APPENDIX A

Neutral
As of: September 18, 2018 5:32 PM Z

Lang v. Bobby

United States Court of Appeals for the Sixth Circuit

March 6, 2018, Argued; May 11, 2018, Decided; May 11, 2018, Filed

File Name: 18a0091p.06

No. 15-3440

Reporter
889 F.3d 803 *; 2018 U.S. App. LEXIS 12319 **; 2018 FED App. 0091p (6th Cir.); 2018 WL 2168649

EDWARD LANG, Petitioner-Appellant, v. DAVID BOBBY, Warden, Respondent-Appellee.

Subsequent History: Rehearing, en banc, denied by *Lang v. Bobby, 2018 U.S. App. LEXIS 17866 (6th Cir., June 28, 2018)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 5:12-cv-02923—Jack Zouhary, District Judge.

Lang v. Bobby, 2015 U.S. Dist. LEXIS 39365 (N.D. Ohio, Mar. 27, 2015)

Core Terms

Juror, mitigation, trial court, trial counsel, childhood, phase, district court, ineffective, post-conviction, state court, juror bias, investigator, deficient, Appeals, prejudicial, strategic, ineffective assistance, closing argument, defense counsel, questioned, abduction, direct appeal, abused, two year, psychologist, sentencing, witnesses, records, early childhood, characterization

Case Summary

Overview
HOLDINGS: [1]-The inmate's *Sixth Amendment* right to an impartial jury was not violated by the presence of Juror 386 because Juror 386 assured the court that she did not mention her relationship to the victim to the other members of the jury, and none of the jurors indicated that Juror 386 had talked to them about it, and once the trial court knew Juror 386's relationship to one of the victims, it acted to prevent her from communicating with the other jurors and held a hearing to determine the effect of her presence on the jury; [2]-The Ohio Supreme Court reasonably concluded that counsel's approach did not result in ineffective assistance of counsel because it allowed the defense to focus the jury's attention on defense counsel's argument that addressed the inmate's abuse after his father abducted him.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN1[] **Review, Antiterrorism & Effective Death Penalty Act**

Under the *Antiterrorism and Effective Death Penalty Act*, a district court shall not grant a habeas petition on a claim that was decided on the merits in state court unless the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *28*

U.S.C.S. § 2254(d). Under the "contrary to" clause, a federal habeas court may grant the writ if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies the law or bases its decision on an unreasonable determination of the facts, in light of the record before the state court. Evidence introduced in federal court is not considered. The petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. *28 U.S.C.S. § 2254(e)(1)*.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Bias

HN2 **Disqualification & Removal of Jurors, Bias**

When there is evidence of possible juror bias, a defendant is entitled to a hearing with all interested parties present to determine the circumstances, the impact on the juror, and whether the information was prejudicial. A petitioner is required to show actual prejudice when alleging juror partiality.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Bias

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN3 **Disqualification & Removal of Jurors, Bias**

A habeas petitioner bears the burden to demonstrate that a juror was biased. Moreover, a juror's testimony at a Remmer hearing is not inherently suspect.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Bias

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN4 **Disqualification & Removal of Jurors, Bias**

In reviewing claims of juror bias in the habeas context: (1) the trial court must hold a hearing when the defendant alleges unauthorized contact with a juror; (2) no presumption of prejudice arises from the unauthorized contact; (3) the defendant has the burden of proving actual juror bias; and (4) juror testimony at the Remmer hearing is not inherently suspect.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN5 **Judges, Discretionary Powers**

Courts enjoy leeway when applying a general standard.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN6 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that deficient performance prejudiced the defense so as to deprive the petitioner of a fair trial.

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN7 **Review, Scope of Review**

In federal habeas proceedings, the reviewing court looks to the last reasoned opinion addressing the claim at issue.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN8 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

There is a strong presumption that an attorney's attention to some issues at the exclusion of others reflects tactics rather than neglect. Strategic choices

made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN9 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

A petitioner bears the burden of proof to show that his counsel made decisions without adequate knowledge.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN10 **Capital Punishment, Mitigating Circumstances**

A defense lawyer has no constitutional obligation to present cumulative evidence at a mitigation hearing. There comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.

Counsel: ARGUED: Michael J. Benza, THE LAW OFFICE OF MICHAEL J. BENZA, INC., Chagrin Falls, Ohio, for Appellant.

Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON BRIEF: Michael J. Benza, THE LAW OFFICE OF MICHAEL J. BENZA, INC., Chagrin Falls, Ohio, Laurence E. Komp, Manchester, Missouri, Karl Schwartz, LAW OFFICE OF KARL SCHWARTZ, Elkins, Pennsylvania, for Appellant.

Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Judges: Before: SILER, MOORE and GIBBONS, Circuit Judges. SILER, J., delivered the opinion of the court in which GIBBONS, J., joined. MOORE, J. (pp. 18-33), delivered a separate dissenting opinion.

Opinion by: SILER

Opinion

[*805] SILER, Circuit Judge. Edward Lang, an Ohio prisoner under a death sentence, appeals from the district court's denial of his petition for a writ of habeas corpus filed under *28 U.S.C. § 2254*. The district court granted Lang a Certificate of Appealability (COA) on his first and second grounds for relief, and we granted an expansion of the COA to include three additional claims.[1] These claims **[**2]** can be reduced to two main issues. The first involves a juror who was related through marriage to one of the victims of the homicide, whom the trial court removed from the jury prior to deliberations. The second concerns the nature and volume of mitigation evidence presented by Lang's defense counsel. For the reasons that follow, we **AFFIRM** the denial of relief by the district court.

