked Alosh to translate the family members' English affidavits into Arabic. *Id*. Consequently, the "affidavits" in English are the original "affidavits" for present purposes. Not

one of the "affidavits," whether in English or the Arabic translations, have been notarized in any way recognizable to this Court. Thus, as evidence they are worthless, particularly given the circumstances of their creation as described by Alosh.

This Court cannot grant habeas corpus relief on the weak evidence Issa has presented. Because Issa has failed to produce reliable evidence that valuable mitigation testimony was erroneously omitted by his attorneys' error, and because he has not shown prejudice from any such error, he has not demonstrated entitlement to habeas corpus relief. Thus, to the extent that he claims his attorneys provided ineffective assistance by failing to "Americanize" him for the jury, his third ground for relief should be denied.

Issa also contends his mother was inadequately prepared to testify in the mitigation phase of his trial. (Petition, Doc. No. 62 at 18.) To demonstrate what additional information could have been presented through Mrs. Issa had she been adequately prepared, however, Issa relies almost exclusively on the English and Arabic "affidavits" just discussed. *Id*. at 18-19. He also cites to two jurors' affidavits in an attempt to show prejudice from his attorneys' failure to adequately prepare Mrs. Issa. (Petition, Doc. No. 62 at 18; Traverse, Doc. No. 41-1 at 36-38.) As noted above, however, the jurors' affidavits are inadmissible under Fed. R. Evid. 606(b). Finally, Issa cites his own affidavit in support of his claim. (Petition, Doc. No. 62 at 19.)

No evidence as to how Mrs. Issa's mitigation phase testimony would have been different had she been adequately prepared was presented at Issa's

evidentiary hearing. One of Issa's trial attorneys acknowledged that she did not prepare the jury for Issa's mother's appearance at the trial clothed in traditional garments, or for Mrs. Issa's need to testify through a translator (Evid. Hrg. Tr., Doc. No. 112 at 129), but that relates to the attorney's preparation of the jury, not the witness. Even if the Court were to assume Issa's trial counsel erred by inadequately preparing Mrs. Issa for her testimony, Issa cannot demonstrate prejudice without presenting the evidence that would have been brought out had his mother been adequately prepared. This, he has not done. Consequently, Issa has not demonstrated that his trial counsel was ineffective in their preparation of Mrs. Issa for her testimony in the mitigation phase. To that extent, Issa's third ground for relief should be denied.

Next, Issa claims his trial counsel failed to conduct an adequate mitigation investigation into his history, background, and character which resulted in an incomplete mitigation presentation. (Petition, Doc. No. 62 at 19-21.) Issa cites the affidavit of Dorian Hall, a mitigation specialist, in support of his claim.[4] (Petition, Doc. No. 62 at 19-20; *see* Appendix, Vol. 3 at 192-96.) Hall's affidavit establishes her credentials as an expert on mitigation and comments on the development of mitigation evidence generally and in Issa's case specifically. (Appendix, Vol. 3 at 192-96.) The United States Supreme Court has never recognized a constitutional right to effective

[4] Although Issa's request to present Dorian Hall's testimony at the evidentiary hearing was granted, he withdrew her as a witness during those proceedings. (Evid. Hrg. Tr., Doc. No. 119 at 74.)

assistance of a mitigation specialist, however, and Hall is not qualified to render an opinion on the quality of legal representation Issa received from his trial attorneys, as she is not a lawyer. For those reasons, and because Hall's opinion was submitted to this Court in uncross-examined affidavit form, the opinions she expressed therein are excluded from this Court's consideration.

Issa also cites the state post-conviction affidavits of Betty Fisher and Pamela Swanson in support of his argument. (Appendix, Vol. 3 at 190-91, 197-200.) As noted above, Betty Fisher stated that Issa paid for and brought her medication when he was married to his first wife, Fisher's granddaughter Bobbie Foreman. *Id*. at 190. Issa's trial counsel's failure to discover and present that evidence, however, does not establish that counsel ceased to function as the counsel guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel presented evidence of Issa's life in Kuwait; the family's move to Jordan; his father's absence from the family due to his employment obligations; Issa's move to the United States to pursue his education; his father's death and the resulting sacrifices Issa made to help his family in Jordan, including his decision to forego his own education so that his brothers could pursue theirs; the family's complete disbelief that Issa could be involved in the murders; and his good and quiet nature. (Trial Tr. at 1546-71.) That Issa may have bought and delivered medicine to an elderly in-law on one or more occasions would have added little to the mitigation side of the scales. Furthermore, the information in Pamela Swanson's affidavit that Issa claims would have been useful to

his mitigation case is entirely hearsay evidence, and uncross-examined hearsay at that. It is therefore useless for purposes of evaluating Issa's ineffective assistance of counsel claim.

The state court of appeals rejected Issa's claim when it was presented in his post-conviction proceedings. *State v. Issa*, No. C-000793, 2001 WL 1635592 at *3-4 (Ohio App. 1st Dist. Dec. 21, 2001)(unreported). Rather than finding the affidavits Issa cites as support for his claim were of limited evidentiary value, however, the court noted that "[t]his is not a situation where counsel failed to present any mitigation at all or to engage in any meaningful preparation." *Id.* at *4. Rather, the court found the information contained in the affidavits was merely cumulative to the evidence actually presented in the mitigation phase, or that it presented an alternative theory of mitigation. *Id.* The court concluded that Issa had not demonstrated his counsel's ineffectiveness and that post-conviction relief was unwarranted. Even if this Court were to credit the evidence Issa has submitted in support of his ineffective assistance of trial counsel claim with the weight apparently given it by the state court of appeals, the state court's resolution of the claim is neither contrary to nor an unreasonable application of federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

For all these reasons, Issa has failed to demonstrate that he is entitled to habeas corpus relief on his ineffective assistance of trial counsel claim. Accordingly, his third ground for relief should be denied.

Fourth Ground for Relief

Issa's fourth ground for relief is indistinguishable from part of his third, above. Here, he argues his trial counsel were ineffective when they failed to call as mitigation witnesses Betty Fisher, Issa's first and second wives, a former employer, and various of Issa's family members and former in-laws. (Petition, Doc. No. 62 at 22-28.) Issa relies on the same affidavits as he did in arguing his third ground for relief, and has no more success this time. *Id.* at 22. For the same reasons discussed above, therefore, Issa's fourth ground for relief should be denied.

Fifth Ground for Relief

In his fifth ground for relief, Issa contends his trial counsel provided ineffective assistance during the mitigation phase of his trial by failing to present expert testimony relating to cultural issues he claims were relevant to his life experiences. (Petition, Doc. No. 62 at 28-31.) Respondent argues that the state court's decision on the merits of the claim was in concert with, not contrary to, clearly established federal law (Return of Writ, Doc. No. 28 at 55-57).

Issa raised the instant claim as his seventh claim for relief in his state post-conviction proceedings. (Appendix, Vol. 5 at 121-23.) The trial court rejected the claim, finding counsel's decision not to call a cultural expert in mitigation one of strategy, and determining that counsel were not ineffective for failing to present what amounted to an alternative theory of mitigation. *Id.* at 308-9. The court of appeals subsequently affirmed the trial court, concluding that the failure of counsel to present "nothing more than an alternative mitigation theory" did not constitute ineffective assistance. *State v. Issa*,

C-000793; 2001 WL 1635592 at *4 (Ohio App. 1st Dist. Dec. 21, 2001) (unreported).

Although Issa's claim is one involving his trial counsel's failure to obtain a cultural expert, in his traverse, he argues first that counsel should have employed a professional translator to assist in communication with Issa's family members. (Traverse, Doc. No. 41-1 at 47-48.) He cites to his own state post-conviction affidavit, where he stated his cousin's translations were faulty, in support of his argument. *Id*. He also quotes mitigation specialist Dorian Hall's post-conviction affidavit where she opines that the use of a qualified translator would have facilitated communication between the defense team and Issa's family members. *Id*. at 48. Jim Crates, a mitigation specialist who actually worked on Issa's case in preparation for trial, stated in his post-conviction affidavit that it "might have been a good idea" to employ a professional translator to communicate with the family members. *Id*.

Nothing in those affidavits, however, identifies any single instance of a mistranslation by Issa's cousin. Issa contends his cousin's translations were incorrect, but he claims elsewhere in his petition for habeas corpus relief that he is deserving of a new trial because his lack of fluency in English rendered him incompetent to stand trial. (*See* Thirteenth Ground for Relief, Petition, Doc. No. 62 at 68-69.) Thus, little weight can be given his assessment of his cousin's translations. In addition, Dorian Hall has no personal knowledge of whether Issa's cousin's translations were accurate as she was not present when the translations were performed, nor does she

claim to be fluent in Arabic. (Affidavit of Dorian Hall, Appendix, Vol. 3 at 192-96.) Crates testified at the evidentiary hearing in these proceedings that the female relative in Jordan who translated for him in his dealings with the Jordanian family members was "certainly not fluent," but that she spoke English well enough so that he could get his point across to them. (Evid. Hrg. Tr., Doc. No. 119 at 19.) Nevertheless, he felt it was "nonsense" to have a family member translate. *Id*. at 36. Crates could not point to any specific incident that caused him to think the translation was less then comprehensive, other than his observation that Issa's mother and brother did not seem to know what was going on in Issa's case when they arrived in the United States. *Id*. at 20-21.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Here, Issa offers not a single instance of any demostrably incorrect translation between the defense team and Issa's relatives, nor does he provide any convincing evidence that Crates' suspicions of faulty translations were anything more than that, mere suspicions. Without more, Issa has demonstrated neither attorney error nor prejudice therefrom. Thus, interpreting this ground for relief as complaining of mistranslation, it is unavailing and should be denied.

Issa's next argument concerns defense counsel's failure to discover a "tribal truce" that was apparently entered into between the Issa and Khriss

families in Jordan. (Traverse, Doc. No. 41-1 at 49-51; *see* Appendix, Vol. 3 at 181.) Issa contends that the "tribal truce" explains his mother's lack of emotion during her testimony at his trial, and goes so far as to suggest that the threat to other family members in Jordan contained in the "tribal truce" caused her to temper her support for her son in his attempt to avoid the death penalty. *Id.* at 49. In support of his argument, Issa presented the testimony of Dr. Fatima Agha Al-Hayani, an expert in Islamic and Muslim family law, at his evidentiary hearing. (Evid. Hrg. Tr., Doc. No. 119 at 75-112.) She testified that Islam provides three options when a murder occurs: (1) the victim's survivors may forgive the murderer and his family, (2) the murderer's family may pay "blood money" to the victim's family, or (3) the victim's family may commit a reciprocal killing. *Id.* at 90. She further explained that the "tribal truce" sets forth an agreement whereby the Khriss family has agreed to let the courts determine guilt and punishment, with the caveat that if Issa were to be found guilty but sentenced to life imprisonment rather than death, the Khriss family reserved their right to "blood money" from the Issa family. *Id.* at 92. Al-Hayani speculates that if Issa's jurors had known that the Khriss family was willing to accept a life sentence and "blood money," it may have made a difference in their sentencing recommendation. *Id.* at 95-96. Nowhere does Al-Hayani suggest that Issa's mother or brother were fearful of retribution in the form of a reciprocal killing in Jordan should Issa receive a life sentence rather than death.[5] In fact,

[5] This Court has previously found Sara Issa's "affidavit" of insignificant evidentiary value, but it is interesting to note that in it, Mrs. Issa states that the "tribal truce," or, as she calls it,

this Court finds no credible evidence to support Issa's contention that the "tribal truce" contained a threat of death against Issa's family members in Jordan in the event of a life sentence for Issa, much less that it actually influenced his mother's or brother's testimony during the mitigation phase of his trial.[6] To the extent Issa contends otherwise, his fifth ground for relief should be denied.

Finally, Issa contends that an understanding of the cultural milieu in which he was raised was important to the jury's sentencing recommendation, and that his attorneys provided substandard representation in failing to present that evidence through a cultural expert. (Traverse, Doc. No. 41-1 at 50-53.) In support, Issa cites to the state post-conviction affidavit of Janice Ort, a psychologist, who stated that during her interviews with Issa, it became apparent that his cultural history merited "further investigation." (Appendix, Vol. 3 at 11.) She further stated that she believed Issa's assimilation into American culture was a significant factor in his psycho-social history. *Id.* Issa also cites James Crates' post-conviction affidavit where Crates states that he "would have liked to have seen a cultural

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the "mutually beneficial contract with the Kreiss [sic] family," took away her family's fear of retribution rather than generated it, as Issa contends. (*See* Appendix, Vol. 4 a 33.)

[6] In spite of Issa's argument that during her testimony, his mother "had to live under the threat that her extended family would be harmed if she was successful in convincing the American jury to recommend a sentence other than death," he seems to acknowledge that "[t]he terms of the ["tribal] truce["] dictate that the Issa family owes the Khriss family monetary compensation . . . unless [Issa] is acquitted of the charge or put to death." (Traverse, Doc. No. 41-1 at 49, 50 n.14.)

expert testify," and that, had he known of the "tribal truce" at the time of trial, he would have encouraged defense counsel to obtain the services of a cultural expert.[7] (Appendix, Vol. 4 at 3.)

Neither of those affidavits provide this Court with any indication of what meaningful mitigation evidence could have been brought out through a cultural expert. For that, the Court turns to the evidentiary hearing testimony of Dr. Fatima Agha Al-Hayani.

It is difficult to give much credence to Al-Hayani's testimony, however. Her field of expertise is in Islamic law as it relates to divorce, custody, and support issues, not criminal trials, much less mitigation issues in capital cases. (Evid. Hrg. Tr., Doc. No. 119 at 80-81, 101.) Al-Hayani testified that a cultural expert could have been used by the defense in a variety of ways, much of which is not relevant to the claim at hand. For instance, she testified that a cultural expert could have "sensitized" the defense counsel and jurors to prejudices against Muslims, encouraging the lawyers to refer to Mrs. Issa's

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[7] Crates' testimony at the evidentiary hearing in these proceedings was equivocal as to when he learned of the "tribal truce." First he testified that he learned of the agreement the night before the mitigation case began, suddenly making cultural issues prominent and problematic. (Evid. Hrg. Tr., Doc. No. 119 at 33.) In cross-examination, however, he testified that he did not learn of the "tribal truce" until he spoke to Dorian Hall during the preparation for Issa's post-conviction petition. *Id*. at 64. Incidentally, trial counsel Agar characterized any information she had about the agreement prior to trial as "rumor," and denied that she learned of it prior to the start of Issa's mitigation hearing. (Evid. Hrg. Tr., Doc. No. 112 at 112, 118.)

traditional clothing as "Islamic dress" rather than "robes." (Evid. Hrg. Tr., Doc. No. 119 at 97-99.) Such testimony has little to do with Issa's psycho-social development in Jordan or his assimilation into American culture, however. She also expounded upon the Arab cultural prohibition against women speaking out or showing emotion in public, the absence of juries in Jordan and Kuwait, prejudice against Arabs and Muslims in Detroit courts,[8] and, in her opinion, the unsatisfactory performance of the certified, court-appointed translator in Issa's case. (Evid. Hrg. Tr., Doc. No. 119 at 85-87, 102-3, 106-7.) None of those subjects are relevant to the current claim, either, although they may have some relevance to ineffective assistance of trial counsel claims Issa asserts in other grounds for relief.

Issa's claim is that had his trial counsel presented a cultural expert's testimony in the mitigation phase of his trial, there is a reasonable probability that the outcome of his trial would have been different. *See Strickland*, 466 U.S. at 694. Al-Hayani testified that because Issa's father was Palestinian, Issa suffered

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[8] Al-Hayani states she reviewed, among other things, the affidavit of Jack Shaheen, which was submitted to the state post-conviction court (Appendix, Vol. 3 at 253-62), and purports to describe anti-Arab/Muslim stereotypes and biases both in American culture generally, and in specific instances in Issa's trial. Shaheen claims to have studied the way Arabs and Muslims are portrayed in popular culture for two decades, and to have lived in the Arab culture for two years, but provides no *curriculum vitae*. His conclusions relate to the potential for juror bias rather than the value of Issa's cultural background to his mitigation case, and his affidavit was never notarized. Consequently, this Court will not consider the substance Shaheen's affidavit, directly or indirectly through Al-Hayani, in making its recommendation on Issa's fifth ground for relief.

the consequences of the Palestinians being driven from their land to another country where they could not be citizens. (Evid. Hrg. Tr., Doc. 119 at 83-84.) No further details of what those consequences might have been, or what impact they may have had on Issa were presented, however. Al-Hayani suggested that other possible mitigating factors in Issa's case were the absence of violent behavior on his part in the past and his poor command of the English language. *Id*. at 97. Issa's trial counsel, however, testified that there was at least one charge of domestic violence against Issa in the past, and that she had no trouble communicating with Issa. (Evid. Hrg. Tr., Doc. No. 112 at 97-98, 101.) Co-counsel Landrigan also stated in his deposition that Issa communicated well with him. (Deposition of Terrance Landrigan, Doc. No. 60 at 35, 78.) Furthermore, Issa's attorney on direct appeal, Norman Aubin, testified that he never had need of a translator to assist in his communication with Issa, either. (Evid. Hrg. Tr., Doc. No. 120 at 39.) Both trial counsel expressed concern about Issa's past criminal record being brought out in court. *Id*. at 58. (Evid. Hrg. Tr., Doc. No. 112 at 98, 149.) Thus, of the two additional mitigating factors Al-Hayani believed might have benefitted Issa, his lawyers contradicted one and pointedly kept out of evidence the other for strategic reasons.

Al-Hayani also testified that Issa never put forth much effort to assist with his mitigation case because he had "given up" and he "had no faith in the justice system" based upon some unspecified experiences he had before coming to the United States. (Evid. Hrg. Tr., Doc. No. 119 at 103.) She also testified that Issa believed the jurors were racially prejudiced against

him. *Id.* at 104. Al-Hayani based those conclusions on what she had read of the trial record and post-conviction affidavits, including Issa's, and on interviews she had done in the course of her work in Detroit, Michigan. *Id.* She opined that Issa had not made the transition from the Jordanian system of justice to the American system where one is presumed innocent until proven guilty. *Id.* Trial counsel Agar, who naturally was in regular contact with Issa throughout his trial, testified in the evidentiary hearing that she found Issa to be culturally assimilated into American culture, and that his attitudes seemed "pretty western," especially compared to those of his family members. (Evid. Hrg. Tr., Doc. No. 112 at 100.) Al-Hayani, on the other hand, never spoke personally with Issa or anyone else involved in his state court trial, and so the information upon which she based her opinion respecting Issa's understanding of the justice system in America apparently comes from her reading of the uncross-examined affidavits filed in the state post-conviction proceedings. (Evid. Hrg. Tr., Doc. No. 119 at 101.) Consequently, Agar's testimony has more credibility than Al-Hayani's. Moreover, while Agar conceded that Issa's reluctance to put on a strong mitigation case "might have been culturally based" (Evid. Hrg. Tr., Doc. No. 112 at 99), a possibility does not amount to a fact. Similarly, Issa's belief that his jurors harbored prejudices against him, whether based on race, nationality, or any other arbitrary characteristic, does not demonstrate the actual existence of the prejudices. Al-Hayani's testimony that Issa's belief in the jurors' prejudices, if explained to the jurors, would have made Issa more sympathetic to the jurors (Evid. Hrg. Tr., Doc. No.

119 at 104), makes no sense. Jurors are unlikely to react sympathetically or mercifully to being accused of racism, particularly where there is no evidence of prejudice. Moreover, trial counsel testified at the evidentiary hearing that the decision not to emphasize Issa's nationality was precisely to avoid arousing any prejudices on the part of the jurors. (Evid. Hrg. Tr., Doc. No. 112 at 129.)

Some of the information Al-Hayani testified should have been presented through a cultural expert was or could have been presented through other mitigation witnesses. For instance, she suggested that Issa's immigration to the United States and his father's death could have been presented through a cultural expert. (Evid. Hrg. Tr., Doc. No. 119 at 88.) But that information was testified to by Issa's brother and mother, no doubt in far more personal and humanizing terms than possible through an expert witness. (Trial Tr. at 1549, 1551, 1561, 1566-68.)

"The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy." *Hill v. Mitchell*, 400 F.3d 308, 331 (6th Cir. 2005). Issa's trial counsel presented evidence of Issa's early life in Kuwait and Jordan, his close family ties his father's struggle to assure that his children obtained better educations than he had, Issa's good performance in school while in Jordan, his move to the United States to pursue his education, his father's death shortly thereafter, Issa's sacrificing his own educational goals so he could work and help his family financially instead, his loving and gentle nature, and the family's disbelief that Issa could be involved in murder. (Trial

Tr. at 1546-71.) Finally, Issa's brother testified that he did not want to see him executed, and his mother asked the jurors for compassion. (Trial Tr. at 1563, 1570.) Trial counsel made a strategic decision not to present evidence that would emphasize Issa's culture of origin because of the perceived risk that jurors might associate it with terrorism. (Evid. Hrg. Tr., Doc. No. 112 at 129.) Furthermore, the cultural evidence Issa claims should have been presented was merely an alternative theory of mitigation, as the state court found, and it was discarded by Issa's trial counsel for that reason. *See State v. Issa*, No. C-000793, 2001 WL 1635592 at *4 (Ohio App. 1st Dist. Dec. 21, 2001)(unreported).

In the end, the evidence Issa claims should have been presented through a cultural expert at his mitigation hearing was either presented through other sources, irrelevant insofar as the instant claim is concerned, or was excluded by his trial counsel for strategic reasons. Even if that were not so, he has failed to present reliable evidence that creates a reasonable probability that the outcome of his mitigation hearing would have been different. *See Strickland*, 466 U.S. at 694. Finally, Issa has failed to demonstrate that the state court's determination that the cultural evidence Issa claims should have been presented was anything other than an alternative mitigation theory was contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1). For those reasons, Issa's fifth ground for relief should be denied.

Sixth Ground for Relief

In his sixth ground for relief, Issa claims that the admission into evidence of Andre Miles' statements

to Bonnie and Joshua Willis about the murders of Maher and Ziad Khriss were hearsay from an available witness, and that their admission violated Issa's Sixth Amendment right to confront the witnesses against him. (Petition, Doc. No. 62 at 31-34.) Respondent quotes extensively from the state court's analysis and ultimate rejection of Issa's claim, and argues it is neither contrary to nor an unreasonable application of federal law. (Return of Writ, Doc. No. 28 at 58-66.) Issa disputes that argument. (Traverse, Doc. No. 41-1 at 53-62.)

Initially, a distinction must be made between Issa's claim that admission of Miles' statements to the Willises violated a state evidentiary rule, and his claim that admission of the statements violated Issa's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. A claim contending a state court violated a state evidentiary rule is not cognizable on habeas corpus review. *Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (stating "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Coburn v. Howes*, 100 Fed.Appx. 328, 329, 2004 WL 613084 at **1 (6th Cir. Mar. 24, 2004)(unreported) (observing that "[f]ederal habeas corpus relief is only warranted where a violation of a state's evidentiary rule results in the denial of fundamental fairness and, therefore, a violation of due process"), *citing Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988). Issa does not here, and did not in the state court, claim that the admission of Miles' statements through other witnesses violated fundamental fairness or his due process rights under the federal constitution. Thus,

whether the statements were erroneously admitted hearsay evidence is a question solely of state law, and one which this Court need not address. Accordingly, the Court confines its review to Issa's Confrontation Clause issue.

As Respondent notes, Issa raised the Confrontation Clause claim as his second proposition of law on direct appeal to the Ohio Supreme Court. (Appendix, Vol. 2 at 75-79.) In denying the claim, that court reasoned as follows:

> We now turn to [Issa's] contention that the admission of Bonnie['s] and Joshua's testimony[ies] regarding Miles's confession violated his right to confront the witnesses against him as guaranteed by the United States and Ohio Constitutions. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *State v. Madrigal* (2000), 87 Ohio St.3d 378, 384, quoting *Maryland v. Craig* (1990), 497 U.S. 836, 845. Although the hearsay rules and the Confrontation Clause are generally designed to protect similar ideals, the two are not equivalent. *Idaho v. Wright* (1990), 497 U.S. 805, 814. In other words, the Confrontation Clause may bar the admission of evidence that would otherwise be admissible under an exception to the hearsay rule. *Id.*
>
> . . .
>
> In *Lilly v. Virginia* (1999), 527 U.S. 116, (plurality opinion), the lead opinion

recognized that the type of hearsay statement challenged herein, *i.e.*, an out-of-court statement made by an accomplice that incriminates the defendant, is often made under circumstances that render the statement inherently unreliable. For example, when a declarant makes such a statement to officers while he is in police custody, the declarant has an interest in inculpating another so as to shift the blame away from himself. In that situation, a declarant will often admit to committing a lesser crime and point to an accomplice (the defendant) as the culprit in a more serious crime. While the statement is technically against the declarant's penal interest, it is also self-serving and, for that reason, particularly deserving of cross-examination when used as evidence against the defendant. *Id*. at 131-132 and 138. Because this type of statement is inherently unreliable, the lead opinion stated that, in order to satisfy the Sixth Amendment, the circumstances surrounding the making of the statement must make the declarant's truthfulness so clear that "'the test of cross-examination would be of marginal utility.'" *Id*. at 136, quoting *Idaho v. Wright*, 497 U.S. at 820.

. . .