I. Factual Overview

In 2006, Lang shot and killed Jaron Burditte and Marnell Cheek during a botched drug deal turned robbery in Canton, Ohio.[2] Lang was indicted on two counts of aggravated murder and one count of aggravated robbery with firearm **[*806]** specifications. In 2007, the case was tried before a jury.

Juror 386

After the jury had been empaneled and the first two witnesses had testified, the prosecutor notified the trial court that Cheek's father recognized Juror 386 as the daughter of the woman married to Cheek's brother. The trial court decided to address the issue at the next break, after two more witnesses testified. The court later noted that, because the jurors were in the courtroom, they did not have the opportunity to interact with each other. During the break, the trial court and counsel questioned **[**3]** Juror 386 outside the presence of the

[1] However, Lang did not brief one of the claims certified for appeal: the ineffective assistance of appellate counsel. Therefore, this claim is waived. *See* *Elzy v. United States, 205 F.3d 882, 886 (6th Cir. 2000)*.

[2] Additional information about the facts underlying the crime can be found in the Ohio Supreme Court's opinion affirming Lang's conviction on direct appeal. *State v. Lang, 129 Ohio St. 3d 512, 2011- Ohio 4215, 954 N.E.2d 596 (2011)*.

other jurors. Juror 386 acknowledged her connection to Cheek and said she had met her once and had attended her funeral. The juror said she learned of Cheek's death from her grandfather and from what she had read in the newspaper; however, she denied talking to her mother, step-father, or family members about the case or learning anything about it. The trial court also questioned Juror 386 about her contact with the other jurors. She denied telling any of them about her connection to Cheek. Juror 386 was excused by agreement of the parties.

Before dismissing her, the trial court confirmed that Juror 386 had not spoken with other jurors and instructed her to have no contact with other jurors:

> **Trial Court**: You cannot discuss this at all with any of the other jurors. You have not done so. Is that correct?
>
> **Juror 386**: No.
>
> **Trial Court**: No? You cannot discuss this with them. You cannot call them on the phone and talk to them about this. If you would see them on the street or at a store while this case is still going on, you can't discuss with them why you were removed from jury service or anything else about this case whatsoever. Do you understand that?
>
> **Juror [**4] 386**: Yes.
>
> **Trial Court**: Have you talked to any of them about this whatsoever up until this very moment? Have you talked to any of the other jurors about this at all?
>
> **Juror 386**: No.
>
> **Trial Court**: Okay thank you.

The trial court then summoned the jurors and told them that Juror 386 was excused because "it was determined that she may have had a relationship with either a witness or a party or somebody that was involved in the case." The trial court asked the jurors as a group whether Juror 386 had talked to them about knowing someone involved in the case. The judge stated: "I take it by your silence that she did not." Neither Lang's counsel nor the prosecutor asked to question the jurors individually. Juror 386 was replaced, and the trial resumed. *State v. Lang, 954 N.E.2d at 613*. Lang does not claim a motion for a mistrial was made. When the prosecution rested, Lang presented no evidence. The jury returned a guilty verdict on all counts. Thereafter, the trial court held a separate hearing for mitigation evidence and sentencing.

Mitigation Hearing

At the mitigation hearing, the jury heard evidence, chiefly from Lang's mother and half-sister, about Lang's difficult and dysfunctional childhood. In his opening statement, Lang's **[**5]** defense counsel, Anthony Koukoutas, said, "I am not here to make excuses." He continued to say, "I want to show you that [Lang] [i]s not just a name on a case file or a name that appears in the newspaper, that he's an actual human being." Counsel then previewed what he expected Lang's mother, Tracie Carter, and Lang's half-sister, Yahnene Robinson, to testify. He emphasized **[*807]** Lang's father's negative qualities and how he abducted, abused, and neglected Lang. He also referred to evidence of Lang's psychiatric problems and the fact that Lang was severely withdrawn and emotionally scarred after living with his father for two years.

The Ohio Court of Appeals summarized Carter's and Robinson's testimony:

> {¶ 315} Yahnena Robinson, the defendant's half-sister, had a close relationship with Lang before he was ten years old. She described it as a "typical brother sister relationship." Lang was also a "good student."
>
> {¶ 316} Robinson testified that Lang's father, Edward Lang Sr., abused their mother and was on drugs. Their mother would not allow Edward to visit Lang very often because of "his history and his anger problems."
>
> {¶ 317} After Lang graduated from elementary school, Lang visited his father **[**6]** in Delaware. The visit was supposed to last for two weeks, but Edward did not allow Lang to return home. Two years later, their mother found Lang and brought him home.
>
> {¶ 318} Lang was happy when he first came home, but later, his mood changed. According to Robinson, "he would be sad sometimes, quiet * * * [and] other times he would look real hurt or be angry." Subsequently, Lang received counseling, went to a psychiatric facility, and spent time in a residential facility for his mental-health problems.
>
> {¶ 319} Robinson also testified that Lang has a two-year-old daughter whose name is Kanela Lang.
>
> {¶ 320} Tracy Carter, the defendant's mother,

testified that Lang is the third of her four children. Carter met Edward Lang Sr. when he was her landlord. Carter did not have money to pay the rent, and she slept with him in exchange for lodging. Carter and Edward then developed a relationship.

{¶ 321} Carter stated that Edward became violently abusive when he was intoxicated and using drugs. After Lang was born, Edward went to jail for stabbing Carter and setting her apartment on fire. Edward was also incarcerated for child molestation.

{¶ 322} Carter would not allow Lang to visit his father until **[**7]** a court order ordered her to do so. Carter lived in Baltimore, Maryland, and Edward lived in Delaware. When he was ten years old, Lang went to see his father in Delaware for a two-week visit. However, Edward did not allow Lang to return home after the two weeks ended, and Carter did not see her son for the next two years. Carter made repeated attempts to find Lang in Delaware, but was unsuccessful. Finally, Carter found Lang and brought him home.

{¶ 323} Carter stated that her son was malnourished when she found him and was wearing the same clothing that he had been wearing when he left. Lang also had a burn on his shoulder, a gash on his hand, and other bruises. Lang told his mother that the burn was a cigarette burn.

{¶ 324} Before he saw his father, Lang had been treated with Depakote, Lithium, and Risperdal for depression and other conditions. Carter made sure that he took these medications on a regular basis. However, Lang did not continue to take them when he was with his father, because Edward did not obtain refills for the prescriptions.

{¶ 325} After returning home, Lang was withdrawn. Lang told Carter that he was fine and did not want to talk to her about what had happened. **[**8]** But Carter learned from her son, Mendez, that Edward had sexually abused Lang.

[*808] {¶ 326} Lang has received extensive psychiatric and other treatment. Carter testified, "He stayed in the Bridges Program twice for 90 days. He stayed at Woodburn Respiratory [sic] Treatment Center for a year. And he stayed off and on at * * * [the] Sheppard Pratt Center [a crisis center] 28 times."

{¶ 327} Lang has one child, Kanela. Carter states, "He has taken care of his daughter ever since the mother was pregnant. * * * [There] was nothing that he wouldn't do for her and for the baby."

{¶ 328} Lang did not finish high school. He dropped out of the 11th grade and "went to take care of his baby's mother." Lang got a job working for the census department. In June 2006, Lang moved to Canton.

{¶ 329} As a final matter, Carter told the jury, "We all are suffering. * * * I never sat here and said my son was a perfect child. I never sat here and said that my child had a good life or a bad life. But I am asking you not to kill my child."

Lang, 954 N.E.2d at 643-44.

After Carter and Robinson testified, the prosecutor began his closing argument. He attempted to minimize the testimony of Lang's mother and half-sister, stating, "We know now that **[**9]** Eddie was born in Baltimore, Maryland, that until the age of 10 life seemed to be pretty good. From 10 to 12 his life was allegedly not so good." The prosecutor continued to discredit Lang's mitigation narrative, "[W]e know that his mother on numerous occasions sought help for Eddie, but Eddie didn't take his medication." In his charge to the jury, the prosecutor stated that the "aggravating circumstances that you found to exist beyond a reasonable doubt now outweigh those mitigating factors by that same burden."

In response, Koukoutas started his closing argument by reminding the jury of the seriousness of the death penalty. He returned to his theme that the jurors had learned about Lang as a person. "You learned that he had siblings, that what like the prosecutor said, pretty normal childhood up until he was ten." Koukoutas depicted Lang's mother in a relatively positive light, in contrast to Lang's abusive father. He asked the jury to consider how she was ashamed to testify that she had exchanged sex for rent to Lang's father—a drug user and a convicted child molester who beat her while she was pregnant with Lang. Koukatas said no one would ever know exactly what happened to Lang **[**10]** during the two years he was with his father, but he speculated that Lang's father may have "molested him or even pimped him out to get drugs." Koukoutas stressed the impact, both physical and psychological, on Lang of those two years when he was kept away from his mother. In conclusion, Lang's counsel acknowledged the loss to the victims' families, and he urged the jury to consider the consequences to Lang and his family.

II. Procedural History

The jury deliberated for approximately eleven hours before recommending that Lang be sentenced to death for the aggravated murder of Cheek and to life imprisonment for the aggravated murder of Burditte. The trial court adopted this recommendation and sentenced Lang accordingly.[3] On direct appeal, Lang presented twenty-one propositions of law, arguing among other things: juror bias and ineffective assistance of counsel for failing to **[*809]** adequately prepare and present mitigation evidence. The Ohio Supreme Court affirmed Lang's convictions and sentence of death. *State v. Lang, 129 Ohio St. 3d 512, 2011- Ohio 4215, 954 N.E.2d 596 (Ohio 2011)*. Thereafter, Lang filed an application to reopen his direct appeal under *Ohio App. R. 26(B)*, alleging ineffective assistance of appellate counsel, but the Ohio Supreme Court denied this application in 2012.

In **[**11]** 2008, while his direct appeal was pending, Lang filed a state post-conviction petition, which raised fourteen claims, including several that alleged ineffective assistance of counsel at sentencing. The trial court dismissed Lang's petition and denied his requests for discovery and an evidentiary hearing. The Ohio Court of Appeals affirmed the trial court's denial of the post-conviction petition. *State v. Lang,No. 2009 CA 00187, 2010-Ohio-3975, 2010 WL 3314494 (Ohio Ct. App.)*. The Ohio Supreme Court declined Lang's post-conviction appeal. *State v. Lang, 131 Ohio St. 3d 1484, 2012- Ohio 1143, 963 N.E.2d 824 (Ohio 2012)*.

In 2012, Lang filed a notice of intent to initiate the underlying federal habeas action. Lang's new counsel filed a *28 U.S.C. § 2254* petition, alleging seventeen grounds for relief. In 2015, the district court denied Lang's habeas petition. ***Lang** v. **Bobby**, No. 5:12 CV 2923, 2014 U.S. Dist. LEXIS 150916, 2014 WL 5393574, at *1 (N.D. Ohio Oct. 23, 2014)*. The district court concluded that the decisions of the Ohio courts were neither contrary to, nor unreasonable applications of, clearly established federal law and were not unreasonable determinations of the facts. However, the district court granted Lang a COA on Ground One, ineffective assistance of trial counsel regarding mitigating evidence, and Ground Two, juror bias.