Applying *Lilly* and *Madrigal,*[9] to this case, it is clear that in order to determine whether

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[9] On habeas review in the United States District Court for the Northern District of Ohio, Judge Gwin determined that "the Ohio Supreme Court's finding that admission of [Madrigal's co-

> the admission of evidence concerning Miles's confession violated [Issa's] confrontation rights, we must examine the circumstances under which the confession was made. Unlike the declarants in *Lilly* and *Madrigal*, Miles was not talking to police as a suspect when he made the out-of-court statement. Miles's confession was made spontaneously and voluntarily to his friends in their home. Moreover, Miles had nothing to gain from inculpating [Issa] in the crime. In fact, by stating that [Issa] had hired him to kill Maher, Miles was admitting a capital crime, *i.e.*, murder for hire. Furthermore, Miles's statement was clearly not an attempt to shift blame from himself because he was bragging about his role as the shooter in the double homicide.
>
> We therefore find that the circumstances surrounding the confession did "'render the declarant [Miles] particularly worthy of belief.'" *Madrigal*, 87 Ohio St. 3d at 387, quoting *Wright*, 497 U.S. at 819. Our decision herein is buttressed by Chief Justice Rehnquist's separate opinion in *Lilly*, in which he noted that in a prior case, the

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defendant's] statements violated the Confrontation Clause is not contrary to or an unreasonable application of federal law." *Madrigal v. Bagley*, 276 F. Supp. 2d 744, 769 (N.D. Ohio 2003), *aff'd Madrigal v. Bagley*, 413 F.3d 548 (6th Cir. 2005). After extensive analysis, however, Judge Gwin concluded that the state court's determination that the violation was harmless error was contrary to federal law and he granted habeas relief on Madrigal's Confrontation Clause claim. *Madrigal*, 276 F.Supp.2d at 769-77.

> [C]ourt "recognized that statements to fellow prisoners, *like confessions to family members or friends*, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant." (Emphasis added.) *Id.*, 527 U.S. at 147. (Rehnquist, C.J., concurring in the judgment). Accordingly, we hold that the admission of Bonnie's and Joshua's testimon[ies] concerning Miles's confession did not violate the Confrontation Clause.

State v. Issa, 93 Ohio St. 3d 49, 59-61, 752 N.E.2d 904 (2001)(parallel citations omitted).

The Sixth Amendment of the federal constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Pointer v. Texas*, 380 U.S. 400 (1965), the Supreme Court deemed that provision applicable to state criminal prosecutions through the Fourteenth Amendment's Due Process Clause. At the time of Issa's trial, the governing law respecting Confrontation Clause issues was set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). There, the circumstances were somewhat different from those in Issa's case, as the prior statements of the unavailable witness in *Roberts* were from a person who had been called to testify by the defense at a preliminary hearing prior to trial. *Id.* at 58. A transcript of that testimony was later introduced at trial to rebut an assertion made by the defendant during his own testimony. *Id.* at 59. The Supreme Court identified two separate restrictions imposed by the Confrontation Clause on the range of admissible hearsay: (1) "the Sixth

Amendment establishes a rule of necessity," which means that "the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant"; and (2) once the witness' unavailability has been demonstrated, the out-of-court statements must possess "indicia of reliability." *Id.* at 65-66. Because of the similar values intended to be protected by the hearsay rules and the Confrontation Clause, reliability may be found where the evidence falls within a "firmly rooted hearsay exception." *Id.* at 66. In other cases, the evidence may be admitted if it possesses "particularized guarantees of trustworthiness." *Id.* After noting the vigorous intellectual discussion that had been taking place respecting the Confrontation Clause prior to *Roberts*, the Court stated that no commentator had demonstrated that the Court's prevailing analysis was in conflict with the Framer's intentions concerning the Confrontation Clause, and indicated its intention to stay the course. *Id.*

Twenty-four years later, and after Issa's trial, the Court reversed course. In *Crawford v. Washington*, 541 U.S. 36, 42-68 (2004), the Court distinguished "testimonial" statements from "nontestimonial" statements, and held that *Roberts* does not apply to "testimonial" statements, and that the Confrontation Clause itself does not apply to "nontestimonial" statements. After *Crawford*, then, the threshold question in a Confrontation Clause analysis is whether the statements claimed to have violated the clause are "testimonial" in nature. *United States v. Cromer*, 389 F.3d 662, 672 (6th Cir. 2004).

The Supreme Court, however, did not define the terms "testimonial" and "nontestimonial." Some guidance may be gleaned from the Court's definition of "testimony: as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51, *quoting* 2 N. Webster, An American Dictionary of the English Language (1828). In addition, the Court observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51. In the absence of a comprehensive definition of "testimonial" statements from the Supreme Court, the Sixth Circuit Court of Appeals has favored the following definition: "The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004); *United States v. Martinez*, 430 F.3d 317, 329 (6th Cir. 2005).

According to *Crawford*, "the Framers would not have allowed admission of a testimonial statement of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. In doing so, the Court relieved the trial courts of the burden of determining whether out-of-court statements bore sufficient "indicia of reliability" to justify their admission into evidence. As noted above, the Court also concluded that "nontestimonial"

statements are outside the contemplation of the Confrontation Clause altogether, and that their admissibility is instead determined by resort to the states' evidentiary rules respecting hearsay. *Id.* at 68.

Crawford, however, is relevant to Issa's claim only if its holding is retroactively applicable. In *Whorton v. Bockting*, 549 U.S. 406, 127 S.Ct. 1173, 1184 (2007), the Court held that although *Crawford* announced a "new rule" of criminal procedure, it did not fall within the *Teague v. Lane*, 489 U.S. 288 (1989), exception for "watershed" rules that would make the new rule applicable retroactively. Therefore, *Roberts* still guides this Court's analysis of Issa's Confrontation Clause claim.[10]

Under *Roberts*' first prong, it must be determined whether the prosecution either produced, or demonstrated the unavailability of the declarant whose statement it wished to use against Issa.

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[10] The Court observes, however, that even if *Crawford* governed Issa's case, his claim would fail. *Crawford* itself recognized that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," effectively distinguishing comments made to friends and family members from the "testimonial" statements to which the Confrontation Clause applies. 541 U.S. at 51; *see also Gendron v. Lafler*, No. 05-CV-74787-DT, 2007 WL 2005057 at *6 (E.D. Mich. July 10, 2007)(stating that "[t]estimonial statements do not include remarks made to family members or acquaintances, *citing Crawford*, 541 U.S. at 51-52, 56; *United States v. Martinez*, 430 F.3d 317, 328-29 (6th Cir. 2005); *United States v. Stover*, 474 F.3d 904, 912-13 (6th Cir. 2007)). As nontestimonial statements, Miles' confession to the Willises would be subject to the state's hearsay rules, but not the Confrontation Clause. *Crawford*, 541 U.S. at 68.

Roberts, 448 U.S. at 65-66. It is noted that unavailability for Confrontation Clause purposes is not synonymous with unavailability in the hearsay context. For instance, both the Federal and Ohio hearsay rules define "unavailablility" in relevant part as a declarant's persistent refusal to testify concerning the subject matter of his or her prior statement "despite an order of the court to do so." Fed. R. Evid. 804(a)(2); Ohio R. Evid. 804(A)(2). For Confrontation Clause purposes, however, "unavailability" requires only that the prosecutorial authorities had to have made a good-faith effort to obtain the declarant's presence at trial. *Barber v. Page*, 390 U.S. 719, 724-25 (1968). *Accord California v. Green*, 399 U.S. 149, 161-62 (1970); *Berger v. California*, 393 U.S. 314, 314-15 (1969). Thus, there is no requirement that a court order the declarant to testify for the declarant to be found unavailable in the Confrontation Clause context.

In Issa's case, the prosecutors subpoenaed Andre Miles to testify at trial, and he appeared, but persistently refused to testify. (Trial Tr. at 938-45.) Therefore, the prosecution went well beyond making a good-faith effort to obtain Miles' presence at Issa's trial, they actually obtained his presence. Miles' subsequent refusal to testify is what rendered him unavailable for Confrontation Clause purposes.

The second prong of *Roberts* requires the Court to consider whether Miles' out-of-court statements possessed "indicia of reliability" necessary for their admission into evidence *Id*. at 65-66. A decade before *Roberts*, the Supreme Court had articulated four "indicia of reliability which have been widely viewed as determinative of whether a statement may be

placed before the jury though there is no confrontation of the declarant." *Dutton v. Evans*, 400 U.S. 74, 89 (1970)(plurality). The *Dutton* factors are as follows:

> (1) whether the hearsay statement contained an express assertion of past fact, (2) whether the declarant had personal knowledge of the fact asserted, (3) whether the possibility that the statement was based upon a faulty recollection is remote in the extreme, and (4) whether the circumstances surrounding the statement make it likely that the declarant fabricated the assertion of fact.

Id. at 88-89; *see also Anthony v. DeWitt*, 295 F.3d 554, 563-64 (6th Cir. 2002)(employing the *Dutton* factors to determine the reliability of a declarant's out-of-court statements).

In *Anthony*, the Sixth Circuit applied the *Dutton* factors to out-of-court statements which "were made shortly after the crime within the confines of the husband-wife relationship, were utter voluntarily, and were against [the declarant's] penal interest." *Id*. at 560. The court found that the declarant's statements included express assertions of past fact based on the declarant's personal knowledge acquired at the scene of the murder, and that there was no realistic likelihood that the declarant's recollection was faulty because the statements were made on the evening of the murder. *Id*. at 563-64. The court also concluded that it was unlikely that the facts asserted by the declarant were false since he voluntarily made the statements to a family member. *Id.* at 564. The court held that the

declarant's statements in *Anthony* did not violate the Confrontation Clause.

Applying the *Dutton* factors to Issa's claim compels the same result. First, like the declarant in *Anthony*, Miles' statements to the Willises contained express assertions of past fact detailing his agreement with Issa to murder Maher Khriss in exchange for money, his acquisition of the murder weapon from Issa, his murder of Maher and Ziad Khriss, and his disposal of the murder weapon in the Willises' backyard. (Trial Tr. at 1100-08, 1167-70.) Second, Miles had personal knowledge of the facts he asserted because he was, for the most part, describing his own participation in the murders. *Id*. Third, the likelihood that Miles' recollection was faulty is remote because he described the events to the Willises the day after the murders. *State v. Issa*, 93 Ohio St. 3d 49, 52, 752 N.E.2d 904 (2001). Fourth, it is unlikely Miles fabricated the facts because he made them voluntarily to two people who described their relationships with Miles as "like a big brother" (Testimony of Bonnie Willis, Trial Tr. at 1087), and as "friends for about four years" (Testimony of Joshua Willis, Trial Tr. at 1163). Bonnie also testified that Miles had lived with her, her brother, and her mother on two occasions, each lasting for a couple of months, *id*. at 1087, 1194, and Joshua stated he saw Miles "just about every day" during their friendship, *id*. at 1163. In addition, both Willises testified that Miles made his statements to them in the privacy and comfort of Bonnie Willis' bedroom. *Id*. at 1100-01, 1168-69. Miles' statements were also against his penal interest, as he admitted to a murder for hire, *id*. at 1100-08, 1167-70, and rather than attempting to shift blame or divert

attention to another, Miles' attitude was one of a braggart about his role in the murders, *id*. at 1137.

The differences between Anthony's and Issa's circumstances are insignificant. First, in *Anthony*, the declarant's statements were made to his own wife, whereas in Issa's case, Miles confessed to Bonnie and Joshua Willis, two young people with whom he had lived, and who described their relationship with Miles as brotherly or very close. Even if not a blood relation, the Willises were unquestionably perceived by Miles as allies. "[S]tatements made to a family member or perceived ally, in confidence, have previously been deemed sufficiently trustworthy" so that they are admissible in spite of the absence of an opportunity to confront the declarant. *Anthony*, 295 F.3d at 564, *citing United States v. Tocco*, 200 F.3d 401, 416 (6th Cir. 2000), and *Bruton v. Phillips*, 64 F.Supp.2d 669, 680 (E.D. Mich. 1999). Second, while the declarant in Anthony made his statements on the same day as the murder, Miles did not confide in the Willises until the next day. It is impossible to make any outcome-determinative distinction between the lapses in time in the two cases, however. Thus, the results of *Anthony* compel the same result in Issa's case.

Under the law as it existed at the time of Issa's trial and direct appeal, the state court's decision respecting Issa's Confrontation Clause claim was neither contrary to nor an unreasonable application of federal law as articulated by the United States Supreme Court, as discussed above. For all of those reasons, Issa's sixth ground for relief should be denied.

Seventh Ground for Relief

In his seventh ground for relief, Issa contends his convictions are not supported by sufficient evidence and that they are against the manifest weight of the evidence. (Petition, Doc. No. 62 at 34-36.) Issa's argument relies upon the success of his first, tenth, and eleventh grounds for relief. As it is recommended that each of those grounds be denied as meritless, the same follows for Issa's claims in the instant ground for relief.

Eighth Ground for Relief

In his eighth ground for relief, Issa claims his trial counsel provided ineffective assistance in the mitigation phase because they did not present the testimony of jailers who observed Issa in confinement as he awaited trial. (Petition, Doc. No. 62 at 37-38.) Respondent acknowledges the claim has been preserved for habeas corpus review, but argues it is nevertheless meritless. (Return of Writ, Doc. No. 28 at 73-75.) In his traverse, Issa contends that but for two incidents during his nine-month incarceration prior to trial, he had no disciplinary actions taken against him, and that he was prejudiced by his attorneys' failure to bring that information to the attention of the jury. (Doc. No. 41-1 at 71-74.)

As Respondent has noted, Issa presented the instant claim to the state court as his sixteenth claim for relief in his petition for post-conviction relief. (Appendix, Vol. 5 at 148-50.) The post-conviction trial court rejected the claim, finding the evidence Issa claims should have been presented in the sentencing phase presented nothing more than an alternative theory of mitigation. (Appendix, Vol. 5 at 309.) The court of appeals subsequently affirmed denial of

Issa's claim, reasoning that Issa had failed to present evidence from outside the record to support the claim as is required in post-conviction proceedings in Ohio. A petitioner in a post-conviction proceeding must present sufficient documentary evidence outside the record to show entitlement either to the relief requested, or to an evidentiary hearing at which such evidence may be developed. *State v. Jackson*, 64 Ohio St.2d 107, 111-12, 413 N.W.2d 819 (1980). The rule in *Jackson* is an adequate and independent state ground for procedural default purposes. *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004), *citing Lorraine v. Coyle*, 291 F.3d 416, 426 (6th Cir. 2002). Consequently, Respondent could have argued that Issa's claim is procedurally defaulted because the state court of appeals relied on an independent and adequate state procedural rule when it overruled his assignment of error. No such argument has been made, however, freeing this Court to address Issa's claim *de novo*. "If deference to the state court is inapplicable . . ., we 'exercise our independent judgment' and review the claim *de novo*." *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003), *quoting Hain v. Gibson*, 287 F.3d 1224, 1229 (10th Cir. 2002).

Issa argues that valuable mitigation evidence was omitted from his trial because his trial counsel failed to investigate, discover, and present evidence of his alleged good behavior while incarcerated awaiting trial. (Petition, Doc. No. 62 at 37-38; Traverse, Doc. No. 41-1 at 70-74.) The state court of appeals correctly observed that Issa did not present any evidence from outside the record to support his claim in post-conviction. (Appendix, Vol. 5 at 148-50.) Nor has Issa presented any evidence in these proceedings upon which this Court might find his claim to be

viable. The exhibits from his evidentiary hearing do not contain any affidavits from any correctional officers or officials who were willing to testify to Issa's alleged good behavior during incarceration. Nor were Issa's trial counsel questioned about their reasons for not presenting Issa's conduct during incarceration as mitigation evidence in the penalty phase of his trial. Consequently, all this Court has to rely on in considering Issa's claim is his own word that he had only two disciplinary actions taken against him during the time he was held between his arrest and his trial. Even if the Court were to take Issa at his word, which is not even an option in habeas corpus, presenting evidence of "good behavior" while admitting two disciplinary actions would have been of questionable value in the mitigation phase of the trial.

Because Issa has not supported his claim with evidence upon which this Court might make a determination respecting the alleged ineffectiveness of his trial counsel, his eighth ground for relief should be denied.

Ninth Ground for Relief

In his ninth ground for relief, Issa contends his appellate counsel provided ineffective assistance during his direct appeal, citing ten instances in which he claims his counsel were ineffective. (Petition, Doc. No. 62 at 38-61.) In this Court's Report and Recommendations on procedural default and statute of limitations issues, it concluded that Issa's claim was made in an amendment to his petition falling outside the AEDPA's one-year statute of limitations, on the authority of *Mayle v. Felix*, 545 U.S. 644 (2005). (R&R, Doc. No. 134 at 25-28.)

Issa has objected to this Court's recommendation that his ninth ground for relief be denied on statute of limitations grounds. (Petitioner's Objections, Doc. No. 138.) He contends that because he was without counsel for more than ten months after the AEDPA statute of limitations began to run, he is entitled to equitable tolling of the limitations period. *Id.*

The United States Supreme Court has not decided whether the AEDPA's statute of limitations is subject to equitable tolling. *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 1085 (2007). Where the parties agree that the doctrine applies, however, the Court has assumed so as well. *Id.* The Sixth Circuit Court of Appeals has held, however, that "the [AEDPA's] one-year limitation period is a statue of limitation subject to the doctrine of equitable tolling." *Dunlap v. United States*, 250 F.3d 1001, 1007 (6th Cir. 2001).

Upon the Ohio Supreme Court's April 17, 2002, denial of Issa's appeal from the state court of appeals' denial of his petition for post-conviction relief, the clock began to run on Issa's one-year time limit for filing a petition for habeas corpus in the federal court. *State v. Issa*, 95 Ohio St. 3d 1422, 766 N.E.2d 162 (2002)(table). The first indication this Court had of Issa's intent to file a petition seeking habeas corpus relief was when the Ohio Public Defender's Office filed notice of such intent, an application to proceed *in forma pauperis*, and a motion for appointment of counsel on February 18, 2003,about two months before the statute of limitations would preclude filing of the petition. (Doc. Nos. 1, 2, and 3.) Issa's motion to proceed *in forma pauperis* was granted on February 28, 2003, and on

that date counsel was also appointed to represent Issa in his habeas corpus proceedings. (Doc. No. 4.)

Appointed counsel explains that he did not receive the Ohio Public Defender's files on Issa's case until April 9, 2003, leaving him eight days to examine the ten banker's boxes of documents, identify grounds for relief, and prepare the petition for habeas corpus relief. (Petitioner's Objections, Doc. No. 138 at 3.) Despite those overwhelming obstacles, counsel was able to file what he terms a "shell" habeas petition which consisted of twenty-three grounds for relief. (Doc. No. 8.) Nevertheless, within a month and a half, habeas counsel discovered reasons to believe that Issa was provided ineffective assistance of counsel by his state appellate counsel. He requested and was granted leave to return to the state court to pursue an application to reopen his direct appeal while his habeas case was held in abeyance. (Doc. No. 15.) Pursuant to this Court's permission, Issa amended his petition to include his ineffective assistance of appellate counsel claim on January 30, 2004. (Doc. No. 26.)

First, the Court notes that "[p]arties cannot raise new arguments or issues on objection that were not presented to the Magistrate Judge." *United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998). Respondent asserted the statute-of-limitations defense in her Return of Writ (Doc. No. 28 at 76-77), but Issa never argued entitlement to equitable tolling in his response (Traverse, Doc. No. 41-1 at 75-76). Instead, Issa quotes this Court's order granting his motion to amend his petition to add a different claim wherein the Court stated that

> [A]mendment of a pleading relates back to the date of the original pleading if "the claim or defense arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . [.]" The transaction in question, of course, is Petitioner's conviction and sentence of death. His claim relating to Ohio App. R. 26(B) unquestionably arises out of that transaction and therefore the amended petition will relate back to the date the original Petition was filed.

(Doc. No. 25 at 2.) For reasons stated in the original Report and Recommendations, Issa's argument was rejected. (Doc. No. 134 at 25-28; *see also* Doc. No. 132.) Since Issa never argued that he should be entitled to equitable tolling in his traverse, he cannot do so now through his objections. *Waters, supra.*

Issa cites *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), as approving the technique of filing a "protective" habeas petition and returning to the state court to exhaust a state remedy, then amending the petition to include the newly exhausted claim. (Petitioner's Objections, Doc. No. 138 at 4.) The procedure suggested by *Pace*, however, does not negate *Mayle*'s requirement that the newly-exhausted claim "relate back" to the original timely petition. In fact, *Pace*'s reliance on *Rhines v. Weber*, 544 U.S. 269, 278 (2005), presumes that a "protective" petition is one that is filed prior to expiration of the limitations period and includes the unexhausted claim or claims, rendering *Mayle*'s analysis of the term "relation back" essentially irrelevant in that situation. *See Pace*, 544 U.S. at

416. Issa correctly notes that this Court has previously stated that there was no need for him to amend his petition to include the ineffective assistance of appellate counsel claim prior to his return to the state courts to exhaust the claim. (Petitioner's Objections, Doc. No. 138 at 4-5, 8.) Practically, however, Issa would be in no better position had the Court required him to amend his habeas petition before returning to the state courts. By that time, the statute of limitations for filing his habeas corpus petition had run, and the amended claim would be out of time for the same reasons explained in this Court's discussion of *Mayle* in the original Report and Recommendations. (Doc. No. 134 at 25-28.)

The United States Supreme Court has held that to be entitled to equitable tolling, a habeas petitioner must show that (1) he has been diligently pursuing his rights, and (2) some extraordinary circumstance stood in they way of his filing within the AEDPA's one-year limitations period. *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 1085 (2007). After *Lawrence*, however, the Sixth Circuit has continued to evaluate claims of entitlement to equitable tolling using the five-factor test it first set out in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), and reaffirmed after the AEDPA's passage in *Dunlap v. United States*, 250 F.3d 1001 (6th Cir. 2001). *See Allen v. Bell*, No. 05-6910, 2007 WL 2962586 (6th Cir. Oct. 10, 2007); *Craig v. White*, No. 05-1821, 2007 WL 1192408 (6th Cir. Apr. 23, 2007).

The five-factors of the *Dunlap* test are as follows: (1) the petitioner's lack of notice of the AEDPA's filing requirement; (2) the petitioner's lack of

constructive knowledge of the filing requirement; (3) the diligence exercised in pursuing his rights; (4) the absence of prejudice to the respondent, and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. 250 F.3d at 1008. Issa does not argue that he was without notice of or unaware of AEDPA's filing requirements, either actually or constructively, so the first, second, and fifth factors are not in contention. The fourth factor's relevance to Issa's case is not apparent until he has demonstrated that one of the *Dunlap* factors might warrant equitable relief. *Allen v. Yukins*, 366 F.3d 396, 401, 403 (6th Cir. 2004).

Issa's argument respecting the remaining diligence factor is essentially that the Ohio Public Defender's Office, which represented him in his state post-conviction proceedings, the completion of which triggered the running of the AEDPA's statute of limitations, prevented the appointment of habeas counsel until two months before his petition was due. (Petitioner's Objections, Doc. No. 138 at 2-4.) In a copy of an April 22, 2002, letter to the Consul of the Jordanian Embassy, assistant Ohio public defender Richard Vickers acknowledged that the public defender's office had taken on the responsibility of requesting counsel to be appointed for Issa in his federal habeas corpus proceedings. (Doc. No. 138-2 at 1.) The request was not made to the federal court until February of 2003, however, depriving counsel who was ultimately appointed of approximately ten months that could have been used to prepare Issa's habeas corpus petition. Instead, appointed counsel had less than two months to do so.

There is no doubt that notice of intent to file the habeas petition, the request to proceed *in forma pauperis*, and the request that counsel be appointed for the federal proceedings should have been filed at the earliest possible moment to ensure that habeas counsel and Issa had benefit of the full one-year limitations period in which to prepare and file Issa's habeas petition. That appointed counsel presented as thorough and well-constructed petition as he did considering the very limited time he had to prepare it is a tribute to his unquestionable dedication and efficiency. *Lawrence*, however, rejected the notion that a habeas petitioner should be entitled to equitable tolling because of his attorney's omissions. 127 S.Ct. 1085. In addition, "the Eleventh Circuit has opined that ineffective assistance of counsel likely would not be grounds for equitable tolling." *Warren v. United States*, 71 F.Supp.2d 820, 823 (S.D. Ohio 1999) *citing Lee v. United States Postal Serv.*, 774 F.2d 1067, 1069 n.3 (11th Cir. 1985). "Attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence . . . ." *Howell v. Crosby*, 415 F.3d 1250, 1252 (11th Cir. 2005). No evidence has been presented to this Court suggesting that Issa made any inquiries to the Ohio Public Defender's Office about his case even though he was aware that that office was going to assist him in filing his case in the federal court. (Petitioner's Objections, Letter to Issa from Ohio Public Defender's Office dated April 22, 2002, Doc. No. 138-2 at 2.)

For all of the reasons above, the Magistrate Judge concludes that Issa is not entitled to equitable tolling respecting the addition of his ninth ground for relief to his habeas petition outside the AEDPA's one-year

statute of limitations period. Consequently, as this Court recommended before, and recommends again here, Issa's ineffective assistance of appellate claim should be denied.