We granted Lang an expansion of the COA to include three additional claims: **[**12]** Ground Three, ineffective assistance of trial counsel based on counsel's failure to question individual jurors about their conversations with a biased juror; Ground Four, ineffective assistance of appellate counsel based on counsel's failure to raise claims of juror bias on direct appeal;[4] and Ground Fourteen, ineffective assistance of trial counsel based on trial counsel's characterization of Lang's childhood as "normal." Therefore, the questions before us in this appeal are as follows:

> (1) Whether Lang's due process rights and rights to an unbiased jury were violated when a juror who was related to one of the victims was seated on the jury.
>
> (2) Whether trial counsel were ineffective for failing to question individual jurors about their conversations with the allegedly biased juror.
>
> (3) Whether Lang's trial counsel provided ineffective assistance by failing to adequately and properly investigate, develop, and present significant mitigation evidence.
>
> (4) Whether Lang's trial counsel were ineffective for characterizing Lang's childhood as "normal."

III. Standard of Review

The Antiterrorism and Effective Death Penalty Act (AEDPA) applies to this case. *See Moreland v. Bradshaw, 699 F.3d 908, 916 (6th Cir. 2012)*. ***HN1***[⬆] Under AEDPA, a district court shall **[**13]** not grant a habeas petition on a claim that was decided on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined **[*810]** by the Supreme Court of the United States; or . . . 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)*; *see also Berghuis v. Thompkins, 560 U.S. 370, 380, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010)*. Under the "contrary to" clause, a federal habeas court may grant the writ "if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)* (citing *Williams v. Taylor, 529 U.S. 362, 405-06,*

[3] The trial court also sentenced Lang to a ten-year term of imprisonment for the aggravated-robbery count and merged the gun specifications with an additional three-year term of imprisonment.

[4] Because Lang did not brief Ground Four, he has waived any claim that his appellate counsel were ineffective when they failed to argue, on direct appeal, that trial counsel should have requested additional questioning of the jurors.

120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies the law or bases its decision on an unreasonable determination of the facts, in light of the record before the state court. Harrington v. Richter, 562 U.S. 86, 100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); Williams, 529 U.S. at 412-13. Evidence introduced in federal court is not considered. Cullen v. Pinholster, 563 U.S. 170, 185, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). The petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the **[**14]** state court's factual findings were correct. *See* 28 U.S.C. § 2254(e)(1); Hodges v. Colson, 727 F.3d 517, 526 (6th Cir. 2013).

IV. Juror Bias

Lang first claims that his constitutional right to an unbiased jury was violated because Juror 386 was seated, albeit briefly. Lang argues that "Juror 386 never should have been on the jury or given the opportunity to taint Appellant's jury. The most basic disqualification of a juror occurs when the juror has a familial connection to the case." He contends that the trial court erred by failing to immediately remove Juror 386 and instead waiting for the next break in the trial, permitting two witnesses to testify in the interim. Lang also argues that his trial counsel was ineffective for failing to individually voir dire the other jurors after Juror 386 was removed.

Lang raised the juror bias claim and the related claim of ineffective assistance of trial counsel on direct appeal. The Ohio Supreme Court held that Juror 386's presence on the jury before being excused did not taint the jury because Juror 386 assured the trial court that she had not talked to any of the other jurors about her relationship to Cheek, and the other jurors indicated that they had had no conversations with her about the matter. Lang, 954 N.E.2d at 614. Citing Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), and Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954) **[**15]** , the Ohio Supreme Court held that there was no prejudice to Lang and that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Lang, 954 N.E.2d at 614. The trial court conducted a hearing in the presence of the prosecutor, defense counsel, and Lang; the trial court and both counsel questioned Juror 386; and neither the prosecutor nor Lang's counsel objected to the questioning or sought additional inquiry. Id. at 615. Under these circumstances, the Ohio Supreme Court concluded that no further inquiry was required. *Id.* The court also held that defense counsel's failure to request individual voir dire did not prejudice Lang. Id. at 631.

Lang's post-conviction petition did not include any claim related to Juror 386. However, in his federal habeas petition, Lang once again argued that his *Sixth Amendment* right to an impartial jury was **[*811]** violated by the presence of Juror 386. Likewise, he claimed his counsel was ineffective for failing to individually question the other jurors regarding Juror 386. The district court rejected these arguments, finding that the Ohio Supreme Court reasonably applied federal law in denying Lang's claim of juror bias. For the reasons that follow, we agree.

Under the standard established by the Supreme Court in *Remmer v. United States*, HN2[] when there is evidence of possible juror bias, a defendant is entitled to a hearing with all interested parties present to determine the circumstances, the impact on the juror, and whether the information was prejudicial. 347 U.S. at 229-30. Subsequently, in *Smith v. Phillips*, the Court narrowed the *Remmer* standard to require that a petitioner show actual prejudice when alleging juror partiality. 455 U.S. at 217. In ***[**16]** Smith*, a habeas petitioner alleged that one of the jurors in his case applied for a job in the district attorney's office while serving on the jury. Id. at 213-14. The Supreme Court held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," and that due process does not require a new trial whenever a juror is placed in a compromising situation. Id. at 215, 217.

In cases applying *Remmer* and *Smith*, HN3[] the habeas petitioner bears the burden to demonstrate that a juror was biased. *See* Sheppard v. Bagley, 657 F.3d 338, 348 (6th Cir. 2011) (Batchelder, C.J., concurring). Moreover, a juror's testimony at a *Remmer* hearing is not inherently suspect. *See* Jackson v. Bradshaw, 681 F.3d 753, 767 (6th Cir. 2012); Zuern v. Tate, 336 F.3d 478, 486 (6th Cir. 2003).