Tenth Ground for Relief

In his tenth ground for relief, Issa contends that Ohio's procedure for litigating a claim of ineffective assistance of appellate counsel is unconstitutional. (Petition, Doc. NO. 62 at 62-63.) In this Court's Report and Recommendations on procedural default and statute of limitations issues (Doc. No. 134 at 29), Issa's tenth ground for relief was found to have relied upon law that has since been overruled, *see Lopez v. Wilson*, 426 F.3d 339, 352 (6th Cir. 2005); *Morgan v. Eads*, 104 Ohio St. 3d 142, 146-47, 818 N.E.2d 1157 (2004). In addition, this Court observed that *Lopez* also established that the application to reopen process in Ohio "does not give rise to any federal constitutional right cognizable on habeas," *Lopez*, 426 F.3d at 354, and that Ohio had no constitutional obligation to create the application to reopen a direct appeal procedure at all, *Lopez*, 426 F.3d at 351, *citing Coleman v. Thompson*, 501 U.S. 722, 756 (1991). Neither party has objected to this Court's determination. (Respondent's Objections, Doc. No. 137 at 2; Petitioner's Objections, Doc. No. 138 at 1.) As Issa's claim is not cognizable in habeas corpus, it should be denied.

Eleventh Ground for Relief

In his eleventh ground for relief, Issa contends his death sentence is disproportionate, arbitrary, and capricious, and consequently unconstitutional under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (Petition, Doc. No. 62

at 63-64.) Respondent argues that Issa presents an issue of state law that is not cognizable in habeas corpus, and that the Ohio courts' rejection of his claim is neither contrary to nor an unreasonable application of federal law. (Return of Writ, Doc. No. 28 at 98-104.) As one would expect, Issa contests Respondent's arguments. (Traverse, Doc. No. 41-1 at 121-26.)

Issa presented his proportionality claim to the state supreme court as his seventh proposition of law on direct appeal. (Appendix, Vol. 2 at 96-97.) That court rejected Issa's argument that his death sentence was disproportionate when compared to Linda Khriss' acquittal and Andre Miles' life sentence. *State v. Issa*, 93 Ohio St. 3d 49, 72, 752 N.E.2d 904 (2001). Instead, the court reasoned, Issa's sentence need only be compared to other cases in which a death sentence was imposed for murder for hire. *Id.*

Issa's proportionality arguments can be quickly dismissed. He contends that a comparison of his sentence to other cases in which a death sentence was imposed is constitutionally insufficient unless it also includes similar cases in which the death sentence was not imposed. (Traverse, Doc. No. 41-1 at 125-26.) It has long been recognized by the United States Supreme Court that there is no federal constitutional requirement for proportionality review in capital cases. *Pulley v. Harris,* 465 U.S. 37, 42-44 (1984). The Sixth Circuit Court of Appeals has observed that "[b]y statutorily incorporating a form of comparative proportionality review that compares a defendant's death sentence to others who have also received a sentence of death, Ohio's death penalty

regime actually adds an additional safeguard beyond the requirements of the Eighth Amendment." *Getsy v. Mitchell*, 495 F.3d 295, 306 (6th Cir. 2007). Thus, the Ohio Supreme Court's rejection of Issa's claim that Ohio's death penalty scheme is unconstitutional because it permits comparison only to other cases in which the death penalty has been imposed was in concert with rather than contrary to federal law.

Issa's claim that his sentence should be compared to the outcomes in his co-defendants' cases is likewise unavailing. There is no constitutional requirement that separately tried co-defendants' sentences be consistent with one another. *Getsy*, 495 F.3d at 307. Consequently, as troubling as it is that Issa received a death sentence while Linda Khriss was acquitted and Andre Miles, who was the actual shooter, received only life imprisonment, that result is not contrary to or an unreasonable application of federal law. Accordingly, Issa's eleventh ground for relief should be denied.

Twelfth Ground for Relief

In his twelfth ground for relief, Issa returns to mine again the vein of his trial counsel's performance in the mitigation phase of his trial. Issa contends that by failing to communicate with and direct the investigation of the mitigation specialist, his trial counsel's representation was rendered ineffective. (Petition, Doc. No. 62 at 65-68.) As an example of counsel's inadequate representation, Issa states that the mitigation specialist was unaware of the "tribal truce" until just days before the beginning of the mitigation phase of Issa's trial. *Id.* at 65. Issa also argues that an insufficient investigation was conducted into his life in Hamilton County, which

would have been a rich source of mitigation evidence. *Id*. at 66. Respondent relies upon the state court of appeals' determination that Issa failed to demonstrate prejudice from counsel's alleged errors. (Return of Writ, Doc. No. 28 at 105-7.)

Even if Issa's claims that his trial counsel failed to effectively direct the mitigation investigation are accurate, *Strickland* requires that he also demonstrate prejudice. 466 U.S. at 694. Although his failure to do so in the state court was the basis for the Ohio court of appeals' rejection of his claim, Issa makes no attempt to prove prejudice here. The only record reference Issa makes, aside from one to a juror's affidavit which is barred from consideration by the *aliunde* rule, is the affidavit of Jim Crates, the mitigation specialist obtained by Issa's trial counsel. (Petition, Doc. No. 62 at 65.) There, Crates states that "[a] great impediment to mitigation was the fear of retribution" (Appendix, Vol. 3 at 203), and yet the state court found that not one of the other post-conviction affiants stated they were cowed from testifying at the mitigation phase by the fear of retribution, *State v. Issa*, No. C-000793, 2001 WL 1635592 at *5 (Ohio App. 1st Dist. Dec. 21, 2001) (unreported). Crates also states in his affidavit that it was his "impression" that if Issa was on death row, no retribution would be taken against the Issa family members remaining in Jordan, and that he "would have liked to see a cultural expert testify" (Appendix, Vol. 3 at 203), but Crates' impressions and desires are not evidence, and they are certainly not a sufficient basis upon which to conclude that the state court's decision respecting Issa's ineffective assistance of trial counsel claim was contrary to or an unreasonable application of federal law.

The state court found Issa had not demonstrated prejudice from his trial counsel's alleged errors in communicating with and guiding the mitigation specialist in his investigation. Issa has presented no evidence from which this Court could conclude that the state court's determination was contrary to federal law. Accordingly, Issa's twelfth ground for relief should be denied.

Thirteenth Ground for Relief

In his thirteenth ground for relief, Issa claims his death sentence should be reversed because he was incompetent to assist his trial counsel in preparing for his capital case due to his limited understanding of the English language. (Petition, Doc. No. 62 at 68-69.) Although Respondent asserted a procedural default defense with respect to Issa's claim (Return of Writ, Doc. No. 28 at 108-9), this Court found that the state courts had misapplied the state procedural rule of *res judicata* to Issa's claim, and that habeas corpus review of the claim was consequently not precluded (R&R, Doc. No. 134 at 6-8). Respondent objected to this Court's conclusion (Doc. No. 137 at 3-4), contending that raising a claim of ineffective assistance of counsel due to their failure to assert his incompetence to stand trial constitutes raising the underlying competency claim itself. It does not. *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005). Thus, this Court is in a position to address Issa's claim *de novo*. *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005); *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001).

Respondent also disputed the merits of Issa's claim, arguing that Issa was both linguistically and culturally competent to stand trial. (Return of Writ,

Doc. No. 28 at 110-12.) In his traverse, Issa responds to both arguments. (Doc. No. 41-1 at 132-37.) He contends there is no evidence that he understood the "culture and customs of the American legal system." *Id*. at 133. In habeas corpus, however, it is not the absence of evidence contradicting a petitioner's claim that makes the case; rather, it is affirmative proof that the claim is meritorious that demonstrates entitlement to relief. "It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992). Issa likens his case to that in *Pate v. Robinson*, 383 U.S. 375 (1966), where the defendant's "mental alertness and understanding" during discussions with the trial judge was not enough justification to ignore the uncontradicted testimony of the defendant's "history of pronounced irrational behavior." *Id*. at 385-86. Issa urges this Court to view his alleged incompetence in the English language as the equivalent of the *Pate* defendant's irrational behavior. (Traverse, Doc. No. 41-1 at 133.)

The difference between Issa's situation and the defendant's in *Pate*, however, is that there was significant evidence in *Pate* that the defendant's psychological competence to stand trial was questionable. As the Supreme Court noted, "[t]he uncontradicted testimony of four witnesses called by the defense revealed that [the defendant] had a long history of disturbed behavior." *Pate*, 383 U.S. at 378. Issa, however, presents no reliable evidence of his alleged incompetence due to his inability to understand English that might contradict the state court's suggestion that Issa's comprehension of the

English language was demonstrated by his unsworn statement in the mitigation phase of his trial. *See State v. Issa*, 93 Ohio St. 3d 49, 67-68, 752 N.E.2d 904 (2001). In addition, Issa's trial counsel apparently found no reason to move for a competency hearing based on Issa's claimed inability to communicate effectively in English. In fact, at the evidentiary hearing, evidence was presented showing that neither trial counsel had any trouble communicating with Issa in English during their representation of him, and that Issa in fact had at least a fair command of the English language. (Deposition of Terence Landrigan, Doc. No. 60 at 35, 78; Evid. Hrg. Tr., Doc. No. 112 at 101.) The mitigation specialist also testified at the evidentiary hearing that his communication with Issa was not hampered by Issa's English. (Evid. Hrg. Tr., Doc. No. 119 at 62.)

In his state post-conviction proceedings, Issa presented his own affidavit in which he claimed not to have understood some of the goings on at his trial, but in which he also deigned to criticize the court-appointed translator's performance during Issa's brother's and mother's testimonies. (Appendix, Vol. 3 at 104.) Issa also submitted educational records from 1984-85 and 1999 showing what appear to be passing grades in English language classes. (Appendix, Vol. 3 at 184-87.) Exactly how that information supports Issa's claim that he was incompetent to stand trial because he did not understand English well enough is a mystery.

Other than Issa's own uncross-examined affidavit, there is nothing in the record to support his claim that his lack of proficiency in English rendered

him incompetent to stand trial. Accordingly, Issa's thirteenth ground for relief should be denied.

Fourteenth Ground for Relief

In his fourteenth ground for relief, Issa contends that prospective jurors' biases against Muslims and Arabs was not sufficiently explored in *voir dire* by his trial counsel, and that he was consequently deprived of the effective assistance of counsel in all phases of his trial. (Petition, Doc. No. 62 at 69-72.) He also contends that his attorneys failed to take measures to "counterbalance the biases." *Id*. Respondent recites the state court's decision on the issue, and argues it comports with rather than contradicts federal law. (Return of Writ, Doc. No. 28 at 17.)

Issa did not present his claim to the state courts on direct appeal. Instead, he appropriately brought it to the state courts through his petition for post-conviction relief. (Appendix, Vol. 5 at 157-59.) The post-conviction trial court concluded that the basis for Issa's claim was factually wrong, and that trial counsel had questioned prospective jurors about biases against Muslims and Arabs. (Appendix, Vol. 5 at 310.) Issa appealed to the state court of appeals (Appendix, Vol. 7 at 116-54), which overruled Issa's claimed error reasoning as follows:

> In his twentieth claim for relief, Issa contended that trial counsel was [sic] ineffective for failing to adequately delve into the jury's biases and prejudices about Arabs and Muslims. He acknowledged that the empanelled jurors all stated that they could follow the law. He maintained, however, that they had hidden biases that went undiscovered. The record demonstrates,

> however, that counsel did question potential jurors about potential biases against people of Issa's nationality. [Issa] did not demonstrate that any particular juror was biased against him because of his nationality. Generalized assertions in an affidavit that American jurors in general have biases against Arabs are insufficient to demonstrate prejudice. Consequently, Issa failed to demonstrate ineffective assistance of counsel in this respect.

State v. Issa, No. C-000793, 2001 WL 1635592 at *5 (Ohio App. 1st Dist. Dec. 21, 2001) (unreported). Further review was declined by the Ohio Supreme Court. *State v. Issa*, 95 Ohio St. 3d 1422, 766 N.E.2d 162 (2002)(table). Consequently, it is the court of appeals' decision to which this Court must apply the AEDPA.

Issa's ineffective assistance of counsel claim fails because the underlying claim is without merit. Preliminarily, the Court notes that Issa has not argued that his attorneys were obligated under state law to pursue questioning the jury venire on racial biases to any greater degree than they did. Instead, he relies on federal law in claiming his attorneys provided ineffective assistance, and in contending that he was entitled to more in-depth probing of the prospective jurors' racial attitudes in *voir dire*. Thus, the trio of United States Supreme Court cases governing Issa's claim is *Ham v. South Carolina*, 409 U.S. 524 (1973), *Ristaino v. Ross*, 424 U.S. 589 (1976), and *Turner v. Murray*, 476 U.S. 28 (1986).

In *Ham*, the defendant was a locally well-known black civil rights activist accused of marijuana

possession, whose defense was that law enforcement was "out to get him" because of his activism and that he had been framed. *Ham*, 409 U.S. at 525. The trial judge refused to question the prospective jurors about racial prejudice in particular, although he did ask three general questions as to bias, prejudice, and partiality. *Id.* at 526. The state courts affirmed Ham's convictions, but the United States Supreme Court reversed, reasoning that under the facts shown by the record, Ham was permitted to have the prospective jurors interrogated on the issue of racial bias. *Id.* at 527. The Court further observed that state trial courts are not required to ask any particular questions or any particular number of questions, because the federal courts' supervision over state trials is not as close under the Sixth and Fourteenth Amendments as it is over federal trials where federal courts have more exacting supervisory authority. *Id.* at 527.

In *Ristaino*, the defendant, James Ross, Jr., was a black man convicted in a state court of violent crimes against a white security guard. 424 U.S. at 589-90. He, too, requested the trial court's permission to question prospective jurors specifically about racial prejudice in addition to the customary questions about general bias or prejudice. *Id.* at 590. Citing *Ham*, the Court stated that "[t]he Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him." 424 U.S. at 594. The Court made clear that "*Ham* did not announce a requirement of universal applicability," but instead "reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood

that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.'" *Id*. at 596, *quoting* Coke on Littleton 155b (19th ed. 1832). The Court rejected Ross' argument that where a violent crime was charged and the defendant and victim are of different races, motions to *voir dire* prospective jurors on racial prejudice must be granted. *Id*. at n.8. Similarly, requiring *voir dire* on racial prejudice because of the defendant's race alone was also disfavored by the Court. *Id*. "In our heterogeneous society, policy as well as constitutional considerations militate against the divisive assumption as a *per se* rule that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Id*. In distinguishing Ham's circumstances from Ross', the Court noted that [t]he circumstances in *Ham* strongly suggested the need for *voir dire* to include specific questioning about racial prejudice," and that the mere fact that the victim and defendant were of different races was "less likely to distort the trial than were the special factors involved in *Ham*." *Ristaino*, 424 U.S. at 596-97. Tellingly, "Ross was unable to support his motion concerning *voir dire* by pointing to racial factors such as existed in *Ham* or others of comparable significance." *Ristaino*, 424 U.S. at 598.

Ten years after *Ristaino*, the Court clarified the circumstances under which *voir dire* of prospective jurors on racial bias is required in capital cases. In *Turner v. Murray*, 476 U.S. 28 (1986), the Court recognized that the discretion entrusted to the jury in a capital sentencing hearing "gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding."

476 U.S. at 37 n.8. The Court did not hold, however, that defendants are entitled to *voir dire* on racial matters in every capital case where race might conceivably be an issue. Instead, the Court noted that "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." 476 U.S. at 37.

Issa's claim, however, is not that the trial judge erred, but that his counsel were ineffective for not questioning the venire, or at least requesting to *voir dire* the venire, on possible bias against Muslims or Arabs. When presented with that question, the Seventh Circuit Court of Appeals has stated the following:

> Lear also argues that his trial lawyer rendered ineffective assistance to him by failing to take advantage of *Turner v. Murray*, 476 U.S. 28, 36-37, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), which holds that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." . . . We must ask whether this omission brought the lawyer's representation of Lear below minimum professional standards, and if so whether it is likely that the jury would not have imposed the death penalty. The Supreme Court made clear in *Turner* that the lawyer's failure to have the jurors informed of the victim's race and questioned about their feelings about interracial crime is not unprofessional, subpar representation per se. *Id.* at 37, 106 S.Ct.

> 1683. Indeed all the Court really held was that if the defense wants to quiz jurors on their reaction to the interracial character of the defendant's crime, the judge must permit this. Obviously there are tactical reasons why a lawyer would not want to direct the jurors' attention to the interracial character of the crime, and the Court recognized this. *Id.* Lear's lawyer testified that he thought he had dealt with the issue adequately by asking general questions about bias without focusing on race. Asking general questions about bias may have been a better method of eliciting reactions to the interracial character of the crime than playing up the interracial issue, especially since there is no suggestion that the crime had a racial *motive*. We are given no reason to doubt that the lawyer made the best tactical choice available to him in the tough circumstances that confronted him: a brutal murder and no real defense. . . . There is, in short, no reason to think counsel was ineffective. In any event no harm has been shown; it is exceedingly unlikely that directing the venire's attention to the interracial character of Lear's conduct would either have disposed the jury that was selected to lenity or have altered the composition of the jury in a direction favorable to him.

Lear v. Cowan, 220 F.3d 825, 829 (7th Cir. 2000). Thus, the United States Supreme Court's recognition of a capital defendant's right to *voir dire* prospective jurors on racial bias, when requested, *Turner*, *supra*, does not lead ineluctably to the conclusion that an

attorney who fails to request such *voir dire* is ineffective. *Lear*, 220 F.3d at 829.

Moreover, there is no interracial component to the murder of Maher Khriss. Issa, Maher Khriss, Ziad Khriss, and Linda Khriss were all from Jordan. Consequently, the circumstance that the Supreme Court found compelling in *Turner* is absent in Issa's case, and as was noted above, Issa's race alone does not necessitate *voir dire* of the venire on racial bias, either, *Ristaino*, 424 U.S. at 596 n.8. In addition, nothing in the record suggests that the Khrisses were Muslim, of a different religion, or of any religion at all, and in the absence of evidence of that nature, this Court makes no assumption one way or the other.

Even if that were not the case, Issa has produced no evidence to demonstrate any racial or religious bias by any of the jurors who participated in his trial. He cites to his counsel's *voir dire* of juror Kathleen Griffith, who stated that she had traveled to the Gaza Strip for two weeks.[11] (Trial Tr. at 458-59.) When asked about her feelings toward the people or the culture there, she stated it was "different," and that she had led a "sheltered life," but whether she agreed or disagreed with the way things were there, she had to respect their culture. *Id.* at 459. Griffith acknowledged that it was not her place to judge another culture, religious belief, or political belief. *Id.* It is difficult to see how her statements would be

[11] The irony of Issa's citation to Griffith's *voir dire* in the trial transcript to support of his claim that his counsel were ineffective for not questioning jurors on racial and religious bias is not lost on this Court.

evidence of prejudice when she explicitly stated the opposite.

Issa also references the post-conviction affidavit of Jack Shaheen, whom he identifies as "an expert on American biases toward Arabs and Muslims. (Petition, Doc. No. 62 at 70; Appendix, Vol. 3 at 253-262.) Aside from the uncross-examined nature of affidavits generally, Shaheen's affidavit is unaccompanied by his *curriculum vitae*, and was never notarized. As evidence, therefore, it is inadmissible.

Issa refers to his state post-conviction affidavit in which he expressed his own opinion that "Americans view Arabs as terrorists." (Appendix, Vol. 3 at 103.) Rather that proving the bias of Americans with that statement, however, Issa demonstrates his own preconceived notions of Americans by stereotyping them all as bigots.

In his deposition, trial counsel Terence Landrigan stated that he prepared for *voir dire* with respect to Issa's nationality by doing what he did in every case: he tried to be relaxed, communicate with the venire, and to get to know them as best he could. (Doc. No. 60 at 59.) He did not think nationality was a "big factor" in Hamilton County, *id.*, and Issa has produced no evidence to suggest the contrary. Trial counsel Elizabeth Agar testified at the evidentiary hearing in these proceedings that she and Landrigan chose not to focus on Issa's Arab culture in *voir dire* because they did not want to emphasize it. (Evid. Hrg. Tr., Doc. No. 112 at 150.) Thus, that decision was a strategic one.

To summarize, then, Issa's claim fails for several reasons. First, *voir dire* on racial prejudice or bias is

not required by the federal constitution in the absence of "special circumstances" justifying such questioning. *Ham v. South Carolina*, 409 U.S. 524 (1973); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Turner v. Murray*, 476 U.S. 28 (1986). Therefore, Issa was not entitled to the *voir dire* on racial bias. Second, even if he were entitled, it is not necessarily ineffective assistance for his attorneys not to have requested such *voir dire*. *Turner*, *supra*. Third, even if Issa were entitled to *voir dire* the venire on racial bias, and even if his counsel erred in not requesting the same, Issa has not demonstrated prejudice from counsel's failure to do so. The state court's decision respecting Issa's claim is neither contrary to nor an unreasonable application of federal law as determined by the United States Supreme Court, and Issa is consequently not entitled to habeas corpus relief. His fourteenth ground for relief should be denied.

Fifteenth Ground for Relief

In his fifteenth ground for relief, Issa contends his federal constitutional rights were violated by state authorities when they failed to inform him of his right of access to the Jordanian consul under the Vienna Convention on Consular Relations after he had been arrested. (Petition, Doc. No. 62 at 72-76.) In its initial Report and Recommendations, this Court concluded Issa's claim is procedurally defaulted and that Issa had not demonstrated cause for and prejudice from the default. (Doc. No. 134 at 8-11.) Neither party has objected to this Court's conclusion. (Respondent's Objections, Doc. No. 137 at 2; Petitioner's Objections, Doc. No. 138 at 1.) Even if Issa's claim were not procedurally defaulted,

however, it would be unavailing under *Medellin v. Texas*, _ U.S. _, 128 S.Ct. 1346 (2008), *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), *Breard v. Greene*, 523 U.S. 371 (1998), and *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001).[12] In either case, Issa's fifteenth ground for relief should be denied.

Sixteenth Ground for Relief

In his sixteenth ground for relief, Issa contends his trial counsel provided ineffective assistance by failing to obtain a firearms expert and an investigator, and by failing to move to suppress the evidence seized at Issa's home pursuant to a search warrant. (Petition, Doc. No. 62 at 76-78.) Respondent acknowledges the claim is preserved for habeas corpus review, but argues that Issa has not presented any specific evidence that could have been presented at trial, the absence of which deprived him of a fair trial. (Return of Writ, Doc. No. 28 at 126-30.) Without referring to any evidence in the record, Issa maintains that his counsel's failure to present the speculative findings of an unnamed firearms expert and an unnamed investigator constituted ineffective assistance. (Traverse, Doc. No. 41-1 at 159-61.) His argument respecting the unsought suppression of the

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[12] Although the United States Supreme Court assumed without deciding that Article 36 of the Vienna Convention grants foreign nationals an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification in both *Sanchez-Llamas* and *Medellin*, such does not constitute a "holding" of the Supreme Court, and consequently cannot form the basis for habeas corpus relief. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000).

evidence seized at his home is merely that his counsel "failed to test the legitimacy of the search . . . by filing a motion to suppress the 7.62 caliber bullet found" pursuant to the search warrant. *Id*. at 161.

In addressing the merits of Issa's claim on direct appeal, the state supreme court held as follows:

> [Issa] argues that his trial counsel were deficient because they failed to request funds to hire investigators and a firearms expert to assist the defense. [S]uch a motion would have been properly denied by the trial court because [Issa] would have been unable to make "a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." [*State v.*] *Mason*, 82 Ohio St. 3d 144 (1998), syllabus.
>
> . . .
>
> [Issa] contends that his trial counsel should have filed a motion to suppress the evidence of the 7.62 caliber bullet discovered during a search of his apartment. [Issa] gives no reason to suspect that the search warrant that authorized this search could have been legitimately challenged. Here, because trial counsel did not file a motion to suppress, the record is silent as to the basis for the search warrant. However, when police executed the search of [Issa's] apartment on December 5, they had probable cause to do so. By that time, police had talked to Bonnie and Joshua [Willis] regarding [Andre] Miles' confession implicating [Issa], arrested Miles and

> obtained his confession, and recovered the murder weapon and ammunition clip.
>
> Furthermore, the outcome of [Issa's] trial would have been the same even if the bullet found in [his] apartment had not been introduced as evidence, as more compelling evidence linked [Issa] to the murder weapon, for example, [Dwyane] Howard's testimony that he saw [Issa] with the murder weapon shortly before the murders and Bonnie's and Joshua's testimony [sic] that Miles told them that [Issa] supplied him with the rifle.

State v. Issa, 93 Ohio St. 3d 49, 68, 752 N.E.2d 904 (2001).

Had Issa brought the claim in the state post-conviction proceedings, he would have been in a position to supplement the record with documentation as to what evidence could have been but was not presented at trial due to trial counsel's alleged deficiencies. *See* Ohio Rev. Code § 2351.21. Issa did not do so, however. Nor did he present any such evidence at the evidentiary hearing or in any other manner in these proceedings. As was noted above, he does not refer to the record before this Court in arguing the current claim. As such, Issa has not provided this Court with any reason to doubt the correctness of the state supreme court's resolution of his claim. Since he has not demonstrated that the Ohio Supreme Court's decision is contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court, Issa's sixteenth ground for relief should be denied.

Seventeenth Ground for Relief

In his seventeenth ground for relief, Issa contends that his indictment was "returned by an improperly constituted grand jury and upon inadequately presented evidence." (Petition, Doc. No. 62 at 79.) This Court has recommended denial of Issa's claim because it is procedurally defaulted and he has not demonstrated cause for and prejudice from the default. (R&R, Doc. No. 134 at 11-13.) Neither party has objected to this Court's conclusion. (Respondent's Objections, Doc. No. 137 at 2; Petitioner's Objections, Doc. No. 138 at 1.) Even if the claim were preserved, however, Issa's claim would fail.

The United States Supreme Court has long recognized that "it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded by the State." *Hernandez v. Texas*, 347 U.S. 475, 477 (1954). That is not to say, however, that every official act which has a racially disproportionate impact is unconstitutional in the grand jury context. *Washington v. Davis*, 426 U.S. 229, 239 (1976). In *Castaneda v. Partida*, 430 U.S. 482 (1977), the Supreme Court articulated a three-part test for examining claims of racial bias in grand jury selection, which is as follows:

> [I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrperesentation of his race or of the identifiable group to which he belongs.

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the state to rebut that case.

Id. at 494-95. *See also Duren v. Missouri*, 439 U.S. 357, 363-70 (1979). The Court has also acknowledged that claims of racial discrimination in grand jury selection are cognizable in habeas corpus. *Rose v. Mitchell*, 443 U.S. 545, 556, 563-64 (1979).

Issa, however, failed to produce any evidence from which this Court could conclude that the selection of his grand jury and foreman was tainted by racial discrimination. In his petition, and again in his traverse, he makes the unsupported statement that "[a]t the time of Mr. Issa's trial, the percentages of African-American and other minorities registered to vote in Hamilton County was less than the

percentage of racial minorities composing the voting age population of Hamilton County." (Petition, Doc. No. 62 at 80; Traverse, Doc. No. 41-1 at 181.) In an attempt to support his claim that such disparities have existed throughout the history of Hamilton County, he cites to the state post-conviction affidavit of Kimberlee Gray, wherein she states that she identified the race of nineteen forepersons who served on grand juries in which capital indictments were returned. (Traverse, Doc. No. 41-1 at 165; Appendix, Vol. 4 at 68-71.) Gray's affidavit, however, does nothing to support Issa's claim of bias in the grand jury selection process, nor does it amount to a statistical study that compares the race of grand jury forepersons in capital cases in Hamilton County to the racial makeup of the population of Hamilton County. Nor does Gray's affidavit contain the dates of the capital cases referred to, so any conclusion that the information she provides cannot be considered as covering "a significant period of time," as required by *Castaneda*, *supra*. Although not cited by Issa, the Court notes that Gray's affidavit is followed in the record by over two hundred pages of what appears to be lists of individuals who served on Hamilton County grand juries from 1985 to 1990. (Appendix, Vol. 4 at 72-203.) Assuming that material's relevance to the instant claim, none of those individuals are identified by race, making the documents useless with regard to Issa's claim of racial discrimination in grand jury selection. In addition, Issa produced no evidence of the historical or current racial demographics of Hamilton County, Ohio. Finally, there is a complete lack of evidence as to the race of the twelve jurors who served on Issa's jury. For all this Court knows, they may have perfectly matched

the racial makeup of Hamilton County. Having been provided with no evidence with which to consider Issa's claim of grand jury and grand jury foreperson discrimination based on race, this Court would have recommended denial of Issa's seventeenth ground for relief even if he had preserved it for habeas review.

Eighteenth Ground for Relief

In his eighteenth ground for relief, Issa contends that prejudicial pretrial publicity deprived him of a fair trial and a fair sentencing determination. (Petition, Doc. No. 62 at 82-83.) This Court earlier recommended that Issa's claim be denied on procedural default grounds, and neither party has objected to that conclusion. (R&R, Doc. No. 134 at 13; Respondent's Objections, Doc. No. 137 at 2; Petitioner's Objections, Doc. No. 138 at 1-16.) Even if the claim were amenable to habeas corpus review, however, Issa's claim would nevertheless fail because he does not cite to any evidence of publicity given his case in his petition or his traverse. (Petition, Doc. No. 62 at 82-83; Traverse, Doc. No. 41-1 at 183-86.) Consequently, there would be no basis upon which this Court could recommend habeas corpus relief.

Nineteenth Ground for Relief

In his nineteenth ground for relief, Issa contends constitutional error resulted from the flawed grand jury foreperson selection process in Hamilton County, Ohio. (Petition, Doc. No. 62 at 83-84.) This claim, too, was found to have been procedurally defaulted, and its denial was recommended by this Court in the initial Report and Recommendations, and neither party has objected to that determination. (Doc. No. 134 at 14-15; Respondent's Objections, Doc. No. 137 at 2; Petitioner's Objections, Doc. No. 138 at

1.) For the same reasons given in this Court's discussion of Issa's seventeenth ground for relief, *supra*, the instant claim would be meritless even if it were preserved for habeas corpus review. Accordingly, this Court would recommend denial of Issa's nineteenth ground for relief even if it were preserved for habeas corpus review.

Twentieth Ground for Relief

In his twentieth ground for relief, Issa contends his constitutional right to a fair trial was violated by the trial court's failure to provide funds for an investigator to assist in his defense. (Petition, Doc. No. 62 at 84-86.) Respondent advanced a procedural default defense (Return of Writ, Doc. No. 28 at 142), but this Court has concluded that the state court did not "clearly and expressly" state its reliance on an independent and adequate state procedural rule when the claim was presented there, and that without such reliance, the claim is not procedurally defaulted for habeas corpus purposes. (R&R, Doc. No. 134 at 15-17.)

Respondent has objected to this Court's determination, contending that the Ohio Supreme Court's discussion of the merits of Issa's claim did not negate its "conclusion" that the claim was waived on procedural grounds. (Respondent's Objections, Doc. No. 137 at 4-5.) Respondent's argument is beside the point. The problem is not the state court's discussion of the merits of Issa's claim, or any effect that discussion might have on the procedural "conclusion" that preceded it. The problem is that the state court did not clearly and expressly rely upon the state procedural rule, a prerequisite to any consideration of whether a subsequent discussion of

the claim's merits has affected a procedural default in the state court. Thus, Respondent has not persuaded this Court that it erred in finding Issa's twentieth ground for relief preserved for habeas corpus review was erroneous. Accordingly, the claim's merits will be addressed.

Issa argues that his defense was hamstrung by the lack of funds to obtain an investigator who might have been able to determine the manufacturer of the murder weapon, interview witnesses including Linda Khriss, gather evidence from the Willis residence, and take photographs that could have been used to impeach the testimony of the Willises. (Petition, Doc. No. 62 at 85.) When he presented the claim to the Ohio Supreme Court on direct appeal (Appendix, Vol. 2 at 99), he was of course prohibited from supplementing the record with the evidence he now claims his trial counsel should have discovered with the help of an investigator.[13] Ohio R. App. Proc. 9(A), 16(A)(3). Confined to the record as it was, the state court concluded that even if Issa's attorneys had requested funds for an investigator, the trial court would have been justified in denying the request. *State v. Issa*, 93 Ohio St. 3d 49, 63, 752 N.E.2d 904 (2001).

Issa never mentions the state court's opinion in his argument, nor does he contend it is contrary to or an unreasonable application of federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d). Furthermore, Issa has not

[13] In these proceedings, Issa has not claimed to have raised the instant issue in his state post-conviction proceedings, where he would have been permitted to supplement the record with support for his argument.

presented this Court with a reason to think the name of the gun manufacturer is relevant to his conviction or sentence, that the named and unnamed witnesses he claims should have been interviewed would have provided information helpful to his defense, or that photographs would have been useful, and how they would have been useful, in impeaching the Willises' testimonies. Instead, he presents this Court with conjecture, absent any reference to a place in the record where support for his claim might be found. Without such support, it is impossible for this Court to conclude that Issa is entitled to habeas corpus relief. Accordingly, his twentieth ground for relief should be denied.

Twenty-first Ground for Relief

In his twenty-first ground for relief, Issa contends he was denied a fair trial as a result of the admission of gruesome, inflammatory, and cumulative photographs at trial. (Petition, Doc. No. 62 at 86-87.) Respondent acknowledges the claim is preserved for habeas corpus review, but argues that the state supreme court's rejection of Issa's claim is consistent with rather than contrary to federal law. (Return of Writ, Doc. No. 28 at 146-50.)

The Ohio Supreme Court discussed Issa's claim at length when he presented it on direct appeal. *State v. Issa*, 93 Ohio St. 3d 49, 64-65, 752 N.E.2d 904 (2001). That court compared several photographs admitted at trial and concluded that they were not cumulative or repetitive, and also found their probative value to be greater than the danger of material prejudice to Issa. *Id.* at 65. From the Ohio court's comments about the photographs, it is clear that the images were a part of the record and that the state court had

them available for viewing. This Court does not have that advantage, as the photographs are not a part of the record in these proceedings. Thus, this Court is unable to evaluate the state court's findings with regard to the relative gruesomeness, repetitiveness, or cumulative nature of the photographs. Moreover, Issa does not explain how the state court's findings and conclusions are contrary to or an unreasonable application of federal law. Because Issa has failed to demonstrate entitlement to habeas corpus relief, therefore, his twenty-first ground for relief should be denied.

Twenty-second Ground for Relief

In his twenty-second ground for relief, Issa contends the Ohio requirement that mitigating factors must be proved by a preponderance of the evidence before they may be weighed against aggravating circumstances prevents the jury from considering relevant mitigating evidence. (Petition, Doc. No. 62 at 87-89.) Respondent admits the claim is preserved, but argues it is meritless. (Return of Writ, Doc. No. 28 at 151-53.) Issa admits that the same claim has been rejected by the United States Supreme Court in *Delo v. Lashley*, 507 U.S. 272, 275-77 (1993), but states it is presented to preserve it for further review**.** (Petition, Doc. No. 62 at 88; Traverse, Doc. No. 41-1 at 195.) As this Court has no authority to grant habeas corpus relief where the state court's resolution of a claim is neither contrary to nor an unreasonable application of federal law as determined by the United States Supreme Court, and since Issa recognizes such law does not presently support his position, *see Walton v. Arizona*, 497 U.S. 639, 649-50 (1990), *overruled on other grounds*, *Ring*

v. Arizona, 536 U.S. 584, 609 (2002), his twenty-second ground for relief should be denied.

Twenty-third Ground for Relief

In his twenty-third ground for relief, Issa contends he was deprived of a fair trial by the trial court's erroneous instructions to the jury. (Petition, Doc. No. 62 at 89-93.) This Court has determined that Issa's claim has been procedurally defaulted, and that he failed to demonstrate cause for the default or prejudice therefrom. (R&R, Doc. No. 134 at 17-20.) Neither party has objected to this Court's conclusion. (Respondent's Objections, Doc. No. 137 at 2; Petitioner's Objections, Doc. No. 138 at 1.) Accordingly, Issa's claim should be denied.

Even if Issa had preserved the issue for habeas corpus review, however, it would fail. Issa contends that the jury instructions in the penalty phase of his trial created an unconstitutional presumption in favor of a death verdict by providing the jurors with unfettered discretion in making a sentencing recommendation. (Petition, Doc. No. 62 at 89-93.) To support his claim in the state post-conviction court, he submitted an affidavit by Michael Geis dated September 7, 1994, well before Issa's trial in 1998. (Appendix, Vol. 3 at 217-52.) No *curriculum vitae* accompanies Geis' affidavit, nor are his qualifications to render an expert opinion included in the body of his affidavit. *Id.* The only indication of Geis' qualifications is his own identification of himself as a professor of linguistics at an unnamed college or university on the signature page of his affidavit. *Id*.

at 252.[14] Furthermore, Issa did not seek to present Geis as a witness in these proceedings, so Geis' opinions respecting any presumption in favor of death verdicts contained in the Ohio Jury Instructions has not been subjected to cross-examination. For those reasons, Geis' affidavit would be entitled to little weight in this Court's consideration of Issa's claim, even if the claim were preserved for habeas corpus review.

Issa's twenty-third ground for relief is procedurally defaulted without excuse, and meritless; it should be denied.

Twenty-fourth Ground for Relief

In his twenty-fourth ground for relief, Issa contends Ohio's statutory definition of "reasonable doubt" is an inadequate standard with which to impose a death sentence. (Petition, Doc. No. 62 at 93-97.) The parties agree that the claim is preserved for habeas corpus review. (Petition, Doc. No. 62 at 96-97; Return of Writ, Doc. No. 28 at 158.) The claim, however, is indistinguishable from identical or similar claims repeatedly considered and rejected by the Sixth Circuit Court of Appeals. *White v. Mitchell*, 431 F.3d 517, 533-34 (6th Cir. 2005); *Buell v. Mitchell*, 274 F.3d 337, 366 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417, 437 (6th Cir. 2001).

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[14] It is noted that Issa identifies Geis as a professor of linguistics at The Ohio State University (Petition, Doc. No. 62 at 89), but writing so in a habeas corpus petition does not constitute proof of the assertion, nor does Geis' title alone, even if accurate, establish him as an expert under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), criteria.

Consequently, Issa's twenty-fourth ground for relief should be denied.

Twenty-fifth Ground for Relief

In his twenty-fifth ground for relief, Issa contends the Ohio death penalty statutory scheme is unconstitutional for a myriad of reasons. (Petition, Doc. No. 62 at 97-111.) Respondent acknowledges the claim is preserved for habeas corpus review, but argues it is meritless. (Return of Writ, Doc. No. 28 at 160-77.)

When Issa raised the instant claim as his fifteenth proposition of law on direct appeal, the Ohio Supreme Court found that each of the arguments Issa made had been rejected in its previous decisions. *State v. Issa*, 93 Ohio St. 3d 49, 69, 752 N.E.2d 904 (2001). The court summarily overruled Issa's claim. *Id*.

Issa first contends that Ohio's statutory scheme allows unfettered prosecutorial discretion in determining whether to capitally indict a defendant which, he argues, violates the prohibitions against arbitrary, discriminatory, and mandatory death sentences, citing *Furman v. Georgia*, 408 U.S. 238 (1972), and *Woodson v. North Carolina*, 428 U.S. 280 (1976). (Petition, Doc. No. 62 at 98.) The Supreme Court of the United States held in *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), that such "'discretionary stages' do not implicate the concerns expressed in *Furman*." *Wickline v. Mitchell*, 319 F.3d 813, 824 (2003), *see also Buell v. Mitchell*, 274 F.3d 337, 367-68 (6th Cir. 2001) (rejecting claim that Ohio's death penalty statutory scheme creates a mandatory death penalty and allows trial courts to apply the death

penalty in an arbitrary, capricious, and discriminatory manner).

Next, Issa argues that the death penalty is neither the least restrictive nor the most effective means of deterring crime. (Petition, Doc. No. 62 at 99.) The only federal law Issa cites in support of his argument is *Shelton v. Tucker*, 364 U.S. 479 (1960), which he states stands for the proposition that "where fundamental rights are involved, personal liberties cannot be broadly stifled when the end can be more narrowly achieved." *Id.* at 488. That case is inapposite, however, as it involved school teachers' First Amendment right to association rather than the Fourteenth Amendment's Due Process Clause. There is no federal constitutional requirement that death be the least restrictive or the most effective means of deterring crime before it may be imposed. Instead, "in rejecting an argument that capital punishment is not the least restrictive or most effective means of furthering societal interests, the Supreme Court recognized that retribution, deterrence, and incapacitation of dangerous offenders are legitimate societal interests supporting capital punishment." *Jamison v. Collins*, 100 F. Supp. 2d 647, 760 (S.D. Ohio 2000), *citing Gregg v. Georgia*, 428 U.S. 153, 183-86 (1976).

Issa also contends the Ohio statutory scheme is unconstitutional because it does not require the prosecutor to demonstrate the absence of mitigating factors. (Petition, Doc. No. 62 at 100.) The United States Supreme Court has never stated such a requirement is necessary under the Eighth Amendment, however. *See Jamison*, 100 F. Supp. 2d at 764.

Next, Issa argues that Ohio's scheme is unconstitutional because the statutory mitigating factors are vague. (Petition, Doc. No. 62 at 100.) Federal review of vagueness claims such as Issa's is quite deferential due to the insusceptibility of the proper degree of definition to a mathematically precise determination. *Tuilaepa v. California*, 512 U.S. 967, 973 (1994). A mitigating factor "is not unconstitutional if it has some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" *Id.*, *quoting Jurek v. Texas*, 428 U.S. 262, 279 (1976)(White, J., concurring in judgment). Issa attacks the statutory mitigating factors as a whole, and does not specify precisely how any factor is lacking in a "common-sense core of meaning." Consequently, he has not demonstrated that the mitigating factors set forth in the Ohio death penalty statutory scheme are unconstitutionally vague.

Issa contends Ohio's death penalty statutes fail to provide juries with adequate guidelines with which to consider and weigh the aggravating circumstances against the mitigating factors. (Petition, Doc. No. 62 at 100-1.) On the authority of *Tuilaepa v. California*, 512 U.S. 967, 978-80 (1994), Issa's argument fails.

Issa next argues that Ohio's scheme is unconstitutional because it requires proof of the aggravating circumstances in the guilt phase of a capital trial. (Petition, Doc. No. 62 at 101.) His claim should be denied on the authority of *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988).

Likewise, Issa's contention that Ohio's death penalty scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a

jury trial (Petition, Doc. No. 62 at 102), fails on the authority of *Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978).

Next, Issa argues that Ohio's catch-all mitigating factor set forth in Ohio Rev. Code § 2929.04(A)(7) unconstitutionally permits the sentencer to convert what should be mitigating evidence into a non-statutory aggravating circumstance. (Petition, Doc. No. 62 at 103.) In *Johnson v. Texas*, 509 U.S. 350, 368 (1993), however, the United States Supreme Court stated that "the fact that a juror might view the [mitigating] evidence . . . as aggravating, as opposed to mitigating, does not mean that the rule of *Lockett* [*v. Ohio*, 438 U.S. 586 (1978)] is violated." Instead, "as long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." *Johnson*, 509 U.S. at 368, *quoting Graham v. Collins*, 506 U.S. 461, 475 (1993).

Issa's next contention is that the Ohio death penalty scheme does not fulfill the constitutional requirement of narrowing the class of individuals eligible for the death penalty. (Petition, Doc. No. 62 at 104.) On the authority of *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988), Issa's claim should be denied. The same is true of Issa's claim that defendants found guilty of felony-murder are treated more harshly than murderers who kill with prior calculation and design. (Petition, Doc. No. 62 at 105-6.) Along those same lines, Issa argues that Ohio's statutory scheme is unconstitutional because the aggravating circumstance set forth in Ohio Rev. Code § 2929.04(A)(7) merely repeats an element of the offense of aggravated murder, automatically

qualifying a the offender for a death sentence. (Petition, Doc. No. 62 at 105.) That argument should be rejected on the authority of *Tuilaepa v. California*, 512 U.S. 967, 917-72 (1994), and *Lowenfield*, *supra.*

Next, Issa contends that Ohio's death penalty statutes are unconstitutional because a statutory aggravating circumstance subsumes a mitigating factor, skewing the weighing of the mitigating factors and aggravating circumstances toward a death sentence. (Petition, Doc. No. 62 at 107-8.) The Sixth Circuit Court of Appeals has found that same argument meritless. *Cooey v. Coyle*, 289 F.3d 882, 927-28 (6th Cir. 2002).

Issa also argues that the Ohio scheme is unconstitutional because it does not require the sentencer to identify or articulate the existence of mitigating factors and aggravating circumstances. (Petition, Doc. No. 62 at 109-10.) Responding to the same claim in a different case, our sister court in the Northern District stated as follows:

> While the Supreme Court does "require that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," *Gardner v. Florida*, 420 [sic] U.S. 349, 361 (1977), there is no actual criterion stating the trial judge must identify and articulate the specific factors used to formulate the decision. Furthermore, Ohio Revised Code § 2929.03(F) requires that a trial judge make a written finding as to the existence of specific mitigating factors and aggravating circumstances, and why the aggravating circumstances outweigh the

> mitigating factors. By making a record of these determinations, the appellate court is able to make an "independent determination of sentence appropriateness." *State v. Buell*, 22 Ohio St.3d 124, 137, 489 N.E.2d 795 (1986), cert. denied, 479 U.S. 871, 107 S.Ct. 240, 93 L.Ed.2d 165 (1986). Thus, no constitutional infirmity exists.

Otte v. Houk, No. 1:06CV1698, 2008 WL 408525 at *49 (N.D. Ohio Feb. 12, 2008)(slip copy). Issa's claim suffers the same fate.

Issa also makes the familiar argument that Ohio's statutory scheme providing for proportionality review is constitutionally flawed because the comparison includes only other cases in which the death penalty was imposed, not those in which a lesser sentence resulted. (Petition, Doc. No. 62 at 109-10.) Proportionality review is not constitutionally required, however, *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), and the Sixth Circuit has observed that states consequently have "great latitude in defining the pool of cases used for comparison." *Buell v. Mitchell*, 274 F.3d 337, 369 (6th Cir. 2001). Issa has not demonstrated that Ohio's proportionality review in capital cases is contrary to or a unreason able application of federal law as established by the United States Supreme Court.

Having found none of Issa's claims respecting the constitutionality of Ohio's death penalty statutes meritorious, his twenty-fifth ground for relief should be denied.

Twenty-sixth Ground for Relief

In his twenty-sixth ground for relief, Issa contends his trial counsel provided ineffective assistance when they failed to conduct an adequate mitigation investigation. (Petition, Doc. No. 62 at 111-12.) Specifically, Issa claims his trial counsel should have presented the testimonies of Johnny Floyd, Rayshawn Johnson, and Gary Hughbanks, all inmates who could have testified that Andre Miles implicated Issa in the murder to get even with Issa after a disagreement. *Id*. Respondent acknowledges the claim is preserved for habeas corpus review, but argues it is nevertheless without merit. (First Amended Return of Writ, Doc. No. 35 at 2-7.)

Issa raised his claim in his state post-conviction proceedings as his twenty-third claim for relief. (Appendix, Vol. 5 at 164-65.) The post-conviction trial court concluded that the decision to call a witness is one of trial strategy, and that Issa's counsel were not ineffective for failing to present Johnson's and Hughbanks' testimonies at Issa's trial. (Appendix, Vol. 5 at 311.) On appeal, the state court of appeals resolved the claim as follows:

> In his twenty-third claim for relief, Issa contended that counsel was [sic] ineffective for failing to present the testimony of two inmates who were Miles's cellmates. They stated in their affidavits that they would have testified that Miles had told them that he had implicated Issa in the murder plot as revenge for an earlier disagreement. The decision whether to call a witness involves trial strategy, and, absent prejudice, the failure to call a witness does not constitute ineffective

> assistance of counsel. In this case, counsel presented the testimony of another witness who testified to the same facts. The presentation of additional witnesses on the issue would have been cumulative, and Issa did not demonstrate that the failure to call these witnesses prejudiced the defense. Accordingly, he failed to demonstrate ineffective assistance of counsel.

State v. Issa, No. C-000793, 2001 WL 1635592 at *6 (Ohio App. 1st Dist. Dec. 21, 2001) (unreported). The Ohio Supreme Court later declined jurisdiction over Issa's further appeal. *State v. Issa*, 95 Ohio St. 3d 1422, 766 N.E.2d 162 (2002)(table). Thus, to warrant habeas corpus relief, Issa must demonstrate that the state court of appeals' decision was contrary to or an unreasonable application of federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

Issa's counsel presented the testimony of Johnny Floyd in the guilt phase of Issa's trial. (Trial Tr. at 1387-1401.) Floyd testified that he had been incarcerated with Miles while Miles' case was pending, and that Miles told him he wanted to "get back" at Issa because of a prior dispute. *Id*. at 1388-89. Because Floyd testified, and because the substance of his testimony at trial is precisely what Issa now contends should have been presented, his counsel were not ineffective. Issa's argument that counsel failed to bolster Floyd's testimony in the penalty phase with the testimonies of Johnson and Hughbanks is unavailing. (*See* Traverse, Doc. No. 41-1 at 208.) The jury had already determined that Floyd's testimony was either not credible or not

worthy of significant weight, or both, as is apparent from their guilty verdict on all counts in the first phase of Issa's trial. There is no reason to believe that the jury would have accepted as true and weighty evidence in the penalty phase what they had already rejected in the guilt phase.

At the evidentiary hearing in these proceedings, Issa presented Rayshawn Johnson's testimony. (Evid. Hrg. Tr., Doc. No. 112 at 56-67.) Johnson was also incarcerated with Miles while Miles was awaiting trial on the Maher and Ziad Khriss murder charges. *Id.* at 57. Johnson testified that Miles admitted to having murdered the Khriss brothers, and said he wanted to implicate Issa and Linda Khriss because "he didn't want to go down by himself." *Id.* at 58. Although Johnson stated he had no independent recollection of receiving it, he identified a letter purportedly written to him by Miles, which Johnson understood to be saying that Miles believed he should be on death row himself rather than Issa. *Id.* at 60, 65-66.