In Phillips v. Bradshaw, 607 F.3d 199 (6th Cir. 2010), jurors encountered a grand juror during a break, and the grand juror said something about Phillips's case. Id. at 222. The trial court questioned the jurors, and each one said that the grand juror's comments would not influence their decision. Id. at 223. The trial court accepted the

jurors' assurances, the trial continued, and Phillips was convicted and sentenced to death. Id. at 204, 223. The Ohio Supreme Court affirmed the trial court's action under *Smith* and *Remmer*. Id. at 223. We denied habeas relief, holding that the petitioner provided no reason to view the jurors' assurances with suspicion and had **[**17]** not met his burden of demonstrating prejudice. *Id.*

HN4[] In reviewing claims of juror bias in the habeas context, we bear in mind that:

> (1) the trial court must hold a hearing when the defendant alleges unauthorized contact with a juror; (2) no presumption of prejudice arises from the unauthorized contact; (3) the defendant has the burden of proving actual juror bias; and (4) juror testimony at the *Remmer* hearing is not inherently suspect.

Id. (citing Zuern, 336 F.3d at 486).

Similarly, in Carroll v. Renico, 475 F.3d 708, 709 (6th Cir. 2007), a member of the petitioner's family threatened a juror, and another juror said a woman asked for her name. The trial court held a post-trial hearing and asked the two jurors whether the incidents affected the verdict. *Id.* Both jurors said no, and defense counsel did not ask any questions or request further investigation. *Id.* The Michigan Court of Appeals found that the jurors were not biased against the petitioner. Id. at 710. We held that *Remmer* and *Smith* do not require more than what the Michigan trial court did. Id. at 711-12. Likewise, in this case, the Ohio Supreme Court reasonably concluded that Juror 386's brief presence on the jury did not deny Lang's right to an impartial jury.

Nevertheless, Lang argues that he was entitled to relief under **[**18]** McDonough Power [*812] Equipment v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984). However, the district court correctly found McDonough to be inapplicable. *McDonough* was a products liability case involving a juror's failure to disclose information that would have supported a challenge for cause. Id. at 556. The jurors were asked about injuries to family members resulting in disability or prolonged pain and suffering. *Id.* After the verdict, one of the parties learned that a juror had failed to reveal that his son had suffered a broken leg when a tire exploded. Id. at 551. We held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Id. at 556. In this case, the Ohio Supreme Court made no finding of dishonesty or deliberate concealment; it determined only that Juror 386 "failed to disclose" her connection to Cheek. Lang, 954 N.E.2d at 614. Juror 386 did not participate in deliberations; thus the sole issue was Juror 386's possible extraneous influence on the jury. Accordingly, Smith and Remmer, not *McDonough*, represent the clearly established law that governs Lang's claim.

Lang also relies on United States v. Corrado, 227 F.3d 528 (6th Cir. 2000), as support for his **[**19]** argument that the trial court conducted an inadequate *Remmer* hearing. In *Corrado*, defense counsel informed the district court that someone had approached the defendant and said that he had a friend on the jury who could help with the verdict. Id. at 533-34. The district court asked the jurors as a group whether anyone had tried to influence them and whether there was any reason they could not continue to serve on the case. Id. at 534. The jurors were instructed to send the judge a note if the answer was yes. *Id.* No jurors submitted a note. *Id.* We held that the district court abused its discretion by failing to conduct an adequate *Remmer* hearing because a juror who was hesitant about coming forward could simply do nothing. Id. at 536. Yet Lang's case is distinguishable because it comes to the court on AEDPA review, rather than review for an abuse of discretion. Under AEDPA, the state court's findings are presumptively correct. *See* Smith, 455 U.S. at 218. Even if the trial court's actions would have been reversible error on direct federal court appeal, the Ohio Supreme Court's decision was not an unreasonable application of *Remmer, Smith*, and our cases interpreting those decisions.

In this case, the state court's rulings were not contrary **[**20]** to clearly established federal law. Once the trial court knew Juror 386's relationship to Cheek, it acted to prevent her from communicating with the other jurors and held a hearing to determine the effect of her presence on the jury. *See* id. at 217. Both prosecution and defense counsel participated in the hearing. *See* Remmer, 347 U.S. at 230. Juror 386 assured the court that she did not mention her relationship to the victim to the other members of the jury, and none of the jurors indicated that Juror 386 had talked to them about it. Neither Juror 386's testimony nor the other jurors' silence is inherently suspect. *See* Smith, 455 U.S. at 217. The burden was on Lang to show that a juror who decided his case was actually biased against him. *See* id. at 215; Sheppard, 657 F.3d at 348 (Batchelder, C.J.,

concurring). Juror 386 was removed from the jury well before deliberations, and Lang presented no evidence that the remaining jurors were tainted by Juror 386's connection with Cheek. *See 28 U.S.C. § 2254(e)(1)*; *Smith, 455 U.S. at 218*.

[*813] *HN5*[↑] Courts enjoy leeway when applying a general standard. *See Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)*. The standard established in *Remmer* and *Smith* provides enough leeway to conclude that the Ohio Supreme Court's decision was reasonable. Accordingly, we adopt the district court's finding that "the Ohio Supreme Court reasonably decided **[**21]** that the trial court's actions with regard to Juror 386 comported with due process."

Furthermore, because Lang's juror bias claim lacks merit, there is no merit to his related claim of ineffective assistance of trial counsel. *HN6*[↑] To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that deficient performance prejudiced the defense so as to deprive the petitioner of a fair trial. *See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Lang alleged that his trial counsel should have requested individual voir dire of the other jurors regarding their possible discussions with Juror 386. The Ohio Supreme Court summarily rejected this claim, reasoning that even if it were to assume deficient performance by counsel, Lang suffered no prejudice. *Lang, 954 N.E.2d at 631*. The state court's decision was not contrary to or an unreasonable application of clearly established law. Accordingly, we affirm the district court's denial of Lang's habeas petition with respect to the alleged juror bias.

V. Mitigation Evidence

Two claims of ineffective assistance of counsel at sentencing were certified for appeal. In Ground One of his habeas petition, Lang alleged that counsel failed to adequately and properly **[**22]** investigate, develop, and present significant mitigation evidence. In Ground Fourteen, he alleged that counsel was ineffective because, in closing argument to the jury, counsel characterized Lang's childhood up to age ten as "normal."

To prevail on these claims, Lang must do two things. First, he must establish a *Sixth Amendment* violation—that his lawyer performed well below the norm of competence in the profession and that this failing prejudiced his case. *Strickland, 466 U.S. at 687*. Second, he must satisfy AEDPA—by showing that any rulings by the Ohio courts on the merits of this claim were unreasonable. *28 U.S.C. § 2254(d)*. *HN7*[↑] In federal habeas proceedings, the reviewing court looks to the last reasoned opinion addressing the claim at issue. *See Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)*; *Loza v. Mitchell, 766 F.3d 466, 473 (6th Cir. 2014)*. In this case, Lang raised essentially the same claims of ineffective assistance of trial counsel on direct appeal[5] and in his post-conviction proceedings. Because the Ohio Court of Appeals issued the last reasoned opinion on Lang's post-conviction claims, we begin by reviewing that decision.

The Ohio Court of Appeals affirmed the trial court's denial of Lang's post-conviction petition. *Lang, 2010 Ohio 3975, 2010 WL 3314494, at *5*. Shortly after Lang was indicted, his counsel requested discovery, moved for funds for an investigator, a psychological **[**23]** expert, and a mitigation expert, and filed **[*814]** over eighty-two motions. *2010 Ohio 3975, Id. at *3*. Therefore, the Ohio Court of Appeals rejected Lang's argument that counsel waited until the last minute to gather mitigating evidence. *2010 Ohio 3975, Id. at *7-8*. Holding that that counsel's strategy was to treat Lang's mother sympathetically, to humanize Lang, and to present his mental health issues in lay, rather than detailed, scientific terms, the Ohio Court of Appeals concluded that Lang's counsel performed reasonably in the mitigation phase. *2010 Ohio 3975, Id. at *8*.

The state court also held that even if counsel's performance was deficient, Lang was not prejudiced by counsel's performance. The court found that Lang's mother and half-sister presented a detailed picture of his youth, mental health problems, and abuse by his father. *Id.* Summarizing Lang's additional, post-conviction evidence, the Ohio Court of Appeals recounted Lang's

---

[5] On direct appeal, the Ohio Supreme Court found that Lang's counsel thoroughly prepared for the penalty phase by hiring a mitigation expert, a psychologist, and a criminal investigator several months before trial and by requesting social service records. *Lang, 954 N.E.2d at 638*. The Ohio Supreme Court held that counsel's decision to rely solely on the testimony of Lang's mother and sister was a tactical choice and not ineffective assistance of counsel. *Id.* The court concluded that Lang's counsel were not ineffective, that he received a fair trial, and that any error was not prejudicial. *Id. at 639*.

father's physical and sexual abuse of Lang's mother, Lang's brother's physical and sexual abuse of Lang and his sister, and Lang's father's sexual, physical, and emotional abuse of Lang. 2010 Ohio 3975, Id. at *6-7. The court also found that, after the two years spent with his father, Lang began using drugs, was admitted to a psychiatric hospital, and attempted **[**24]** suicide. 2010 Ohio 3975, Id. at *7. Moreover, Lang's mother abandoned him at times and did not ensure that he took his mood disorder medications. *Id.* Nonetheless, the Ohio Court of Appeals was unpersuaded that this "additional and more detailed evidence about the [Lang]'s upbringing and mental health issues would have created a reasonable probability that the jury would have recommended a life sentence, rather than the death penalty, for the Marnell Cheek killing." 2010 Ohio 3975, Id. at *9.

The district court agreed, holding that the Ohio Court of Appeals' denial of Lang's claims was not contrary to or an unreasonable application of *Strickland*. For the reasons articulated by the district court, we also find that the Ohio court reasonably determined that defense counsel's performance at the mitigation hearing was not ineffective.

As a threshold matter, Lang did not submit affidavits from his trial counsel, and both the post-conviction trial court and the district court denied Lang an evidentiary hearing. Thus, there is no direct evidence of Lang's trial counsel's mitigation strategy. However, invoices filed with the trial court indicate that counsel began preparing for the mitigation hearing soon after taking Lang's case. Counsel hired **[**25]** a mitigation investigator and a psychologist and spent several hundred hours preparing for trial.

Lang's post-conviction materials suggest that counsel either chose not to present or perhaps overlooked other evidence about Lang and his family, but there are reasonable strategic reasons for counsel to have chosen not to present these materials. This additional evidence could have opened the door to evidence of bad character on cross-examination and rebuttal. Reports from various social services agencies documented how Lang's mother neglected, abused, and abandoned Lang and his siblings. A psychologist's expert report filed by Lang in his post-conviction materials indicated that Lang had no friends, threatened people, set fires, made improper sexual advances, was too violent to be placed in juvenile detention, and did not comply with mental health treatment. Thus, counsel's choice to have only Lang's mother and sister testify at the mitigation hearing and to not call a psychologist may have been strategic.