That Miles did not want to "go down by himself" does not necessarily mean that his confession implicating Issa was in any way false. It could just as well mean that he did not intend to take responsibility for killings that were not entirely his own doing without the involvement of any others. In other words, Miles' statement to Johnson does not suggest that Miles acted alone. Similarly, assuming the authenticity of the letter about which Johnson testified at the evidentiary hearing, Miles' statement that he should be on death row rather than Issa could very well mean that Miles felt he was the more culpable given Issa's role as the middleman, and

Miles' own role as the actual killer. As such, even if Johnson's testimony and the letter had been produced at trial, it is highly unlikely they would have affected the outcome of Issa's trial.[15]

Issa also faults his trial counsel's representation for their failure to produce Gary Hughbanks' testimony. (Petition, Doc. No. 62 at 112.) Hughbanks submitted an affidavit in Issa's state post-conviction proceedings in which he states he was housed with Miles when Miles was awaiting trial. In it, he describes a conversation with Miles in which Miles described what happened on the night of the Khrisses' murders. (Appendix, Vol. 5 at 93-94.) Hughbanks stated that Miles told him he had made a plan to rob Maher Khriss, and that he had shot and killed both Khriss brothers. *Id*. The only mention of Issa in Hughbanks' affidavit are Hughbanks' statements that "Miles blamed his incarceration on Issa, and he thought that Issa spoke to someone about the crime," and "I had spoken briefly with Ahmed [sic] Issa while I was in jail . . . ." *Id*. Putting aside the uncross-examined nature of Hughbanks' affidavit, and assuming the truth of the matters asserted therein, testimony consistent with the substance of the affidavit would not have affected the outcome of Issa's penalty phase hearing. Miles did not tell Hughbanks that Issa was not also involved, or that Issa's role in the murders was less than what

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[15] It is noted that the letter purporting to be from Miles to Rayshawn Johnson is undated, but from its contents, was written after Issa's trial was completed. (Evid. Hrg. Petitioner's Exhibit 4 (marked "Plaintiff's Exhibit 4).) Therefore, the letter itself would not have been available to Issa's trial counsel during their representation of Issa.

the jury had already determined it to have been in the guilt phase of the trial. Thus, Issa's counsel were not ineffective for failing to present Gary Hughbanks' testimony in the penalty phase of Issa's trial.

Issa has not demonstrated trial counsel error or prejudice resulting from their failure to present the testimonies of Johnny Floyd, Rayshawn Johnson, and Gary Hughbanks at trial, nor has he persuaded this Court that the state court's rejection of his claim in post-conviction is contrary to or an unreasonable application of federal law as determined by the United States Supreme Court. Accordingly, his twenty-sixth ground for relief should be denied.

It should be noted that Respondent has challenged this Court's statement in its initial Report and Recommendations (Doc. No. 134), that Respondent had not raised a statute of limitations defense with regard to Issa's twenty-sixth ground for relief. (Respondent's Objections, Doc. No. 137 at 12-14.) The Court's statement is true. Respondent argues, however, that mention of a possible but ultimately eschewed statute of limitations defense in her response to Issa's request to amend his petition for a second time to include his twenty-sixth claim counts as actually raising the defense. (Respondent's Objections, Doc. No. 137 at 12-14, referencing Respondent's Reply to Petitioner Issa's Motion for Leave to File His Second Amended Petition for Writ of Habeas Corpus, Doc. No. 32 at 2-3.) In addition, Respondent explains that this Court's order for additional briefing on the effect of *Mayle v. Felix*, 545 U.S. 644 (2005) (Doc. No. 131), was limited to an earlier amendment to the petition and precluded addressing the case's effect on Issa's twenty-sixth

claim. (Doc. No. 137 at 12-13.) There was a good reason for that. This Court has never been inclined to order additional briefing on the effect of a new and binding case interpreting a statute of limitations issue where no statute of limitations defense has been advanced. In noting that she had considered and rejected a statute of limitations defense respecting Issa's twenty-sixth ground for relief, and by expressly stating she did not oppose allowing Issa to amend his habeas petition to include the claim (Doc. No. 32), Respondent waived her opportunity to claim that the statute of limitations barred Issa's twenty-sixth claim. In other words, advising the Court that she considered and rejected a defense is not the same as asserting the defense. Moreover, defenses are raised in pleadings, not in responses to motions or objections.

Twenty-seventh Ground for Relief

In his twenty-seventh ground for relief, Issa contends his appellate counsel were ineffective because one of them labored under a conflict of interest caused by his appointment to represent Andre Miles in his appeal while the lawyer also represented Issa. (Petition, Doc. No. 62 at 113-15.) Respondent advanced procedural default and statute of limitations defenses (Second Amended Return of Writ, Doc. No. 73 at 2-5), but both were rejected in this Court's previous Report and Recommendations (Doc. No. 134 at 20-23, 29-31).

Respondent has objected to this Court's conclusions respecting procedural default of Issa's claim and its timeliness. (Doc. No. 137 at 5-12.) Respondent argues that the procedural rule upon which the state court relied in rejecting Issa's

application to reopen his direct appeal in which he presented the instant claim was firmly established and regularly followed in Ohio courts at the time the rule was applied in Issa's case. (Respondent's Objections, Doc. No. 137 at 7-9.) Respondent cites *Monzo v. Edwards*, 281 F.3d 568, 577-78 (6th Cir. 2002) and *Richey v. Mitchell*, 395 F.3d 660, 680 (6th Cir. 2005) *rev'd on other grounds Bradshaw v. Richey*, 546 U.S. 74 (2005), for the proposition that whether a state procedural rule was firmly established and regularly followed so as to preclude habeas corpus review in the federal courts is determined by examining the state of the rule at the time it was applied in the habeas petitioner's case. (Respondent's Objections, Doc. No. 137 at 7.) This Court does not disagree with that proposition, but the recommendation that Issa's twenty-seventh ground for relief should survive Respondent's procedural default defense is not contrary to either *Monzo* or *Richey*. Moreover, those cases are not in conflict with *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2006), as Respondent suggests.

In *Monzo*, the defendant's application to reopen his direct appeal was filed on May 8, 1998, and denied by the state court the following month. 281 F.3d at 574, 578. In *Richey*, the application to reopen the direct appeal was filed in April 1994, and the court of appeals' denial of the application was affirmed by the Ohio Supreme Court in August 1995. 395 F.3d at 671; *State v. Richey*, 73 Ohio St. 3d 523, 653 N.E.2d 344 (1995). Thus, the state courts applied the state procedural rule respecting applications to reopen a direct appeal in both *Monzo* and *Richey* at a time that *Franklin* recognized the Ohio Supreme Court had been regularly enforcing the rule's

timeliness requirements. *Franklin*, 434 F.3d at 420 (citing nine cases in which the rule's timeliness requirements were enforced, spanning the years between 1995 and 2000). Beginning in 2000, however, the Ohio Supreme Court stopped consistently enforcing the timeliness requirements and began addressing the merits of the claims asserted in applications to reopen direct appeals, many times in spite of the intermediate courts of appeals' rejection of the claims on timeliness grounds. *Id*. at 420-21 (citing nineteen Ohio Supreme Court decisions from 2000 to 2004 in support). In 2004, the state supreme court enforced the timeliness requirement in three cases cited by the Sixth Circuit. *Id*. at 421. Issa filed the application to reopen his direct appeal in early 2005, shortly after the Ohio Supreme Court began to enforce the timeliness provision, and the state court denied it on June 29, 2005. (R&R, Doc. No. 134 at 21.) After several years of not enforcing the timeliness requirement, however, beginning to enforce it again in three cases is insufficient to establish the rule as one that is firmly established and regularly followed for procedural default purposes.

Furthermore, Respondent ignores this Court's determination that Issa's return to the state court to pursue reopening his direct appeal was futile from the beginning, as the state's rules respecting reopening appeals does not contemplate or provide for second or successive applications. *State v. Issa*, 106 Ohio St. 3d 1407, 830 N.E.2d 342 (2005)(table.) Thus, even were this Court to agree with Respondent's arguments on the untimeliness of Issa's application, the futility of his return to the state courts would still permit habeas corpus review

of his claim. See 28 U.S.C. § 2254(c). Since Issa's claim arose during the pendency of these federal habeas corpus proceedings, and he had no available procedure with which to pursue the claim in the state courts, (R&R, Doc. 134 at 20-23), this Court may address the claim *de novo*, *id* at 23.

Respondent also takes issue with this Court's recommendation that Issa's twenty-seventh ground for relief not be dismissed as untimely under the AEDPA's one-year statute of limitations. (Respondent's Objections, Doc. No. 137 at 10-11.) Respondent argues that since Issa's twenty-seventh ground for relief does not share an essential predicate with any ground asserted in his original habeas petition, the doctrine of "relation back" does not apply, making the claim untimely under *Mayle v. Felix*, 545 U.S. 644 (2005). Respondent misconstrues this Court's recommendation, however. The doctrine of relation back was not relied upon in the Court's discussion of Respondent's statute-of-limitations defense. Instead, the Court observed that 28 U.S.C. § 2244(d)(1) allows that the statute of limitations for filing a habeas claim does not begin until the date on which the factual predicate upon which the claim is based could have been discovered through the exercise of due diligence. Thus, there is no requirement that such a newly discovered claim share a common core of operative facts with any claim asserted in an original habeas petition in order for the new claim to "relate back" to the original petition since the new claim need not relate back at all.

Respondent also contends Issa failed to exercise due diligence to discover his appellate counsel's

alleged conflict by failing to perform a search of the public record to discover his counsel's representation of co-defendant Miles. Had Issa done so, Respondent argues, he could have filed his conflict of appellate counsel claim within the original one-year limitations period. (Respondent's Objections, Doc. No. 137 at 11.) As was noted in this Court's Report and Recommendations on Procedural Default and Statute of Limitations Issues, Respondent did not dispute Issa's assertion that he had only learned of his appellate counsel's alleged conflict on March 23, 2005, in the her Second Amended Return of Writ , nor did she accuse Issa of failing to exercise due diligence to discover the conflict. "Parties cannot raise new arguments or issues on objection that were not presented to the Magistrate Judge." *United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998). That the General Order of Reference for the Dayton location of court permits the Magistrate Judges to reconsider decisions or reports and recommendations when objections are filed has no bearing on the prohibition against raising new arguments in objections. Consequently, Respondent has waived the argument that Issa failed to exercise due diligence with regard to his ineffective assistance of appellate counsel claim.[16] Thus, this Court may consider Issa's claim *de novo*.

As noted above, Issa did return to the state courts to litigate his conflict of interest claim and although

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[16] That is not to say that the Court agrees with Respondent that habeas counsel should have searched the public record for Issa's appellate counsel's alleged conflict. As this Court has no reason to address that question, it is left for another day.

that attempt was futile, he explained his appellate counsel's alleged conflict as follows:

> On February 16, 2005[,] the deposition of Herbert E. Freeman occurred. At that deposition, Attorney Freeman, who handled Ahmad Issa's direct appeal from his capital conviction in Hamilton County [,] Ohio [,] to this court [sic], indicated that he had his file from the appeal in his basement and that habeas counsel was welcome to it. The file was obtained on March 23, 2005; the file was [B]ates stamped and inspected.
>
> Included in the file of Attorney Freeman was a letter to his co-counsel on Issa's direct appeal, [B]ates number 201 and 202 . . . .
>
> The letter includes the following statement: Enclosed please find a photocopy of the rough draft of the "Statement of Facts" from the appellate brief of Andre Miles. You will recall that he was a codefendant to Mr. Issa, although he was tried separately. I AM SENDING IT TO YOU, BECAUSE I AM LEAD COUNSEL APPEALING MILES' CASE IN THE COURT OF APPEALS (HE WAS THE "SHOOTER," BUT HE AVOIDED THE DEATH PENALTY). IT WILL BE IN MANY WAYS VIRTUALLY THE SAME AS THE TESTIMONY ELICITED AGAINST MR. ISSA. (Emphasis added.)

(Supplemental Appendix, Doc. No. 139 at 32.) Issa argues that appellate counsel's conflict amounts to an "alternative explanation" for the deficient representation provided on direct appeal, which is illustrated by his ineffective assistance of appellate

counsel claim, appearing in his habeas petition as his ninth ground for relief, *supra*. (Petition, Doc. No. 62 at 115.)

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Supreme Court has held that the right to the assistance of counsel extends beyond conviction to a defendant's first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). In addition, the right to the assistance of counsel means the right to effective counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). An attorney who labors under a conflict of interest does not provide effective representation as contemplated by the Sixth Amendment. *Holloway v. Arkansas*, 435 U.S. 475, 481-84 (1978).

In *Holloway*, the United States Supreme Court reaffirmed that an attorney's representation of multiple criminal co-defendants does not violate the Sixth Amendment unless it gives rise to a conflict of interest. *Id.* at 482. To establish such a violation, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348. In *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002), the Supreme Court modified the test articulated in *Sullivan*, recognizing that the term "actual conflict" encompasses adverse effect. As the Sixth Circuit Court of Appeals observed, however, although *Mickens* changed the terminology, the substance of the *Sullivan* test survives, and demonstration of a choice by counsel caused by the conflict of interest is still required. *McFarland v. Yukins*, 356 F.3d 688,

705-6 (6th Cir. 2004). The mere possibility of conflict "is insufficient to impugn a criminal conviction." *Sullivan*, 446 U.S. at 350.

The Supreme Court has held that when a defendant or his counsel timely objects to joint representation of clients with antagonistic interests and the court fails to investigate the conflict, a defendant is entitled to automatic reversal without a showing of prejudice. *Holloway*, 435 U.S. 489(?). Issa never brought to the state court of appeals' attention his appellate counsel's simultaneous representation of Miles in Miles' direct appeal, however. (See Evid. Hrg. Tr., Doc. No. 112 at 46-48.) Thus, Issa cannot benefit from *Halloway*'s automatic reversal rule. *Mickens*, 535 U.S. at 168; *McFarland*, 356 F.3d at 702.

In order to demonstrate an adverse effect resulting from his appellate counsel's alleged conflict of interest, then, Issa must show that his counsel decided to forego claims of error in his case that would have been inconsistent with counsel's duty to Miles, and that the decision was not part of a legitimate strategy, judged under the deferential review of counsel's performance prescribed in *Strickland v. Washington*, 466 U.S. 668 (1984). *See McFarland*, 356 F.3d at 706. Even where an attorney omits "some course of action that undoubtedly would have been advantageous to the defendant, there is no proof of adverse effect if there is some other adequate explanation for the omission." *Id.* at 707, *citing Moss v. United States*, 323 F.3d 445, 470 (6th Cir. 2003). The Sixth Circuit has considered counsel's decisions evidence of disloyalty where the choices made by counsel worked to one defendant's detriment and

another's benefit, and there was no other explanation for the decisions. *McFarland*, 356 F.3d at 707, *citing United States v. Boling*, 869 F.2d 965, 972 (6th Cir. 1989); *United States v. Hall*, 200 F.3d 962, 966-67 (6th Cir. 2000).

Issa has utterly failed to meet his burden. Rather than demonstrating with specificity how his appellate counsel's choices in handling his direct appeal worked to his detriment and Miles' benefit, he characterizes his appellate counsel's alleged conflict as an "alternative explanation" for the ineffective assistance of his appellate counsel identified in the ninth ground for relief of his petition for a writ of habeas corpus. (Petition, Doc. No. 62 at 38-61, 113-15.) By characterizing the alleged conflict as an "alternative explanation" for appellate counsel's ineffectiveness, however, Issa essentially eviscerates his claim because the law requires that there be no other adequate explanation for the choices counsel made. *McFarland*, 356 F.3d at 707. That counsel's conflict might be an alternative explanation for his choices admits that there is at least one other explanation for the decisions he made. Thus, Issa has failed to show that his appellate counsel provided ineffective assistance on direct appeal due to a conflict of interest which resulted in choices that adversely affected Issa's appeal. Accordingly, Issa's twenty-seventh ground for relief should be denied.

CONCLUSION

Having considered each of Issa's twenty-seven grounds for relief and found none that were timely, preserved, and meritorious, Issa's petition for a writ of habeas corpus should be denied.

November 5, 2008.

s/ Michael R. Merz
Chief United States
Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being

served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

APPENDIX D

IN THE
SUPREME COURT OF OHIO

Case No. 98-2449
Appeal from the Court of Common Pleas
Filed: August 29, 2001

State of Ohio,

Appellee,

v.

Ahmad Fawzi Issa,

Appellant.

JUDGMENT ENTRY

This cause, here on appeal from the Court of Common Pleas for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Common Pleas is affirmed consistent with the opinion rendered herein.

Furthermore, it appearing to the Court that the date heretofore fixed for the execution of judgment and sentence of the Court of Common Pleas has passed,

IT IS HEREBY ORDERED by this Court that said sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, the 27th day of November, 2001, in accordance with the statutes so provided.

IT IS FURTHER ORDERED that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Southern Ohio Correctional Facility and that said Warden shall make due return thereof to the Clerk of the Court of Common Pleas for Hamilton Count.

IT IS FURTHER ORDERED by the Court that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Hamilton County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Common Pleas for Hamilton County for entry.

COSTS: Docket Fee, Affidavit of Indigency filed.

(Hamilton County Court of Common Pleas;
No. B9709438)

s/ Thomas J. Moyer
Chief Justice

THE STATE OF OHIO, APPELLEE

v.

ISSA, APPELLANT.

Criminal law – Aggravated murder – Death penalty upheld, when.

(No. 98-2449 – Submitted March 27, 2001 – Decided August 29, 2001.)

APPEAL from the Hamilton County Court of Common Pleas, No. B-9709438

DOUGLAS, J. At approximately 1:30 a.m. on November 22, 1997, Andre Miles, armed with a high-powered assault rifle, confronted brothers Maher and Ziad Khriss in a parking lot in front of Save-Way II Supermarket in Cincinnati, Ohio ("Save-Way") and demanded money. As Maher and Ziad put money on the ground and pleaded for their lives, Miles shot and killed them.

After investigating the shootings, Cincinnati police concluded that Miles had been hired to kill Maher. The police theorized that Maher's wife, Linda Khriss, had offered to pay defendant-appellant, Ahmad Fawzi Issa, to kill Maher. The police believed that appellant then enlisted Miles to do the killing, supplied him with the weapon, and arranged the opportunity. Appellant, Miles, and Linda were each charged with aggravated murder.

Prior to the murders, Maher and Linda Khriss owned and operated Save-Way. In addition to Maher and Linda, Renee Hayes, Souhail Gammoh, and appellant worked at the store. Bonnie Willis and her brother Joshua Willis, who were both teenagers at

the time of the murders, lived with their mother approximately one block from Save-Way. Because they often shopped at Save- Way, they were familiar with the store employees. Miles had previously lived with the Willis family and was a close friend of Bonnie and Joshua.

In the two weeks preceding the murders, two witnesses saw appellant with a rifle in his apartment. On November 14, Dwyane Howard, Hayes's husband, went to appellant's apartment to wake him for work. Appellant invited Howard in and showed him a military-style rifle. When Howard asked appellant what he was going to do with the rifle, appellant's only response was "a little sneer." After the murders, appellant called Howard and told him not to tell anyone that he had seen appellant with a gun. At appellant's trial, Howard identified the murder weapon as being identical to the rifle appellant had shown him. No more than two weeks before the murders, appellant's coworker and friend, Gammoh, while visiting at appellant's apartment, also saw appellant with a rifle.

A few days before the murders, Joshua went to Save-Way and saw Miles standing out in front of the store. Joshua and Miles started talking, and Miles told Joshua that appellant was going to pay him to kill somebody. Miles asked Joshua if he wanted to take part in the crime for half of the money. Joshua did not take Miles seriously and told him he was crazy. On November 20, the Thursday evening before the Saturday morning murders, Joshua told Bonnie about his conversation with Miles. Bonnie also did not believe that Miles would actually kill someone, because Miles "had a tendency to * * * talk big." That

is, he talked "about doing a lot of things and never did it."

Linda, Maher, Gammoh, and Hayes worked late at Save-Way on the evening of November 21. At approximately 10:00 p.m., Miles arrived at the store and asked for appellant. Although appellant was scheduled to work at 10:00 p.m., he was not yet there. Linda drove to appellant's apartment to wake him, and then she returned to the store. Appellant arrived around 11:15 p.m. Miles was waiting at the store for appellant, and when he arrived, appellant and Miles went outside together to talk.

Around midnight, Maher left Save-Way with a friend to check on another store that Maher owned. Maher left his truck in the Save-Way parking lot and instructed Linda and appellant to put the keys to the truck near the right front tire and that Maher would come back later to get the truck.

At approximately 1:09 a.m. the Save-Way employees closed the store for the night. Appellant put the keys near Maher's truck as he had been instructed. Appellant's mother was visiting from Jordan and was with appellant at the store when it closed. Appellant, his mother, and Gammoh left the store in appellant's car. Appellant drove his mother to his apartment, and then he drove Gammoh home. When appellant dropped Gammoh off at approximately 1:20 a.m., he told Gammoh that he was going back home to check on his mother but that he might come back later and take Gammoh to a bar. Approximately twenty-five to thirty-five minutes later, appellant returned to Gammoh's apartment, and they went to a bar together. After Gammoh heard about the murders, he asked appellant where

he went before he returned to Gammoh's apartment. Appellant told Gammoh, "Don't tell the police. Tell them that we were together all the time."

At approximately 1:26 a.m. on November 22, Sherese Washington was driving near Save-Way when she heard gunshots. Frightened, she stopped her car and turned off the headlights. She then saw a man run from the Save-Way parking lot and down Iroll Street (the street on which Bonnie and Joshua lived). Sherese went home and called 911. Within four minutes of the shooting, Cincinnati police officers arrived at Save-Way and discovered Maher's and Ziad's bodies in the parking lot. Medical personnel arrived shortly thereafter but were unable to revive the Khriss brothers.

Near the bodies, crime-scene investigators for the Cincinnati Police found six 7.62 caliber rifle casings, a broken beverage bottle, and several $1 bills. A small crater in the blacktop near Ziad's body and a fresh gouge in the dirt near Maher's body were noted by officers as possibly having been made by gunfire. Officers also documented that three milk crates had been arranged like steps behind a dumpster in the parking lot. The police found this noteworthy because all the other items behind the dumpster were in disarray, and the police speculated that the perpetrator may have arranged these milk crates.

Dr. Lawrence Schulz, a deputy coroner for Hamilton County, performed autopsies on Maher and Ziad and testified as to his findings. Schulz found that a single bullet had struck the palm of Maher's left hand and traveled through the back of his hand and then entered his chest. The bullet then perforated Maher's lungs and his aorta, causing his

death within a few minutes. Ziad had been shot in the palm of his right hand and twice in his left arm. Each bullet that struck his arm traveled through to his chest.

Joshua testified that around 5:00 p.m. on November 22, Miles called him and told him that he had killed Maher and Ziad and that he had put the gun in Bonnie and Joshua's back yard in a white plastic bag. He told Joshua not to touch the gun.

The following day, November 23, Miles came to the Willises' home. Bonnie and Joshua both testified regarding the conversation they had with Miles. Miles told them that appellant was going to pay him $2,000 for killing Maher but "[s]ince [Maher's] brother also got killed that night he had to throw in an extra $1,500." According to Miles, appellant had not paid him yet. Miles told the Willises that, on the night of the shooting, appellant gave Miles the rifle, which Miles described as an M-90. Miles then sat on milk crates behind a dumpster outside the store and waited for Maher to come back for his truck. When Maher returned with Ziad, Miles confronted them and demanded money. Maher and Ziad pulled money from their pockets, dropped it on the ground and pleaded with Miles not to shoot.

Miles said that when he reached down for the money, the gun went off and the beverage bottle that Maher was holding shattered. Then Miles said he "got trigger happy. He freaked. He shot them once. He might as well kill them." While Maher was "still squirming," Miles said, he shot him in the head, and then shot Ziad in the head. After that, Miles picked up the money they had thrown down, but said he left two $100 bills on the ground. Miles said that after

the shooting he ran down Iroll Street, put the rifle in the Willises' back yard, and then met appellant in a nearby parking lot and appellant drove him home.

Bonnie and Joshua noticed that Miles was wearing new clothes "from head to toe." Miles said that he "had bought the new clothes with the money that he got from the two victims." While describing the killings, Miles showed "no remorse at all. He was actually bragging." Miles also told Bonnie and Joshua, "If anybody knows about this or tells, I'll kill them." Miles reiterated that the rifle was in a white plastic bag in their back yard and that neither Bonnie nor Joshua should touch it. Miles promised to come back and remove the gun. Both Bonnie and Joshua saw an object wrapped in a white bag in their back yard and Joshua described it as "shaped like a gun."

A few days later, Joshua went to Save-Way, and as soon as appellant saw him appellant asked, "Does anybody know?" Joshua said, "No, not that I know of." Joshua then told appellant, "You're going to have to come and get this gun. I don't want to put my family in this type situation." Although Joshua did not mention Miles, appellant replied, "Okay. I'll talk to Andre [Miles] and if Andre don't come and get it, I will." After a few days, Joshua noticed the white bag was still in his yard. Joshua again went to the store and confronted appellant about it. Appellant again promised Joshua that either he or Miles would remove the gun. Bonnie also went to the store and told appellant that the gun needed to be removed from their yard. Appellant told her the same thing he had told Joshua. Appellant also told Bonnie to "[t]ell [Miles] not to come around the store because the

police were investigating, that he would get in touch with him." A few days later, Miles removed the gun.

On November 25, while working at Save-Way, Hayes saw Linda hand appellant two $1,000 packets in cash and "some other money." The state theorized that this represented at least a partial payoff for the killing. The defense, on the other hand, attempted to show that this money was deposited in a Save-Way bank account later that same day. The bank deposit ticket entered into evidence, however, indicated that the money deposited in the Save-Way account on that day did not include $2,000 in cash. The defense suggested that Hayes had been mistaken regarding the amount she saw Linda give appellant.

On December 4, police learned that Miles had admitted to Bonnie and Joshua that he had committed the murders. Police arrested Miles that evening, and he confessed to the crime and sketched a map depicting where he had disposed of the murder weapon. Following the map, police recovered a MAK-90, 7.62 caliber, semiautomatic rifle. Expert testimony established that the rifle had fired the fatal bullet extracted from Maher's body, thus confirming it was the murder weapon. An attempt to determine who had purchased the weapon was unsuccessful.