HN8[↑] There is a strong presumption that an attorney's attention to some issues at the exclusion of others reflects tactics rather than neglect. *See* Yarborough, 540 U.S. at 8. "[S]trategic choices made after thorough **[**26]** investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic **[*815]** choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Here, it was reasonable for counsel to limit mitigation testimony to Lang's mother and half-sister and avoid the risk of negative information about Lang's behavior and criminal history. *See* id. at 699 (holding counsel did not perform deficiently by limiting testimony about Washington's character because it ensured that contrary character evidence and criminal history would not come in). Applying *Strickland*, we have held that counsel enjoy wide latitude in strategic decision-making on issues of mitigation evidence. *See* Hartman v. Bagley, 492 F.3d 347, 358-61 (6th Cir. 2007). In *Hartman*, we found no deficient performance when defense counsel chose to offer mitigating evidence through the testimony of Hartman's relatives rather than a psychologist who identified mitigating circumstances but who also would have presented arguably damaging evidence. Id.; *see also* Moore v. Parker, 425 F.3d 250, 254 (6th Cir. 2005) (finding no deficient performance in counsel's decision not to present the testimony of a psychologist who would **[**27]** have testified that the petitioner was impulsive, had poor judgment, low behavior control, anger, and harmful emotional attachments).

Moreover, Lang HN9[↑] bears the burden of proof to show that his counsel made decisions without adequate knowledge. *See* Strickland, 466 U.S. at 687; Carter v. Mitchell, 443 F.3d 517, 531 (6th Cir. 2006) (holding that there was no basis to find that counsel's performance was deficient because the petitioner did not provide any statement from trial counsel describing what he did or did not do). Here, there was no direct evidence of defense counsel's strategy or choices. The opening statement and closing argument support the Ohio Court of Appeals' theory that counsel wanted to humanize Lang and avoid presenting him and his mother in a bad light. Lang's post-conviction submissions show that there was more evidence available about his background, both potentially helpful and potentially harmful, than counsel presented. But Lang did not prove

that his trial counsel overlooked this evidence, and he did not rebut the presumption that counsel acted strategically. Courts may not "insist counsel confirm every aspect of the strategic basis for his or her actions." *Harrington, 562 U.S. at 109*.

As we recently held in *Caudill v. Conover, 881 F.3d 454, 462 (6th Cir. 2018)*, ***HN10***[↑] a defense lawyer has no constitutional obligation to present **[**28]** cumulative evidence at a mitigation hearing. In that case, counsel had no duty "to identify and interview distant relatives, former childhood neighbors, past boyfriends, and acquaintances who would provide similar information." *Id.* (citing *Bobby v. Van Hook, 558 U.S. 4, 11, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009)* (per curiam)). "There comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Van Hook, 558 U.S. at 11*. In *Van Hook*, the Supreme Court reversed our circuit and held that there was nothing wrong with the lawyer's decision not to seek more mitigation evidence about the defendant's background than he already had. *Id. at 11-12*. Having already unearthed evidence "from those closest to Van Hook's upbringing and the experts who reviewed his history," the lawyer was under no duty to "identify and interview every other living family member or every therapist." *Id. at 11*. The same conclusion applies here—and doubly so because AEDPA deference applies. Lang's counsel reasonably could conclude that calling a psychologist or introducing **[*816]** volumes of records from Baltimore Social Services might undermine Lang's case. We presume the reasonableness of such strategic decisions. *Cullen v. Pinholster, 563 U.S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)*.

Finally, we turn **[**29]** to Lang's argument that his counsel performed both deficiently and prejudicially when, during closing argument, he mischaracterized Lang's early childhood as "normal." Lang argues that "[a] childhood filled with horrific abuse and violence is not normal." We do not dispute this. As the post-conviction evidence revealed, Lang's childhood prior to age ten was anything but normal. However, Lang's mitigation evidence centered on Lang's experiences at the hands of his father who, as Lang's mother testified, was absent until Lang was ten years old. Lang's counsel echoed the prosecutor's characterization of Lang's early life as "normal" presumably to avoid blaming Lang's mother—his primary mitigation witness—for his client's difficulties. Therefore, the Ohio Supreme Court reasonably concluded that counsel's approach did not result in ineffective assistance of counsel because it "allowed the defense to focus the jury's attention on defense counsel's argument that addressed Lang's abuse after his father abducted him." *Lang, 954 N.E.2d at 639*. Based on the evidence before the state court, it cannot be said that its application of *Strickland* was objectively unreasonable. *See Yarborough, 540 U.S. at 5*.

For the foregoing reasons, the district **[**30]** court's denial of Lang's petition for a writ of habeas corpus is **AFFIRMED**.

Dissent by: KAREN NELSON MOORE

Dissent

KAREN NELSON MOORE, Circuit Judge, dissenting. Because I believe that Lang's constitutional right to an unbiased jury was violated and also that he has established his two ineffective-assistance-of-counsel claims arising out of the mitigation phase of his trial, I respectfully dissent from the majority's denial of relief to Lang on Grounds One, Two, and Fourteen.

I. STANDARD OF REVIEW

Lang's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a federal court may not grant a writ of habeas corpus unless the state court's adjudication of the claim on the merits was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or (2) "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)*.