In the same vicinity as the rifle, police found a banana-style magazine clip that fit the murder weapon. The clip contained twelve 7.62 caliber hollow-point rifle bullets. The same foreign manufacturer made all of the shells found at the crime scene and the bullets in the clip. There were no fingerprints on the rifle, the clip, or the ammunition.

On December 5, officers executed a search warrant on appellant's apartment and found a single live 7.62 caliber bullet in a nightstand drawer in appellant's bedroom. The manufacturer of this bullet was different from the manufacturer of the bullets found in the murder weapon's clip and from the casings found at the crime scene.

A jury convicted appellant of the aggravated murder of Maher with a death penalty specification charging that the offense was committed for hire. R.C. 2903.01(A) and 2929.04(A)(2). After a penalty hearing, the jury recommended the death penalty. The trial court sentenced appellant to death and an additional one-year term for a gun specification. This matter is now before this court upon an appeal as of right.

Appellant has raised fifteen propositions of law. See Appendix. We have reviewed each and have determined that none of those propositions justifies reversal of appellant's conviction for aggravated murder. Pursuant to R.C. 2929.05(A), we have also independently weighed the specified aggravating circumstance against the mitigating evidence and reviewed the death penalty for appropriateness and proportionality. For the reasons that follow, we affirm appellant's conviction and death sentence.

Vienna Convention on Consular Relations

Appellant, a Jordanian national, asserts in his first proposition of law that his rights guaranteed by the Vienna Convention on Consular Relations ("VCCR") were violated when arresting officers failed to inform him that as a foreign national he had a

right to meet with consular officials from Jordan.[1] Appellant did not raise this issue at trial but now contends that this alleged violation of his rights rendered his postarrest statement inadmissible. Because testimony was admitted regarding his postarrest statement, appellant urges this court to reverse his conviction and remand this cause for a new trial.

The VCCR is a seventy-nine-article treaty to which both the United States and Jordan are signatories. The Vienna Convention on Consular Relations, April 24, 1963, TIAS 6820, 21 U.S.T. 77, 596 U.N.T.S. 261. It was negotiated in 1963 and ratified by the United States in 1969. Article 36 of the VCCR provides:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "* * *
>
> "(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said*

[1] The record does not reflect whether the police advised appellant of his right to consular access. For the purpose of this appeal, we assume that he was not advised of that right.

> *authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*
>
> "* * *
>
> "2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." (Emphasis added.)

Although the issue appellant raises regarding VCCR rights is an issue of first impression in this court, it has been raised and addressed in various other courts. At least one court has rejected the claim by holding that Article 36 does not create individually enforceable rights. *United States v. Li* (C.A. l, 2000), 206 F.3d 56, 62-66. But, see, *Breard v. Greene* (1998), 523 U.S. 371, 376, 118 S.Ct. 1352, 1355, 140 L.Ed.2d 529, 538 (the VCCR "arguably confers on an individual the right to consular assistance following arrest"). Many other courts have held that even if individuals can enforce the treaty provisions, application of the exclusionary rule is not an appropriate remedy for a violation. See, *e.g., United States v. Alvarado-Torres* (S.D.Cal.1999), 45 F.Supp.2d 986, 993-994; *United States v. Page* (C.A.6, 2000), 232 F.3d 536, 540; *United States v. Chaparro-Alcantara* (C.A.7, 2000), 226 F.3d 616; *United States v. Jimenez-Nava* (C.A.5, 2001), 243 F.3d 192, 198-200; *United States v. Lombera-Camorlinga* (C.A.9, 2000), 206 F.3d 882 (en banc).

For the purposes of this case, we assume, without deciding, that upon is arrest appellant had an individually enforceable right under Article 36 to be informed of his right to consular notification and that the appropriate remedy for the violation of that right is the suppression of appellant's postarrest statement.[2] Even applying the foregoing assumptions, we nevertheless reach the conclusion that appellant is not entitled to the relief he seeks.

As stated previously, Article 36(2) of the VCCR provides, "The rights referred to in paragraph 1 of

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[2] We doubt whether suppression of evidence is the appropriate remedy for a violation of the VCCR. Rights of persons arising under a treaty are regarded as if they arose under a statute of this state. *State v. Vanderpool* (1883), 39 Ohio St. 273, 276-277. Thus, as in the case of a statutory violation, the exclusionary rule is not an appropriate sanction, absent an underlying constitutional violation, unless the treaty expressly provides for that remedy. *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 234, 18 O.O.3d 435, 437, 416 N.E.2d 598, 600. Nothing in the text of the VCCR requires suppression of evidence, and "there is no indication that the drafters of the Vienna Convention had these 'uniquely American rights in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted.'" *United States v. Page* (C.A.6, 2000), 232 F.3d 536, 541, quoting *United States v. Lombera-Camorlinga* (CA.9, 2000), 206 F.3d 882, 886 (en banc). Furthermore, "no other signatories to the Vienna Convention have permitted suppression under similar circumstances, and * * * two (Italy and Australia) have specifically rejected it." *Id.* at 888.

Regardless of the appropriate remedy for violations of its provisions, the VCCR is the law of the land and police officers are required to comply with its terms. Section 2, Article VI, United States Constitution.

this Article shall be exercised in conformity with the laws and regulations of the receiving State * * *." Thus, claims of error based on violations of the VCCR for failure to notify a defendant of his right to consular access can be procedurally defaulted if not properly raised. *Breard v. Greene*, 523 U.S. at 375-376, 118 S.Ct. at 1354-1355, 140 L.Ed.2d at 537. This court has long held that failure to raise an issue in the trial court or the court of appeals waives all but plain error in our review. *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804; *State* v. *Williams* (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1156. Thus, because appellant failed to raise this issue in the trial court, he has waived all but plain error.

Plain error exists when it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899. We find that even if the trial court erred in admitting testimony regarding appellant's postarrest statement, that testimony did not affect the outcome of the trial.

At trial, Officer David Feldhaus testified regarding appellant's statement to police officers after his arrest. Feldhaus testified that after waiving his *Miranda* rights, appellant denied any involvement in the murders. When police questioned appellant regarding his actions around the time of the murders, appellant said that after closing the store, he placed the keys to Maher's truck near the vehicle as instructed, drove his mother to his

apartment, and then went with Gammoh to a bar, where he and Gammoh remained until closing.

If the jury believed Gammoh's testimony that appellant had left Gammoh's company for twenty-five to thirty-five minutes before they went to the bar, then appellant's omission of this fact could have been perceived by the jury as an intent to deceive police regarding his whereabouts at the time of the murders. However, the jury heard evidence far more damaging in this regard through Gammoh's testimony. Gammoh testified that appellant told him not to tell the police about the time they were apart and instructed Gammoh to say that he and appellant were together all night. Whereas the jury could have concluded that appellant's failure to inform police of the time he was not with Gammoh was simply the result of a lapse of memory or the omission of a seemingly unimportant detail, Gammoh's testimony clearly indicates appellant's intent to deceive the police regarding his actions. Hence, this portion of appellant's postarrest statement was not damaging.

Appellant's postarrest admission that he knew that Maher would be coming back to the store later to get his truck may have led jurors to the conclusion that appellant conveyed this information to Miles. However, Officer Feldhaus's testimony also made it clear that Linda knew that her husband would be returning to Save-Way to get his truck. Because the jurors were aware of the state's theory that Linda was behind the murder-for-hire scheme, Feldhaus's testimony could have put doubt in their minds regarding whether it was Linda or appellant who had arranged for Miles to wait for Maher. Regardless, the other evidence against appellant is

so strong that we cannot say that without this testimony the outcome of the trial would clearly have been otherwise. For the foregoing reasons, appellant's first proposition of law is overruled.

Amicus curiae, the National Association of Criminal Defense Lawyers, argues that if the Jordanian Consulate had been advised of appellant's arrest, it would have provided assistance with certain aspects of the mitigation portion of appellant's trial. Specifically, *amicus* suggests that Jordanian officials could have provided complete transcripts of appellant's educational record rather than just the certificates of completion and good behavior that were presented in mitigation. In addition, one of appellant's brothers was unable to obtain a visa and was therefore unavailable to provide mitigation testimony during the penalty phase of appellant's trial. *Amicus* alleges that Jordanian Consul could have assisted in obtaining a visa. For these reasons, *amicus* urges us to order a new "mitigation trial."

Even assuming that Jordanian consul would have provided assistance to appellant's defense in the manner suggested by *amicus,* that assistance would not have affected the jury's penalty recommendation. Appellant provided proof that he had completed the schooling and that he was well behaved in school. The transcripts would not have added any additional weight to the mitigating evidence.

With regard to a visa for appellant's brother, appellant's attorney advised the trial court that had appellant's brother been available, his testimony would have been similar to the testimony of Jamal Issa, also appellant's brother, who did provide

mitigation testimony. Therefore, his testimony would have provided no additional weight to the mitigating factors. For the above reasons, we reject the *amicus*'s argument.

Admission of Accomplice's Pretrial Statements

In his second proposition of law, appellant asserts that the trial court erred in allowing Bonnie and Joshua to testify regarding Miles's confession. Appellant contends that the admission of this evidence violated his right to confront witnesses as guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. In addition, although not explicitly stated in his second proposition of law, appellant argues that the out-of-court statements should have been excluded as inadmissible hearsay.

We first discuss appellant's hearsay argument. The trial court admitted Bonnie's and Joshua's testimony regarding Miles's statements under the exception to the hearsay rule for statements against interest pursuant to Evid.R. 804(B)(3).[3] In order for a

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[3] Evid.R. 804(B)(3) provides:

"Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> "* * *
>
> "(3) *Statement against interest*. A statement that * * * at the time of its making * * * so far tended to subject the declarant to civil or criminal liability * * * that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating

declarant's statement to qualify as an Evid.R. 804 exception to hearsay, it must first be shown that the declarant is unavailable as a witness. Evid.R. 804(B). Appellant argues that Evid.R. 804 was not applicable in this case because the declarant, Miles, was not unavailable as a witness.

"Unavailability" is defined in Evid.R. 804(A)(2):

> "'Unavailability as a witness' includes situations in which the declarant:
>
> "* * *
>
> "(2) persists in refusing to testify concerning the subject matter of the declarant's statements despite an *order* of the court to do so." (Emphasis added.)

Appellant argues that Miles did not satisfy the definition of unavailable because "the Court did not *order* Miles to testify." (Emphasis added.) Contrary to appellant's assertion, we find that the record clearly establishes that Miles was unavailable as a witness before the trial court. Our finding is based on the following discussion between the court and Miles after Miles was sworn in and refused to testify:

> "THE COURT: All right.
>
> "Mr. Miles, let me make this statement to you. You're here under subpoena to testify as a witness in this case. You do have an obligation to testify if subpoenaed and you have been subpoenaed.

> circumstances clearly indicate the trustworthiness of the statement."

> "I want to advise you, though, that you do not have to testify as to anything that my *[sic]* tend to incriminate yourself if called to the witness stand to testify. Okay?
>
> "Now, with that caution in mind, I want to ask you again are you going to testify in this case?
>
> "MR. MILES: I'm not going to testify.
>
> "THE COURT: Why not?
>
> "MR. MILES: Because I'm not going to testify.
>
> "THE COURT: All right. You just simply are refusing to testify, even though I'm informing you you do have an obligation to testify, except to those things that might incriminate yourself?
>
> "MR. MILES: Yes."

The subpoena issued to Miles, to which the court referred, stated: "You are required * * * to testify * * * in the case of State of Ohio versus **Ahmed Fawzi Issa** * * *. **Fail not under penalty of the law**." (Emphasis *sic*.) We find that the court's repeated statements to Miles that he had an obligation to testify, combined with the court's reference to the subpoena (which clearly subjected Miles to criminal penalty for failure to testify) satisfied the requirements of Evid.R. 804(A)(2).

We further note that the 1980 Staff Note to Evid.R. 804(A)(2) provides that to be unavailable, a witness must refuse to testify "despite all efforts by the court to compel him to do so." Although the judge did not explicitly order Miles to testify, he did attempt to compel him. Furthermore, even if the

court had expressly threatened contempt proceedings for refusal to obey a court order, the threat would undoubtedly have been unavailing, as Miles was soon to be tried for murder and the state had strong evidence against him. For the foregoing reasons, we find that appellant's assertion with regard to Evid.R. 804(A) is without merit.

We now turn to appellant's contention that the admission of Bonnie and Joshua's testimony regarding Miles's confession violated his right to confront the witnesses against him as guaranteed by the United States and Ohio Constitutions.[4] "'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *State v. Madrigal* (2000), 87 Ohio St.3d 378, 384, 721 N.E.2d 52, 61, quoting *Maryland v. Craig* (1990), 497 U.S. 836, 845, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666, 678. Although the hearsay rules and the Confrontation Clause are generally designed to protect similar ideals, the two are not equivalent. *Idaho v. Wright* (1990), 497 U.S. 805, 814, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638, 651.

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[4] The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

Section 10, Article I of the Ohio Constitution provides:

> "In any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face * * *."

In other words, the Confrontation Clause may bar the admission of evidence that would otherwise be admissible under an exception to the hearsay rule. *Id* Consequently, although testimony concerning Miles's confession qualified as an exception to the hearsay rule, the admission of the testimony could nevertheless have violated appellant's right to confront witnesses against him.

In *Lilly v. Virginia* (1999), 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (plurality opinion), the lead opinion recognized that the type of hearsay statement challenged herein, *i.e.,* an out-of-court statement made by an accomplice that incriminates the defendant, is often made under circumstances that render the statement inherently unreliable. For example, when a declarant makes such a statement to officers while he is in police custody, the declarant has an interest in inculpating another so as to shift the blame away from himself. In that situation, a declarant will often admit to committing a lesser crime and point to an accomplice (the defendant) as the culprit in a more serious crime. While the statement is technically against the declarant's penal interest, it is also self-serving and, for that reason, particularly deserving of cross-examination when used as evidence against the defendant. *Id* at 131-132 and 138, 119 S.Ct. at 1897-1898 and 1901, 144 L.Ed.2d at 131 and 135. Because this type of statement is inherently unreliable, the lead opinion stated that, in order to satisfy the Sixth Amendment, the circumstances surrounding the making of the statement must make the declarant's truthfulness so clear that "'the test of cross-examination would be of marginal utility.'" *Id*. at 136, 119 S.Ct. at 1900, 144

L.Ed.2d at 134, quoting *Idaho v. Wright*, 497 U.S. at 820, 110 S.Ct. at 3149, 111 L.Ed.2d at 655.

This court followed *Lilly* in *State v. Madrigal*, 87 Ohio St.3d 378, 721 N.E.2d 52. In *Madrigal*, we held that "[o]ut-of-court statements made by an accomplice that incriminate the defendant may be admitted as evidence if the statement" contains "adequate indicia of reliability." *Id.* at paragraphs one and three of the syllabus. The relevant circumstances in measuring the degree of reliability include "'*only those that surround* the making of the statement'" and "do not include those that may be added using hindsight." (Emphasis *sic.) Id.* at 387, 721 N.E.2d at 63, quoting *Wright,* 497 U.S. at 819, 110 S.Ct. at 3148, 111 L.Ed.2d at 655. Thus, the fact that other evidence corroborates the statement is irrelevant in a Confrontation Clause analysis. *Madrigal,* 87 Ohio St.3d at 387, 721 N.E.2d at 63, citing *Lilly,* 527 U.S. at 138, 119 S.Ct. at 1900-1901, 144 L.Ed.2d at 135.

Applying *Lilly* and *Madrigal* to this case, it is clear that in order to determine whether the admission of evidence concerning Miles's confession violated appellant's confrontation rights, we must examine the circumstances under which the confession was made. Unlike the declarants in *Lilly* and *Madrigal,* Miles was not talking to police as a suspect when he made the out-of-court statement. Miles's confession was made spontaneously and voluntarily to his friends in their home. Moreover, Miles had nothing to gain from inculpating appellant in the crime. In fact, by stating that appellant had hired him to kill Maher, Miles was admitting a capital crime, *i.e.,* murder for hire. Furthermore,

Miles's statement was clearly not an attempt to shift blame from himself because he was bragging about his role as the shooter in the double homicide.

We therefore find that the circumstances surrounding the confession did "'render the declarant [Miles] particularly worthy of belief.'" *Madrigal,* 87 Ohio St.3d at 387, 721 N.E.2d at 63, quoting *Wright,* 497 U.S. at 819, 110 S.Ct. at 3148, 111 L.Ed.2d at 655. Our decision herein is buttressed by Chief Justice Rehnquist's separate opinion in *Lilly,* in which he noted that in a prior case, the court "recognized that statements to fellow prisoners, *like confessions to family members or friends,* bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant." (Emphasis added.) *Id.*, 527 U.S. at 147, 119 S.Ct. at 1905, 144 L.Ed.2d at 141 (Rehnquist, C.J., concurring in judgment). Accordingly, we hold that the admission of Bonnie's and Joshua's testimony concerning Miles's confession did not violate the Confrontation Clause.

For the foregoing reasons, we overrule appellant's second proposition of law.

Grand Jury Issues

In his fifth proposition of law, appellant argues that he was indicted "by an improperly constituted grand jury and upon inadequately presented evidence" in violation of his constitutional rights. Appellant failed to raise issues in the trial court, and therefore he has waived them. *Williams*, 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus. See *e.g.*, *State v. Joseph* (1995), 73 Ohio St.3d 450, 455, 653 N.E.2d 285, 291; *State v.*

Taylor (1997), 78 Ohio St.3d 15, 23, 676 N.E.2d 82, 91.

Appellant's argument that he was indicted by an improperly constituted grand jury would fail even if it were properly before this court. Appellant claims that Hamilton County uses only voter registration lists to select grand jurors and that when appellant was tried "the percentages of African-Americans and other minorities registered to vote in Hamilton County was less than the percentage of racial minorities composing the voting age population of Hamilton County." The record does not support these assertions. Moreover, "not every grand jury has to represent a 'fair cross-section,' so long as the selection process is nondiscriminatory." *State v. Williams* (1997), 79 Ohio St.3d 1, 17, 679 N.E.2d 646, 660. In *State v. Moore* (1998), 81 Ohio St.3d 22, 28, 689 N.E.2d 1, 9, we held that "[t]he use of voter registration rolls as exclusive sources for [petit] jury selection is constitutional" and does not systematically or intentionally exclude any racial group of the community. We see no reason to apply a different principle to the selection of grand jurors.

Likewise, appellant's argument that he was indicted upon inadequate evidence would fail even if it had been properly preserved. It is not clear from the record what evidence was presented before the grand jury. Hence, whether the indictment was based on inadequate evidence cannot be evaluated. In addition, "'an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * *.'" *State v. Davis* (1988), 38 Ohio St.3d 361, 365, 528 N.E.2d 925, 929, quoting *United States*

v. Calandra (1974), 414 U.S. 338, 344-345, 94 S.Ct. 613, 618-619, 38 L.Ed.2d 561, 569.

For the foregoing reasons, appellant's fifth proposition of law is not well taken.

In his eighth proposition of law, appellant argues that the "process used in Hamilton County to select foremen of grand juries that return capital indictments is biased geographically, racially, culturally, and socio-economically." Appellant failed to raise this issue below and thereby waived it. *Williams,* 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus. Moreover, the record contains no evidence of how grand jury foremen were selected in Hamilton County, and appellant has failed to cite statistical or other evidence to suggest that the method was biased. Accordingly, appellant's eighth proposition of law is overruled.

Trial Publicity

In his sixth proposition of law, appellant argues that prejudicial publicity, "which occurred throughout appellant Issa's trial, deprived him of his right to a fair trial and a fair and reliable sentencing determination." However, appellant waived this issue by failing to request a change of venue. *State v. Campbell* (2000), 90 Ohio St.3d 320, 336, 738 N.E.2d 1178, 1197.

In addition, we have reviewed the entire record in this case, and there is nothing before us that supports appellant's claim that he was denied a fair and impartial trial because of the alleged publicity. This court has long held that voir dire examination provides the best test as to whether adverse publicity

necessitates a change of venue. *State v. Swiger* (1966), 5 Ohio St.2d 151, 34 O.O.2d 270, 214 N.E.2d 417, paragraph one of the syllabus; *State v. Montgomery* (1991), 61 Ohio St.3d 410, 413, 575 N.E.2d 167, 170-171.

During voir dire, only one juror recalled learning specific details of the case from pretrial publicity, and he indicated that he could put that information out of his mind and not let it influence his judgment in this case. Moreover, the trial judge repeatedly advised prospective jurors during voir dire and seated jurors throughout both phases of appellant's trial to avoid exposure to information about the case outside of the courtroom and to advise the court of any incidents of exposure. *State v. Landrum* (1990), 53 Ohio St.3d 107, 117, 559 N.E.2d 710, 722-723. No incidents were reported.

For the foregoing reasons, appellant's sixth proposition of law is not well taken.

Indigency

In his ninth proposition of law, appellant argues that he was unable to adequately defend himself because a lack of funds prevented him from hiring a crime-scene investigator, a general investigator, and a forensic pathologist. Appellant alleges that he was denied a fair trial because these experts were not provided to him at state expense.

The court granted various defense requests for funds throughout the trial. For example, the court granted appellant's motions for a mitigation specialist, travel and housing expenses for appellant's family members from Jordan to testify in the penalty phase, a translator, transcripts of Linda

Khriss's trial, and additional attorney fees. However, appellant did not move for funds for the experts that he now argues were necessary for a fair trial. The court need not consider an error when the complaining party did not call the matter to the trial court's attention. *Williams*, 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus.

Moreover, in *State v. Mason* (1998), 82 Ohio St.3d 144, 694 N.E.2d 932, syllabus, we held that due process "requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." The circumstances surrounding this case do not support appellant's assertion that the lack of these experts resulted in an unfair trial.

The cause of Maher's death was clear, and the crime scene evidence did not suggest justifiable homicide. In addition, the fact that Miles was the actual killer was not in question. Moreover, the record reveals a thorough, professional, and well-documented autopsy and police investigation. For these reasons, appellant would have been unable to make the particularized showing required by *Mason*. Thus, if appellant had filed a motion for funds for these experts the trial court would have been justified in denying it.

For the foregoing reasons, appellant's ninth proposition of law 1s overruled.

Denial of Bond

In his eleventh proposition of law, appellant argues that the trial court failed to set a reasonable bail. We disagree.

Section 9, Article I of the Ohio Constitution provides:

> "All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great * * *."

The trial court set appellant's bail at $1,000,000. In essence, appellant argues that this was excessive and, in effect, rendered him not bailable. Appellant complains that the trial court erred in failing to hold an evidentiary hearing to determine whether the proof was evident or the presumption great before setting bail. However, appellant did not request such a hearing and thereby waived this issue. *Williams,* 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus.

Furthermore, if the court had held a hearing on the matter, it is unlikely that a lower bail would have been set. The jury convicted appellant of Maher's murder largely on the basis of evidence available by December 5, 1997. Therefore, when appellant was arraigned on December 18, 1997, the proof was evident and the presumption great.

For the foregoing reasons, appellant's eleventh proposition of law is not well taken.

Gruesome Photographs

In his twelfth proposition of law, appellant alleges that the "trial court erred in admitting into evidence

gruesome and cumulative photographs of the victim." We have consistently held that "photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number." *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, paragraph seven of the syllabus. The trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court. *Id.* at 265, 15 OBR at 401,473 N.E.2d at 791.

We have reviewed the nine photographs of the murder victims that the state introduced into evidence. All were taken at the crime scene and show the victims lying on their backs in the Save-Way parking lot. Medical personnel had cut the clothing on the victims' upper bodies and the victims' bare chests are visible in the photos. Six of the photographs, exhibits 3, 4, 5, 6, 30, and 31, each show both victims from several feet away. Although blood is visible on the brothers' chests and clothing, these photographs are not gruesome. Moreover, these photographs illustrate witness testimony describing the crime scene. Exhibit 29 is a duplicate of exhibit 5, and, therefore, the trial court erred in admitting it. However, we find that the repetition of this single photograph did not prejudice appellant, and, therefore, the error was harmless.

The remaining two photographs, exhibits 7 and 8, are close views of Maher's body. Exhibit 7 shows the wound to Maher's left hand described in the coroner's testimony. This wound is not visible in any other photograph. Exhibit 8 shows the fatal wound to Maher's chest. This photograph is illustrative of the coroner's testimony and assists the finder of fact in evaluating the defense theory that the location of Maher's fatal wound shows that the shooter was not intent on killing him.[5]

The photographs are not cumulative, and, with the exception of exhibit 29, discussed previously, the photographs are not repetitive. We further find that the probative value of the photographs outweighed any danger of material prejudice to appellant. *Maurer,* paragraph seven of the syllabus.

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[5] During closing arguments of the guilt phase of his trial, appellant's attorney stated:

> "I want to take a look at the pictures. I want you to take a good look and pass it around of the body of Maher Khriss as it was found at the scene. Take a look where the bullet hole is in that body. Remember the testimony Dr. Schulz that this is the only bullet hole, this is the only bullet that struck Maher Khriss. The one you see is there, which went through his hand into his shoulder. You can look at that. I am not exaggerating. That bullet hole is in his shoulder.
>
> "You tell me if his only purpose was to kill Maher Khriss, and the only way you're going to get paid, would you rely on that to get the job done?
>
> "Take a look at that shot. Would you rely on one bullet hole in the shoulder to kill a person? Look at that shot. I would never have guessed that that would be the fatal shot, looking at the picture."

Appellant also contends that "the prosecutor's closing argument, combined with the gruesome photographs, rendered Mr. Issa's trial unfair." Appellant fails to specify what portions of the closing arguments he is challenging. Nevertheless, the prosecutors made only a few references to the photographs of the victims in their closing argument, and those were unobjectionable.[6]

For the foregoing reasons, we reject appellant's twelfth proposition of law.

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[6] During closing argument, in response to appellant's counsel's argument that the location of Maher's wound indicated that the shooter was not intent on killing him (see footnote 5), the prosecutor referred to the picture of Maher and stated:

"In regards to the bullets and the shots that were in Maher Khriss's body, well, you look at the pictures. There is a hole. It's that big (indicating). Do you think that would not kill someone? When you see the bullets, they are like torpedoes.

"Why would you think that one shot couldn't or wouldn't kill someone?"

The only other reference to the pictures of the victims made by the prosecution during closing arguments was as follows:

"I think you can believe that Andre Miles thought he did shoot them in the head when you look at one of those photos. Here is State's Exhibit Number 31. It's a little extreme; but when you look at it later, you will see that it sure looks like Ziad got shot in the eye. It really looks like he was shot in the eye—Hardly blame Miles for thinking he did shoot him in the head. That wasn't what the Coroner said. I think we'd all believe this guy got it in the head; but the coroner said, 'No, he wasn't shot in the head.' We have to accept that from all appearances that's what it looks like it is."

Sufficiency and Weight of Evidence

In his tenth proposition of law, appellant challenges the sufficiency of the evidence to support his guilt of aggravated murder and argues that the judgment is against the manifest weight of the evidence. In reviewing a record for sufficiency, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

The following evidence was presented to the jury in this case. Gammoh and Howard saw appellant with a rifle in his apartment within a two-week period preceding the murders. Howard identified the murder weapon as the rifle he saw in appellant's possession. After the murders, appellant attempted to persuade Howard not to tell anyone about seeing him with the weapon.

Before the murders, Miles told Joshua that appellant hired him "to kill somebody for some money." Less than four hours before Maher and Ziad were killed, Miles went to Save-Way and met with appellant. Then, Miles waited outside the store with a rifle for Maher to return. When Maher returned, Miles shot him and his brother Ziad. Miles's identity as the shooter was not questioned, because he confessed to the crime, told the police the exact location of the murder weapon, and knew details of the crime that the killer would be expected to know, *i.e.,* the type of weapon used, the stacked milk crates

near the dumpster, the location of money and a shattered beverage bottle on the ground near the bodies, and the manner and direction in which the shooter fled.

The day after the murder, Miles told both Bonnie and Joshua that he had shot and killed Maher and Ziad and related details of the murders. Miles told them that appellant had hired him to kill Maher and that appellant had supplied the rifle and drove him home after the murders. He also told them that he had left the murder weapon in their back yard in a white bag. Both Bonnie and Joshua saw a white bag in their back yard, and Joshua testified that it was shaped like a gun.

Bonnie and Joshua independently went to appellant after the murders and told him that they wanted the rifle removed from their yard. Appellant responded to each of them that if Miles did not remove the rifle, he would. Appellant also told Bonnie to tell Miles not to come around the store because the police were investigating and that appellant would get in touch with Miles.

Three days after the murders, Hayes saw Linda hand appellant$2,000 in cash along with some other money. Although the defense argued that this money was later deposited in the store's account, the defense failed to produce evidence of such a deposit.

Gammoh testified that appellant asked him to tell police that he was with appellant around the time of the murders. Trying to create a false alibi "strongly indicates consciousness of guilt." *State v. Campbell* (1994), 69 Ohio St.3d 38, 47, 630 N.E.2d 339, 349.

When police searched appellant's apartment they recovered a 7.62 caliber rifle shell from a nightstand in his bedroom. This was the same caliber ammunition as that used to kill Maher and Ziad.

We find that the foregoing evidence was sufficient to establish, beyond a reasonable doubt, that appellant was guilty of the aggravated murder of Maher and that the murder was committed for hire. R.C. 2903.01(A) and 2929.04(A)(2).

As to the weight of the evidence, the issue is whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the evidence of guilt was legally sufficient. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 545-546. After reviewing the entire record, weighing all the evidence and all reasonable inferences drawn therefrom, and considering the credibility of the witnesses, we conclude that appellant's conviction was not against the manifest weight of the evidence. Accordingly, we overrule appellant's tenth proposition of law.

Ineffective Assistance of Counsel

In his third proposition of law, appellant argues that his counsel provided ineffective assistance. Reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland* v. *Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693. Accord *State* v. *Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

Appellant alleges that his trial counsel were deficient in three separate instances. First, appellant argues that his trial counsel should have raised the issue of appellant's "cultural competency" to stand trial. Contrary to appellant's assertion, the fact that he is a foreign national and that English is not his first language does not suggest that he lacked competency to be tried. Appellant's unsworn statement demonstrated that he understood and could speak English well. In addition, because he immigrated to the United States in 1990, our customs and culture were not mysterious to him. Furthermore, appellant was clearly intelligent, having completed two years of college in Jordan before emigrating to the United States. For these reasons, appellant was clearly capable of understanding the nature and objective of the proceedings against him and assisting in his own defense. Thus, he was competent to stand trial. R.C. 2945.37(G). Counsel is certainly not deficient for failing to raise a meritless issue. *State v. Taylor* (1997), 78 Ohio St.3d 15, 31, 676 N.E.2d 82, 97.

Second, appellant argues that his trial counsel were deficient because they failed to request funds to hire investigators and a firearms expert to assist the defense. We reject appellant's argument for the reasons set forth previously in the section entitled "lndigency." That is, such a motion would have been properly denied by the trial court because appellant would have been unable to make "a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." *Mason,* 82 Ohio St.3d 144, 694 N.E.2d 932, syllabus.

Third, appellant contends that his trial counsel should have filed a motion to suppress the evidence of the 7.62 caliber bullet discovered during a search of his apartment. Appellant gives no reason to suspect that the search warrant that authorized this search could have been legitimately challenged. Here, because trial counsel did not file a motion to suppress, the record is silent as to the basis for the search warrant. However, when police executed the search of appellant's apartment on December 5, they had probable cause to do so. By that time, police had talked to Bonnie and Joshua regarding Miles's confession implicating appellant, arrested Miles and obtained his confession, and recovered the murder weapon and ammunition clip.

Furthermore, the outcome of appellant's trial would have been the same even if the bullet found in appellant's apartment had not been introduced as evidence, as more compelling evidence linked appellant to the murder weapon, for example, Howard's testimony that he saw appellant with the murder weapon shortly before the murders and Bonnie's and Joshua's testimony that Miles told them that appellant supplied him with the rifle.

For the foregoing reasons, we overrule appellant's third proposition of law.

Settled Issues

In his fourth proposition of law, appellant challenges the constitutionality of the provision of the Ohio Constitution that requires a direct appeal of capital cases from the trial court to this court. We reject this argument on the authority of *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668.

In his thirteenth proposition of law, appellant argues that requiring that mitigating factors be proven by a preponderance of the evidence violates the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. We summarily reject this argument on the authority of *Delo v. Lashley* (1993), 507 U.S. 272, 275-276, 113 S.Ct. 1222, 1224, 122 L.Ed.2d 620, 626; *Walton v. Arizona* (1990), 497 U.S. 639, 650, 110 S.Ct. 3047, 3055, 111 L.Ed.2d 511, 526 (plurality); *State v. Jenkins* (1984), 15 Ohio St.3d 164, 171, 15 OBR 311, 317, 473 N.E.2d 264, 275. Moreover, appellant failed to object to this procedure at trial and thereby waived the issue. *State v. Combs* (1991), 62 Ohio St.3d 278, 291, 581 N.E.2d 1071, 1082; *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, syllabus.

In his fourteenth proposition of law, appellant argues that Ohio's statutory definition of reasonable doubt is unconstitutional when applied to the penalty phase of a capital case. We reject this argument on the authority of *State v. Goff* (1998), 82 Ohio St.3d 123, 131-132, 694 N.E.2d 916, 923-924.

In his fifteenth proposition of law, appellant raises constitutional challenges to Ohio's death penalty statutes. Each of appellant's arguments has been rejected in previous decisions issued by this court, and we summarily overrule them here. *State v. Carter* (2000), 89 Ohio St.3d 593, 607, 734 N.E.2d 345, 357-358; *State v. Clemons* (1998), 82 Ohio St.3d 438, 454, 696 N.E.2d 1009, 1023; *State v. Jenkins,* 15 Ohio St.3d at 168-177, 15 OBR at 314-322, 473 N.E.2d at 272-279; *State v. Seiber* (1990), 56 Ohio St.3d 4, 16, 564 N.E.2d 408, 421; *State v. Weind* (1977), 50 Ohio St.2d 224, 227-229, 4 O.O.3d 413,

415-416, 364 N.E.2d 224, 228-229, vacated in part and remanded (1978), 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1156; *State v. Bradley* (1989), 42 Ohio St.3d 136, 147, 538 N.E.2d 373, 384; *State v. Buell* (1986), 22 Ohio St.3d 124, 138-139, 22 OBR 203, 215-216, 489 N.E.2d 795, 807-809; *State v. Stallings* (2000), 89 Ohio St.3d 280, 297-298, 731 N.E.2d 159, 177; *State v. Raglin* (1998), 83 Ohio St.3d 253, 261 and 276-277, 699 N.E.2d 482, 490 and 500-501; *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237, paragraph two of the syllabus; *State v. Chinn* (1999), 85 Ohio St.3d 548, 567-568, 709 N.E.2d 1166, 1183; *State v. Bays* (1999), 87 Ohio St.3d 15, 32, 716 N.E.2d 1126, 1143-1144; *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668; *State* v. *Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568, syllabus.

Appellant also contends that Ohio's death penalty statute violates the American Declaration of the Rights and Duties of Man, which appellant claims binds the United States via the Charter of the Organization of American States. We reject this argument on the authority of *State v. Phillips* (1995), 74 Ohio St.3d 72, 103-104, 656 N.E.2d 643, 671. Moreover, appellant failed to raise this claim at trial and thereby waived it. See *State v. Keene* (1998), 81 Ohio St.3d 646, 669, 693 N.E.2d 246, 265.

Independent Sentence Evaluation

In accordance with R.C. 2929.05(A), we now independently determine whether the aggravating circumstance outweighs the mitigating factors in this case and whether appellant's sentence is excessive or disproportionate to sentences in similar cases. R.C. 2929.05(A). We begin by considering whether the aggravating circumstance charged against appellant,

R.C. 2929.04(A)(2), murder for hire, was proven beyond a reasonable doubt. We find that it was.

Against this aggravating circumstance, we weigh the nature and circumstances of the offense, the history, character, and background of the offender, and any applicable mitigating factors enumerated in R.C. 2929.04(B)(1) through (7). The nature and circumstances of the offense offer no mitigating value. Appellant offered Miles money to kill Maher. Appellant supplied the murder weapon and provided Miles with transportation immediately after the murder.

Appellant's mother, Sara Abdel Satchsaad, and one of his brothers, Jamal Issa, provided mitigation testimony. Jamal testified that appellant has four brothers and two sisters and that the family members are Jordanian citizens. When appellant was born, the family lived in Kuwait. In 1977, appellant moved with his mother and siblings back to Jordan, but his father stayed in Kuwait to work and visited the family in Jordan for one month each year.

With his father's financial assistance, appellant studied engineering in college from 1998 through 1990 in Jordan. In 1990, appellant immigrated to the United States to continue his studies. However, appellant's father died, and for financial reasons appellant was unable to continue his education. He then had to work to support himself and to help support his family in Jordan. Jamal described his brother as a "quiet person. Gentle. Loving to people." He could not believe that his brother committed the offense charged. Jamal does not want his brother to be executed.

Sara testified that appellant was born in 1969. She corroborated the family history given by Jamal. She testified that appellant sent money to his family from time to time before he was arrested. Prior to the murders, Sara traveled from Jordan to the United States to visit appellant. She was surprised to hear of the charges against her son because he "was of good character and quiet" and was not the sort of man to do such things. She suffers because of her son's situation and does not want him to be executed.

In an unsworn statement, appellant reiterated his family history and noted that he came to the United States in 1990 to continue his college studies. Because of his father's death, he went to work while living in New York and Chicago. In 1992, he moved to Cincinnati and got married, but the marriage did not work out. He worked at two other stores before he started working for Maher. Maher gave him the job at his store when appellant was having difficulty finding a job. Appellant said that he liked both Maher and Ziad and that he had a good relationship with them and their families. Appellant stated that Maher and Ziad were like brothers to him and that Ziad and he had been roommates. Appellant also stated that Maher frequently permitted him to use his car, and appellant thought Maher was a "very, very, very nice person." Appellant said that he felt sorry for Maher and Ziad's family for what happened but that he had "nothing to do with" the murders and he was shocked when he heard about it.

Appellant's "history, character, and background" provide some mitigating weight. As a child and young man, appellant lacked his father's guidance after they moved to Jordan, as his father could visit

the family for only one month out of each year. Appellant attended two years of college in Jordan and then moved to the United States to continue his studies, but his father's death prevented him from pursuing his education and he undertook employment to support himself and to help his family financially.

In addition, the record suggests that appellant remained steadily employed while in the United States. This is entitled to some mitigating weight. See *State* v. *Fox* (1994), 69 Ohio St.3d 183, 194, 631 N.E.2d 124, 133.

Appellant's mother and brother both described appellant as being of good character. They love him and do not want him executed. This also provides some mitigating weight. *State v. Mason,* 82 Ohio St.3d at 170, 694 N.E.2d at 957.

Appellant also offered the fact that he was not the principal offender in the offense as a mitigating factor to consider. R.C. 2929.04(8)(6) provides one of the enumerated mitigating factors to consider and weigh against the aggravating circumstance: "If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim."

After reviewing the facts of this case, we give no weight to this mitigating factor. Although appellant was not the actual killer, *State* v. *Penix* (1987), 32 Ohio St.3d 369, 371, 513 N.E.2d 744, 746, he was nevertheless a crucial participant in Maher's murder. Appellant offered to pay Miles to kill Maher. He then supplied the weapon and assisted in Miles's escape

after the murder. But for appellant's involvement, Miles would not have killed Maher.

No evidence suggests that the remaining statutory mitigating factors are applicable here: R.C. 2929.04(B)(1) (inducement by the victim), (B)(2) (duress, coercion, or strong provocation), (B)(3) (mental disease or defect), (B)(4) (youth of the offender), (B)(5) (lack of criminal record), or (B)(7) (other factors).

Overall, we find, beyond a reasonable doubt, that the aggravating circumstance outweighs the mitigating factors. We must now determine whether appellant's sentence is excessive or disproportionate to sentences in similar cases.

Appellant argues, in his seventh proposition of law, that his death sentence is excessive and disproportionate to penalties in similar cases. In support of this assertion appellant points to the disparity between the outcome of his trial and the outcomes of Linda's and Miles's trials. Appellant states that Linda was acquitted of the charges against her in relation to this crime and Miles received life imprisonment without the possibility of parole.

We have held, however, that "[d]isparity of sentence does not justify reversal when the sentence is neither illegal nor an abuse of discretion." *State v. Jamison* (1990), 49 Ohio St.3d 182, 191, 552 N.E.2d 180, 188. Moreover, "[t]he proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *State* v. *Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, syllabus. Neither Linda nor Miles

received a death sentence, and their trial records are not before this court; thus we refuse to include a review of those cases in our analysis. *State v. Smith* (1997), 80 Ohio St.3d 89, 118, 684 N.E.2d 668, 694; *State v. Green* (1993), 66 Ohio St.3d 141, 151, 609 N.E.2d 1253, 1262.

We find that the penalty imposed in this case is neither excessive nor disproportionate when compared with other capital cases in which an aggravated murder was committed for hire. See, *e.g., State v. Williams* (1988), 38 Ohio St.3d 346, 528 N.E.2d 910; *State v. Getsy* (1998), 84 Ohio St.3d 180, 702 N.E.2d 866.

For the foregoing reasons, we affirm appellant's conviction and death sentence.

Judgment affirmed.

Moyer, C.J., Resnick and F.E. Sweeney, JJ., concur.

Cook, J., concurs separately.

Pfiefer, J., concurs in part and dissents in part.

Lundberg Stratton, J., dissents.

Cook, Jr., concurring. Like the majority, I find no plain error in admitting the appellant's postarrest statements, notwithstanding the provisions of Article 36 of the Vienna Convention on Consular Relations. I arrive at this conclusion, however, by applying the plain-error analytic framework described in *United States v. Olano* (1993), 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508. Applying an *Olano* analysis, I would find that the error Issa complains of in his

first proposition of law was not "plain," and therefore cannot constitute reversible error. See *State v. Hill* (2001), 92 Ohio St.3d 191, 205, 749 N.E.2d 274, 286-287 (Cook, J., concurring in judgment); *State v. McKee* (2001), 91 Ohio St.3d 292, 300-301, 744 N.E.2d 737, 744 (Cook, J., dissenting). At present, the question whether Article 36(1)(b) of the Vienna Convention creates individual rights that are enforceable in American courts remains open. See *Breard v. Greene* (1998), 523 U.S. 371, 376, 118 S.Ct. 1352, 1355, 140 L.Ed.2d 529, 538 *(per curiam)* (noting, without deciding, that the Vienna Convention "arguably" confers individual right to consular assistance following arrest); see, also, *United States v. Page* (C.A.6, 2000), 232 F.3d 536, 540. I concur in the majority opinion in all other respects.

I also write separately to respond to the view, advocated by Justice Lundberg Stratton, that the failure to inform Issa of any rights he had to consular access under Article 36 of the Vienna Convention constitutes "structural error" warranting automatic reversal. Although Justice Lundberg Stratton voices the legitimate position that the states must follow international treaties made under authority of the United States, there is simply no legal basis upon which to conclude that the "structural error" doctrine should apply here.

Treaties of the United States are on the "same footing" with federal statutes under the United States Constitution. *Whitney* v. *Robertson* (1888), 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386, 388. Thus, violation of a treaty is treated just like a violation of a federal statute. We do not necessarily

treat a violation of either, however, as a violation of one's constitutional rights. As the United States Court of Appeals for the Fourth Circuit observed:

"Although states may have an obligation under the Supremacy Clause [Article VI, United States Constitution] to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional* rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty." (Emphasis *sic.*) *Murphy v. Netherland* (C.A.4, 1997), 116 F.3d 97, 100.

Accordingly, because the failure to advise an accused of his or her rights under Article 36 of the Vienna Convention does not rise to the level of a constitutional error, suppression of an accused's postarrest statements is *not* an appropriate remedy for a violation. *United States v. Page,* 232 F.3d at 540-541; *United States v. Li* (C.A.1, 2000), 206 F.3d 56, 61; *United States v. Lombera-Camorlinga* (C.A.9, 2000), 206 F.3d 882, 885-886 (en banc). We ordinarily do not suppress evidence as a remedy for a statutory violation absent a violation of an underlying constitutional right. *State v. Droste* (1998), 83 Ohio St.3d 36, 40, 697 N.E.2d 620, 623; see, also, *United States v. Thompson* (C.A.11, 1991), 936 F.2d 1249, 1251.

Justice Lundberg Stratton does not contend that suppression is the appropriate remedy for violation of any rights Issa may have had under Article 36 of

the Vienna Convention. Rather, she argues that "the failure to inform the defendant of his rights under the Vienna Convention constitutes structural error" warranting reversal. But this conclusion cannot possibly be correct under the existing doctrine of structural error. "Structural" errors are a category of fundamental *constitutional* errors that "are so intrinsically harmful as to require automatic reversal * * * without regard to their effect on the outcome." *Neder* v. *United States* (1999), 527 U.S. 1, 7, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35, 46.[7] Thus, a "structural error" necessarily involves the deprivation of a constitutional right. See *Brecht* v. *Abrahamson* (1993), 507 U.S. 619, 629-630, 113 S.Ct. 1710, 1717, 123 L.Ed.2d 353, 367 (describing structural errors as a category of constitutional error defying harmless-error analysis); *Arizona* v. *Fulminante* (1991), 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302, 331 (describing structural errors as "constitutional deprivations * * * affecting the framework within which the trial proceeds, rather than simply an error in the trial process"); *Sullivan v. Louisiana* (1993), 508 U.S. 275, 282, 113 S.Ct. 2078, 2083, 124 L.Ed.2d 182, 191 (Rehnquist, C.J., concurring) (noting that *Fulminante* "divided the class of constitutional violations that may occur during the course of a criminal proceeding" into "trial error[s]," which are

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[7] The United States Supreme Court has recognized only a very limited category of errors as "structural." These include the complete denial of counsel, a biased trial judge, racial discrimination in jury selection, denial of the right to self-representation at trial, denial of a public trial, and a defective reasonable-doubt instruction. *Neder v. United States,* 527 U.S. at 8, 119 S.Ct. at 1833, 144 L.Ed.2d at 46 (collecting cases).

amenable to harmless-error analysis and "structural defects," which are not). Without some error affecting a criminal defendant's *constitutional* rights, however, the structural-error doctrine is simply not implicated. And because a violation of the Vienna Convention is not a constitutional error, see *Murphy*, 116 F.3d at 100, it therefore cannot be deemed "structural error." Accord *Garcia v. State* (Nev. 2001), 17 P.3d 994, 997.

Moreover, it is worth noting that the United States Supreme Court has already undermined the notion that a violation of Article 36 of the Vienna Convention can be deemed structural error. In *Breard v. Greene,* the Supreme Court addressed Article 36 of the Vienna Convention in the context of a federal habeas corpus action. The defendant in *Breard,* a citizen of Paraguay who was convicted of capital murder in a Virginia court, filed a motion for habeas relief in which he argued, for the first time, that arresting authorities never informed him of his right to contact the Paraguayan Consulate. *Breard,* 523 U.S. at 373, 118 S.Ct. at 1354, 140 L.Ed.2d at 536. The Supreme Court held that Breard had procedurally defaulted his Vienna Convention claim by failing to raise it in state court. *Id.,* 523 U.S. at 375, 118 S.Ct. at 1354, 140 L.Ed.2d at 537. The court rejected as "plainly incorrect" the claim that the Vienna Convention was "the 'supreme law of the land' and thus trump[ed] the procedural default doctrine." *Id.* Significantly, the court also noted that, even if Breard had properly raised his Vienna Convention claim in state court, "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction *without some showing that the violation had an effect on the*

trial." (Emphasis added.) *Id.,* 523 U.S. at 377, 118 S.Ct. at 1355, 140 L.Ed.2d at 538, citing *Fulminante,* 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302. By noting that Breard would be unlikely to demonstrate prejudice, the Supreme Court implicitly rejected the notion that a proven violation of Article 36 of the Vienna Convention amounts to structural error; by definition, a structural error obviates any requirement of demonstrating prejudice. See *Neder,* 527 U.S. at 7, 119 S.Ct. at 1833, 144 L.Ed.2d at 45-46; see, also, *Lambright v. Stewart* (C.A.9, 1999), 191 F.3d 1181, 1191-1192 (structural error does not require showing of prejudice, even on federal habeas corpus review).

For these reasons, I see no constitutional barrier to this court utilizing a plain-error analysis in disposing of Issa's arguments concerning Article 36 of the Vienna Convention.

Pfiefer, J., concurring in part and dissenting in part. As I stated in dissent in *State v. Murphy* (2001), 91 Ohio St.3d 516, 562, 747 N.E.2d 765, 813, restricting the universe of cases this court reviews when conducting proportionality review "continually lower[s] the bar of proportionality." This case then will enable prosecutors to go where they have never been before. For in this case, after conducting proportionality review, a majority of this court has upheld a sentence of death even though the defendant was not the principal offender, even though the principal offender did not receive the death penalty, even though the defendant was not present when the murder took place, and even though the murder victim's wife, who allegedly

initiated the murder by paying the defendant to get a gun, was acquitted.

None of this is to suggest that Issa is not culpable for the murder. He is, and I vote to affirm his convictions. He was an active participant in the planning of the murder and the murder almost certainly would not have occurred without him. However, the facts remain: Issa did not kill; Issa was not present during the killing; the actual killer did not receive the death penalty. If ever a sentence of death deserved to be vacated because of proportionality, this is it. But of course, we cannot consider the case in which Issa's accomplice received a life sentence because he received a life sentence, and we cannot consider the case in which the victim's wife was acquitted because she was acquitted.

Never mind that the facts are exactly the same; never mind that Issa was not the trigger man, he was eligible to be charged with capital murder, he was convicted of capital murder, and he was sentenced to death. All the rest, according to the majority, is irrelevant. I beg to differ.

R.C. 2929.021 requires clerks of courts to file with this court certain basic information concerning each case in which a capital indictment is filed. R.C. 2929.03(F) requires trial courts to file a separate opinion here when they impose a life sentence under R.C. 2929.03(D). This information would be helpful to this court but it is seriously incomplete. We should also receive information on every case in which a capital indictment could have been sought. We also should be informed of the ultimate resolution of each potential or actual capital case. Without this information, our ability to conduct serious and

thorough proportionality review is significantly compromised.

Issa's death sentence should be reversed because it is disproportionate to those received by his accomplices. He should be sentenced to life in prison. I dissent.

Lundberg Stratton, J., dissenting. I respectfully dissent from the majority's decision to affirm the defendant's convictions and sentence of death. The defendant was not properly advised of his consular rights under the Vienna Convention, Article 36, and, therefore, I would reverse the judgment of the trial court and remand for a new trial.

The Vienna Convention on Consular Relations was created in 1963, and today, more than one hundred sixty countries have ratified the treaty. See State Department, Pub. No. 10518, Consular Notification and Access, January 1998: Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them (1998) at 42. The United States signed the Vienna Convention on April 24, 1963, and it became effective with respect to the United States on December 24, 1969. 21 U.S.T. 77.

Article 36 sets forth the framework for communication between foreign nationals and their consuls and imposes obligations on United States law enforcement:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

"* * *

"(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to any consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph*." (Emphasis added.)

"Consular access serves two functions. It serves the needs of foreign nationals who benefit from prompt communication with consular officials, as well as their intervention during legal proceedings; at a minimum, it provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system. It also enables governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained persons." Aceves, International Decisions: *Murphy v. Netherland* (1997), 116 F.3d 97 (1998), 92 Am.J.Internatl.L. 87, 89-90.

In October 1973, the United States Department of State concluded, "In the Department's view, Article

36 of the Vienna Convention contains obligations of the highest order and should be no dealt with lightly." Quoted in Aceves, The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies (1998), 31 Vand.J.Transnatl.L. 257, 270. Although the United States vigorously insists on consular notification for its own nationals, we often fail to comply with the treaty regarding foreign nationals in our country. Of the eighty-three foreign nationals currently on death row in the United States, the vast majority were not alerted to their right to consular notification under the Vienna Convention. Henry, Overcoming Federalism in Internationalized Death Penalty Cases (2000), 35 Tex.Internatl.L.J. 459, 459-460, citing The International Bannister Foundation, Reported Nationals on Death Row in the United States, at a now inaccessible web address; see related address <*http://www.ibf.brum.net/fornatl.htm*>. Moreover, attempts to raise this issue have not been successful. At least two thirds of foreign nationals executed since reinstatement of the death penalty in 1976 unsuccessfully raised the treaty issue. *Id.* at 460.

Today, the majority follows the trend by failing to recognize the significance of defendant's rights under the Vienna Convention. The majority concludes that because defense counsel failed to raise defendant's Vienna Convention claim in the trial court, he has waived all but plain error, and the majority goes on to find no plain error on these facts.

In my view, however, the failure to inform the defendant of his rights under the Vienna Convention constitutes structural error, affecting "'the entire conduct of the trial from beginning to end" as well as

the "framework within which the trial proceeds.'" *State v. Esparza* (1996), 74 Ohio St.3d 660, 661, 660 N.E.2d 1194, 1196, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302, 331. I agree with the majority that suppression is not the remedy, however. Because the right to be advised of consulate access rights affects every aspect of a trial, I believe that the treaty's provisions can be enforced only by starting anew. Therefore, I believe that a new trial is the appropriate remedy.

On June 27, 2001, the International Court of Justice agreed. The court, which is the principal judicial organ of the United Nations, delivered its judgment in the *LaGrand* case, holding that the United States, in arresting, detaining, trying, convicting, and sentencing Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention. See *Germany v. United States of Am.* (2001), *http://ww.icjcij.org/icjwww/idocket/igus/igusframe.htm*. To view the *LaGrand* case, ftp://ftp.sconet.state.oh.us\Opinions\2001/982449.pdf.) The LaGrand brothers, born in Germany in 1962 and 1963 respectively, were arrested in 1982 in Arizona and convicted of first degree murder, attempted first degree murder, attempted armed robbery, and two counts of kidnapping. Both brothers were sentenced to death in 1984 for their crimes.

The German consulate was made aware of the case only in June 1992 by the LaGrands themselves, who had learned of their rights from other resources,

and not from the Arizona authorities. On December 21, 1998, the LaGrands were formally notified by the United States authorities of their right to consular access. After the brothers' execution dates were set for 1999, Germany intervened in an attempt to prevent the execution of the LaGrands. Although Germany sought on several levels to prevent the execution of the LaGrands, both were executed in 1999.

The International Court of Justice noted that the United States conceded that United States authorities failed to advise the LaGrand brothers of their consular rights under the Vienna Convention on Consular Relations. The court held in a fourteen-to-one decision that "by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph l(*b*), of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1." *Id.* at paragraph 128(3).

Moreover, the court held that "by not permitting the review and reconsideration, in the light of the rights set forth in the convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brother sunder Article 36, paragraph 2, of the Convention." *Id.* at paragraph

128(4). Further, the court held that "by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999." *Id.* at paragraph 128(5). Last, the court held that "should nationals of the Federal Republic of Germany nonetheless be sentenced to sever penalties, without their rights under Article 36, paragraph 1(*b*), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention." *Id.* at paragraph 128(7).

The *LaGrand* decision makes clear that the United States must not take lightly the provisions of the Vienna Convention on Consular Relations. Today the majority does that which the International Court of Justice and even our Constitution warn against.

The Supremacy Clause, Section 2, Article VI of the United States Constitution provides: "This Constitution, and the Law of the United States * * * *and all Treaties made*, or which shall be made, * * * *shall be the supreme Law of the Land; and the Judges in every State shall be bound* * * *.*" (Emphasis added.)

This very court has held in the past that the protections of treaties are on part with the Constitution. In *State v. Vanderpool* (1883), 39 Ohio St. 273, this court reviewed the provisions of the Ashburton Treaty, which provided for extradition,

and held, "The provisions of this treaty are part of the law of the land, enforceable by the judicial tribunals of this state, in behalf of a person so detained and prosecuted." *Id,* paragraph two of the syllabus. The court continued, "This treaty is therefore the law of the land, and the judges of every state are as much bound thereby as they are by the constitution and laws of the Federal or State governments. It is therefore the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself." *Id.* at 276-277.

Thus, in addition to the Supremacy Clause, this court in *Vanderpool* clearly held that treaties are on par with the Constitution, and we are bound by both. Therefore, I would find that the failure to advise the defendant of his rights under the Vienna Convention is akin to the failure to advise a defendant of his Sixth Amendment right to counsel. See *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

The majority finds that, as in the case of a statutory violation, the exclusionary rule is not an appropriate sanction, absent an underlying constitutional violation, unless the treaty expressly provides for that remedy. I agree with the majority that exclusion is not the remedy, but I would distinguish *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 18 O.O.3d 435, 416 N.E.2d 598, in that it deals with a statutory violation, not a treaty violation. As noted above, I would find that the failure to advise defendant of his rights under the Vienna Convention equates to the failure to advise him of his Sixth

Amendment right to effective assistance of counsel. See *Vanderpool*. Therefore, as noted above, I would reverse and remand to the trial court for a new trial.

The Vienna Convention offers foreign nationals, who often have both cultural and language barriers, the opportunity to obtain information from their consul about the legal system in which they are detained and how it may differ from the legal system in the defendant's home country. Particularly with foreign nationals with language barriers, cultural differences, and scarce resources, the Vienna Convention can greatly enhance their ability to defend themselves; likewise, our nationals in foreign countries equally need such assistance.

Having grown up abroad and having lived in three different foreign countries, I have seen first-hand the vastly different foreign legal systems and how our nationals are often treated in a foreign land. Article 36 of the Vienna Convention may provide our nationals their only safeguard against a hostile legal system.

The Vienna Convention offers Americans abroad the comfort of reciprocity. Under starkly different legal systems, where rights we take for granted, such as the right to counsel, a jury, discovery, cross-examination, and open trials, are routinely not afforded by other countries, how could our nationals possibly prove that they did not waive their consulate rights? With the closed trials and secrecy of many legal systems, how could our nationals overcome foreign legal barriers to prove that the failure to provide access to a consul resulted in an error at trial? Our best way to ensure that other nations honor the treaty by providing consular access

to our nationals is to demand strict adherence to the right to consular access for foreigners in *our* country. In that way, our nationals will be provided an advocate to try to safeguard the minimal protections we take for granted in the United States.

When we excuse our failure to advise the defendant of his consulate rights on the ground that there was "no plain error," we provide the very words and tools to other countries to use to excuse their denial of rights to our nationals, and the protections of the treaty become meaningless. "If the right under the treaty * * * can only be enforced by the surrendering nation by protest or otherwise against the one making the demand, that is, if it is a question not cognizable in the courts, it is of little value under our system of Federal and state governments." *Vanderpool*, 39 Ohio St. at 277.

If the United States fails in its responsibilities under the convention, then other member countries may choose to do unto us as we have done unto them. Oliver Wendell Holmes said, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid* (1922), 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299, 303. If we are to expect that our nationals will be afforded the rights guaranteed them under the treaty, we must guard the rights of foreign nationals in our country as well. I respectfully dissent and would reverse the judgment of the trial court and remand the cause for a new trial.

APPENDIX

Proposition of Law No. I. A treaty signed by the United States government is the law of the land. Therefore, under the Vienna Convention, Issa's rights were violated by the police's and court's failure to inform him of his right to meet with Jordan counsel.

Proposition of Law No. II. The trial court allowing in hearsay statements of Andre Miles as to lssa's alleged role in the murders violated Issa's right to confront witnesses, as mandated by the United States and Ohio Constitutions.

Proposition of Law No. III. A defendant is denied effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution, when defense counsel fails to raise the issue of defendant's cultural competency to stand trial, fails to have an independent firearms expert, investigation or crime scene experts.

Proposition of Law No. IV. A change in the Ohio Constitution, which provides less review to capital appellants (whose crimes were committed on or after January 1, 1995) violates the Fourteenth Amendment and fails to provide the meaningful appellate review mandated by the Eighth Amendment.

Proposition of Law No. V. Appellant's indictment was returned by an improperly constituted grand jury and upon inadequately presented evidence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. VI. The prejudicial publicity, which occurred throughout appellant Issa's trial, deprived him of his right to a fair trial and a fair and reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. VII. Appellant's death sentence is excessive and disproportionate to sentences in similar cases, thereby depriving Mr. Issa of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Sections 9 and 16, Article I of the Ohio Constitution.

Proposition of Law No. VIII. The process used to select the foremen of grand juries which return capital indictments in Hamilton County is biased. As a result, appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

Proposition of Law No. IX. The defendant-appellant was prejudiced by a lack of funds to adequately defend himself in this litigation. As a result, Issa was deprived of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. ·

Proposition of Law No. X. The judgment of conviction on the aggravated murder counts [*sic*] is unsupported by legally sufficient evidence and is contrary to the manifest weight of the evidence, and as a result, appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

Proposition of Law No. XI. Appellant was denied reasonable bond in violation of his rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 9, of the Ohio Constitution.

Proposition of Law No. XII. The admission of gruesome and otherwise prejudicial photographs which were cumulative of each other as well as other evidence violated appellant Issa's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Proposition of Law No. XIII. Requiring that mitigating factors be proven by a preponderance of the evidence violates the Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. XIV. The trial court's application of Ohio's statutory definition of reasonable doubt in the mitigation phase of appellant's capital trial deprived him of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. XV. Ohio's death penalty law is unconstitutional. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and §§ 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05, do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Ahmad Fawzi Issa.

Michael K. Allen, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for appellee.

Faulkner & Tepe and *A. Norman Aubin*; *Herbert E. Freeman*, for appellant.

Speedy Rice, urging reversal for *amicus curiae*, National Association of Criminal Defense Lawyers.

APPENDIX E

No. 15-4147

United States Court of Appeals
for the Sixth Circuit

AHMAD FAWZI ISSA,

Petitioner–Appellant,

v.

MARGARET BRADSHAW, Warden,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

No. 1:03-cv-00280—Sandra S. Beckwith,
District Judge.

Decided and Filed: December 13, 2018

Before: COLE, Chief Judge; MERRITT, MOORE, CLAY, GIBBONS, SUTTON, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, and NALBANDIAN, Circuit Judges.*

* Judge Batchelder and Judge Cook recused themselves from participation in this ruling.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Michael J. Hendershot, Samuel C. Peterson, Brenda S. Leikala, Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON RESPONSE:** S. Adele Shank, LAW OFFICE OF S. ADELE SHANK, Columbus, Ohio, Lawrence J. Greger, Dayton, Ohio, for Appellant.

The court delivered an order denying the petition for rehearing en banc. SUTTON, J. (pp. 3-9), delivered a separate opinion concurring in the denial of the petition for rehearing en banc.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

OPINION

SUTTON, Circuit Judge, concurring in the denial of rehearing en banc. This en banc petition implicates the recurring tension between deciding cases correctly and delegating decision-making authority to three-judge panels of the court.

In my opinion and with all respect to the panel, this case was not decided correctly. At stake is whether Ahmad Issa, an Ohio prisoner convicted of aggravated murder for his role in a murder-for-hire scheme in 1997, is entitled to habeas relief for an alleged Confrontation Clause violation. That clause gives a criminal defendant the right "to be confronted with the witnesses against him" at trial. U.S. Const. amend. VI.

In granting habeas relief, the panel erred in assessing what the Confrontation Clause required at the time of trial and in assessing what the Confrontation Clause requires today.

First, no constitutional violation occurred at the time of trial two decades ago—at least not one that AEDPA permits us to correct. The Ohio Supreme Court's decision rejecting Issa's claim was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In 1997, Andre Miles shot Maher Khriss and Ziad Khriss with a high-powered rifle. The day after the murders, Miles told his friends Joshua and Bonnie Willis that Issa had agreed to pay him to kill

Maher and described the details of the crime to them. Miles refused to testify at Issa's trial, prompting the State to call the Willises to testify about what Miles had told them. The jury convicted Issa of aggravated murder and recommended the death penalty. The trial court sentenced Issa to death. *See State v. Issa*, 752 N.E.2d 904, 910–13 (Ohio 2001).

When the state courts decided the case, out-of-court statements could be admitted under the Confrontation Clause if they (1) fell within a "firmly rooted hearsay exception" or (2) had "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The first prong has nothing to do with this case. Under the second prong, courts determined admissibility based on "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 820 (1990). "[C]ourts ha[d] considerable leeway in their consideration of appropriate factors" because no one "mechanical test" determined reliability. *Id.* at 822.

The Ohio Supreme Court reasonably applied that test in rejecting Issa's claim and most assuredly did not contradict the test. In its words:

> Applying [*Lilly v. Virginia*, 527 U.S. 116 (1999)] and [*State v. Madrigal*, 721 N.E.2d 52 (Ohio 2000)] to this case, it is clear that in order to determine whether the admission of evidence concerning Miles's confession violated appellant's confrontation rights, we must examine the circumstances under which the confession was made. Unlike the declarants in *Lilly* and *Madrigal*, Miles was

> not talking to police as a suspect when he made the out-of-court statement. Miles's confession was made spontaneously and voluntarily to his friends in their home. Moreover, Miles had nothing to gain from inculpating appellant in the crime. In fact, by stating that appellant had hired him to kill Maher, Miles was admitting a capital crime, *i.e.*, murder for hire. Furthermore, Miles's statement was clearly not an attempt to shift blame from himself because he was bragging about his role as the shooter in the double homicide.
>
> We therefore find that the circumstances surrounding the confession did "render the declarant [Miles] particularly worthy of belief." *Madrigal*, 87 Ohio St.3d at 387, 721 N.E.2d at 63, quoting *Wright*, 497 U.S. at 819 . . . . Our decision herein is buttressed by Chief Justice Rehnquist's separate opinion in *Lilly*, in which he noted that in a prior case, the court "recognized that statements to fellow prisoners, *like confessions to family members or friends*, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant." (Emphasis added.) *Id.*, 527 U.S. at 147, 119 S.Ct. at 1905, 144 L.Ed.2d at 141 (Rehnquist, C.J., concurring in judgment). Accordingly, we hold that the admission of Bonnie's and Joshua's testimony concerning Miles's confession did not violate the Confrontation Clause.

Issa, 752 N.E.2d at 919.

By my count, the Ohio Supreme Court considered ten factors regarding Miles's statements: Miles was not talking to police, was not a suspect, made the statements spontaneously, made the statements voluntarily, made the statements to friends, made the statements in his friends' home, had nothing to gain from inculpating Issa, admitted committing a capital crime, did not attempt to shift blame, and was boasting about what he had done. The Ohio Supreme Court reasonably found Miles's statements reliable and worthy of belief under "the circumstances surrounding the confession." *Id.*

Our panel nonetheless granted Issa relief, holding that the Ohio Supreme Court's decision conflicted with *Wright*'s requirement that courts consider the *totality* of the circumstances in determining the reliability of the out-of-court statements. As the panel saw it, "the Ohio Supreme Court determined that Miles's statements were trustworthy simply because he made them to his friends" instead of the police, without "considering any other facts." *Issa v. Bradshaw*, 904 F.3d 446, 457 (6th Cir. 2018). That alleged deficiency became the springboard for the panel's decision to take a fresh look at the case, then to find that the statements were unreliable, then to hold them constitutionally inadmissible, then to grant the writ. *Id.* at 457-61.

This approach cannot be squared with Congress's mandate that we may disregard state-court decisions only if they are "contrary to" or "unreasonably apply" decisions of the U.S. Supreme Court. The Ohio Supreme Court invoked the relevant cases, quoted several of them, and fairly applied the *Roberts* test to Issa's case. The worst that can be said of the decision

is that it did not say "totality" in describing the test. But surely it applied an all-of-the-circumstances test in view of the many criteria—ten—that it mentioned and that reasonably supported the reliability of these statements.

For my part, I cannot identify any other material circumstance the court should have considered.

For its part, the panel identified two circumstances the Ohio Supreme Court should have considered. One is that Miles, long after the murders, testified at Linda Khriss's murder trial (the State believed Linda initially hired Issa to kill Maher, her husband) and at that point denied talking to the Willises. But we have no warrant to take the Ohio Supreme Court to task for neglecting to consider this factor. It is not a permissible factor. Under the *Roberts* test, courts assess reliability based on the circumstances that "render the declarant particularly worthy of belief" at the time. *Wright*, 497 U.S. at 819. Just as one could not say an out-of-court statement became reliable based on corroborating evidence at trial, *id.*, one cannot say a statement became unreliable based on statements at a later trial.

The other circumstances was this: The panel said that, in the course of Miles's friendship with the Willises, Miles often bragged and told stories the Willises weren't sure were true. But the Ohio Supreme Court did consider this possibility and simply drew a different conclusion about it—that he was boasting and that this reality added authenticity to (rather than subtracted authenticity from) the statements. Either possibility, it seems to me, is reasonable. What's not reasonable is to say that the

Ohio Supreme Court's decision is "contrary" to *Roberts* because it could have viewed this circumstance in a slightly different light than the panel viewed it. Find me a totality-of-the-circumstances test in which it is not possible—it's always possible—for the reviewer court to identify another consideration the reviewee court might have addressed or for that matter a consideration the reviewee court might have addressed differently. If we interpret AEDPA to mean that we may identify one factor a state court didn't mention in a totality-of-the-circumstances test, then use that failure to grant habeas relief, that amounts to circumvention of the law, not respect for the modest power it gives us.

How, then, could one conclude that the Ohio Supreme Court did not apply a totality-of-the-circumstances test? Or applied it unreasonably? I do not see a plausible explanation. To accept the panel's conclusion that the decision was contrary to *Wright* and *Roberts* would be to accept that a state-court decision is contrary to clearly established law whenever it fails to mention one word from the U.S. Supreme Court's applicable test, emphasizes some factors over others under a totality test, or draws a different conclusion with respect to one factor under a totality test. Only a most ungenerous reading of the Ohio Supreme Court's decision permits the conclusion that the court failed to consider all of the material circumstances surrounding the statements or applied the test unreasonably.

Second, Issa is not eligible for habeas relief for another, freestanding reason: Miles's statements would be admitted today anyway. Under current Confrontation Clause jurisprudence, the statements

were readily admissible, making any potential error (including the one identified by the panel) harmless. In *Crawford v. Washington*, the Supreme Court abrogated *Roberts* and later cases applying the "indicia of reliability" test. 541 U.S. 36, 60-68 (2004). It is now clear that only "testimonial statements"—those "made with the primary purpose of creating evidence" for a prosecution—implicate the Confrontation Clause. *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015); *see Crawford*, 541 U.S. at 51 (defining testimony as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" (quotation omitted)).

All of this adds a serious additional obstacle to Issa, as the habeas statute provides relief only for prisoners "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Miles did not make the spontaneous statements to his friends solemnly or in order to establish a fact for a trial. He was showing off. His statements were not remotely testimonial and thus did not violate the Confrontation Clause. Because the State does not currently hold Issa in violation of the Confrontation Clause or any other provision of the Constitution, he is not eligible for habeas relief.

Ten years ago, one of our decisions made this precise point. *Desai v. Booker*, 538 F.3d 424, 427-28 (6th Cir. 2008) (holding that the inmate could not obtain habeas relief under § 2254(a) for non-testimonial statements admitted under the pre-*Crawford* regime). The panel should have respected it here.

Think about *Desai*'s point this way. If Issa received what he wants—a new trial premised on the

contention that the state courts erred in admitting the Willises' testimony under *Roberts*—it would not do him any good. The State could admit that same testimony in the new trial, this time under *Crawford*'s directive that the Confrontation Clause applies only to testimonial statements. A new trial with the same evidence as the old trial makes any potential error quintessentially harmless, which means the panel erred in granting habeas relief. *Desai*, 538 F.3d at 428; *see Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

The panel shunted *Desai* to the side on the ground that it failed to follow *Fulcher v. Motley*, 444 F.3d 791 (6th Cir. 2006), and *Stallings v. Bobby*, 464 F.3d 576 (6th Cir. 2006), which both granted habeas relief under the *Roberts* test. The point does not stand up. Neither case discussed, or for that matter mentioned, whether *Crawford* applied in this context. They asked only whether *Crawford* applied retroactively because in those cases the decision *helped* the habeas applicants. Neither case thus had any explanation for addressing today's issue because the statements in both cases were testimonial—and therefore *also inadmissible*—under *Crawford*. *Stallings* said exactly that. 464 F.3d at 581. The same was true in *Fulcher*. 444 F.3d at 808 (statements by defendant's girlfriend to police while in custody, while subjected to interrogation and leading statements, and while suspected by police of wrongdoing).

Unjustifiably setting *Desai* to the side is one thing. What makes it worse is to replace it with an approach that comes to the opposite conclusion and violates AEDPA in the process. Congress has

authorized federal courts to give habeas relief to a prisoner only when a State presently holds him in violation of his constitutional rights, not to someone who at some prior point was held in violation of the Constitution according to a later-overruled precedent. 28 U.S.C. § 2254(a). There's no other way to read that provision. All in all, the panel's new rule runs headlong into the language of the habeas statute, buries a precedent (*Desai*) that comes to the opposite conclusion, and has no provenance in *Fulcher* or *Stallings*—the two decisions that allegedly gave the panel an explanation for looking anew at the issue in the first instance.

Don't let the timing of *Roberts*, *Crawford*, or this two-decade-old trial distract you. There are *two* independent reasons for denying relief under AEDPA today: No eligible constitutional violation occurred under *any* of the tests at *any* time. Whether one considers the belt for denying relief (that the state-court decision did not contradict or unreasonably apply the *Roberts* test) or the suspenders (that Issa is not currently in custody in violation of the Constitution under the *Crawford* test), the conclusion is identical: The writ cannot issue.

What to do? One the one hand, several considerations support en banc review of this decision. The panel ignored, indeed seemingly overruled, our decision in *Desai*. And in doing so, it precipitated a circuit split. At least one other circuit has followed *Desai* in denying confrontation claims under §2254(a) when the statements are not testimonial under *Crawford*. *See Mitchell v. Superintendent Dallas SCI*, 902 F.3d 156, 163-64 (3d Cir. 2018). Plus, I have a hard time looking the other

way when the statute that gives federal courts this supervisory power requires a showing that the state courts "contradicted" or "unreasonably applied" Supreme Court precedent, when at least the same (if not more) can be said of our panel's decision.

On the other hand, the dispositive hand for me, the number of cases presenting this issue is small and growing smaller. *Crawford* was decided in 2004. It thus would seem to be the rare, perhaps non-existent, non-capital case that will raise the issue today. As for capital cases, the number of cases presenting this issue must be vanishingly small. Even with the snail-like pace of capital-habeas litigation, the number of capital-punishment convictions obtained under *Roberts* leading to habeas claims looked at after *Crawford* must be near zero as well. Consider what must happen. You need a capital case that turns on the out-of-court statements of a witness who does not testify. Then you need a federal habeas decision that the state court contradicted or unreasonably applied the *Roberts* test in admitting the witness's statement. Then you need a situation in which the evidence, while inadmissible under *Roberts*, would be admissible under *Crawford*. One could add the condition that the witness must have crossed the international date line before trial without materially shrinking this tiny pool of cases.

Not every error, it's worth remembering, is worth correcting through the en banc process. That's why a decision not to vote for en banc rehearing, in the words of Judge Harry Edwards, does not "sanction the result [the panel] reached" but simply reflects that it does not justify such a "significant expenditure of judicial energies." *Bartlett ex rel.*

Neuman v. Bowen, 824 F.2d 1240, 1243-44 (D.C.Cir. 1987) (Edwards, Jr., concurring in the denial of rehearing en banc) (quotation omitted). The trust implicit in delegating authority to three-judge panels to resolve cases as they see them would not mean much if the delegation lasted only as long as they resolved the cases correctly as others see them. Last but not least: We are not the court of last resort. From time to time, it's worth letting the United States Supreme Court decide whether a decision is correct and, if not, whether it is worth correcting.

For these reasons, I concur in the denial of rehearing en banc.

ENTERED BY ORDER OF THE COURT:

/s/ Deborah S. Hunt, Clerk