II. JUROR BIAS

The *Sixth Amendment* guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *U.S. Const. amend. VI*. This right is applicable to the states via the *Fourteenth Amendment*. *Morgan v. Illinois, 504 U.S. 719, 726-27, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*. Furthermore, "due **[**31]** process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the *Sixth Amendment* requires it, the jury must stand impartial and indifferent to the extent

commanded by the *Sixth Amendment*." *Id. at 727*.

Lang argues that his constitutional right to an unbiased jury was violated when the victim Marnell Cheek's niece by marriage was seated on his jury. I agree.

A. Juror 386

On the morning of the second day of trial, defense counsel informed the court that Juror 386 had been observed nodding and smiling to individuals in the public **[*817]** gallery. R. 22-2 (App'x Vol. 28 at 517) (Page ID #7352). In response, the prosecutor stated that Marnell Cheek's father had approached him and revealed that Juror 386 was Cheek's niece by marriage. *Id.* at 517-18 (Page ID #7352-53). The trial court said that it would investigate this issue at the next break. *Id.* at 518 (Page ID #7353).

When questioned, Juror 386 confirmed that the victim Marnell Cheek was her stepfather's sister. *Id.* at 593 (Page ID #7428). Juror 386 claimed that she had not discussed the case with anyone and that the only information she had about the case was what she had read in the newspaper. *Id.* at 594, 598 (Page ID #7429, 7433). However, Juror 386 admitted that she had learned of her aunt's **[**32]** death from her grandfather and that she had attended her aunt's viewing and funeral with her step-father. *Id.* at 596-99 (Page ID #7431-34). She also admitted that she had failed to disclose this information to the court. *Id.* at 593 (Page ID #7428); *see also* R. 22-1 (App'x Vol. 27 at 227-39) (Page ID #6551-63) (portion of voir dire in which the court asked the prospective jurors about any connections to the criminal justice system, including whether they knew a victim of a crime, and Juror 386 remained silent); R. 55-1 (Juror Questionnaires Part 1a at 99-109) (Page ID #10969-79) (Juror 386's questionnaire in which she stated that no relative had ever been a victim of a crime, she had no personal knowledge of Cheek's death, and she had not discussed Cheek's death with anyone). Juror 386 did deny discussing her relationship to Cheek with the other jurors. R. 22-2 (App'x Vol. 28 at 597-98) (Page ID #7432-33).

At this point, the prosecutor moved to remove Juror 386 for cause, and defense counsel agreed. *Id.* at 601 (Page ID #7436). The trial court removed Juror 386 from the jury panel, *id.* at 603 (Page ID #7438), and proceeded to question the remaining jurors as a group, *id.* at 605 (Page ID #7440). The court first informed the jurors that Juror **[**33]** 386 "may have had a relative relationship with either a witness or a party or somebody that was involved in the case." *Id.* at 606 (Page ID #7441). Next, the court asked the jurors as a group whether Juror 386 had discussed her relationship with someone involved in the case with any of them; the court stated that "I will take your silence if none did." *Id.* All the jurors remained silent and the court then proceeded with the trial. *Id.*

B. Inadequate *Remmer* Hearing

Lang raised his claim for relief predicated on Juror 386 on direct appeal in front of the Supreme Court of Ohio. *State v. Lang, 129 Ohio St. 3d 512, 2011- Ohio 4215, 954 N.E.2d 596, 613 (Ohio 2011)*. The state court found that Juror 386 had failed to mention her familial relationship to victim Cheek both in her juror questionnaire and during voir dire. *Id.* But the Supreme Court of Ohio rejected Lang's claim of bias as "speculative and unsupported by the evidence." *Id. at 614*. Furthermore, the court held that the trial court had properly conducted a *Remmer* hearing. *Id. at 614-15*. On federal habeas review, the district court concluded that the state-court decision reasonably applied federal law and thus denied Lang's claim, but it granted a Certificate of Appealability ("COA") with respect to this claim. R. 56 (Dist. Ct. Op. at 74, 121) (Page **[**34]** ID #13159, 13206).

Lang argues that the Supreme Court of Ohio unreasonably applied *Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*, when it concluded that the trial court had conducted an adequate *Remmer* hearing. Appellant Br. at 17-19.[1] In *Remmer*, the Supreme Court **[*818]** held that a trial court, when faced with a claim of jury bias, "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *347 U.S. at 230*. At a *Remmer* hearing, the defendant has the burden of proving actual bias. *Smith v. Phillips, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*.

The trial court's inquiry into juror bias in this case was less than minimal. The court asked the remaining jurors as a group one question—had Juror 386 discussed a potential relationship with someone involved in the case with them—and took silence as a no. R. 22-2 (App'x Vol.

[1] Lang makes other arguments with respect to this claim, Appellant Br. at 19-20, but I agree with the majority that these arguments are inapposite, Maj. Op. at 11.

28 at 606) (Page ID #7438). This question was overly narrow because it focused only on whether Juror 386 had revealed her relationship to Cheek to her fellow jurors, and not on whether Juror 386 had tainted the remaining jurors' ability to be impartial through other biased comments. Furthermore, if a juror were hesitant, being forced to speak up in front of the rest of the jury panel **[**35]** would have a depressing effect on his or her ability or willingness to be forthcoming. Certainly, as the majority admits, Maj. Op. at 12, if this case were before us on direct review, our precedent compels us to conclude that this one-question hearing was constitutionally inadequate. *United States v. Corrado, 227 F.3d 528, 535-36 (6th Cir. 2000)*. But even viewed through the deferential lens of AEDPA review, the Supreme Court of Ohio's conclusion that this minimal inquiry satisfied due process is an unreasonable application of clearly established federal law.

The majority looks to *Carroll v. Renico, 475 F.3d 708 (6th Cir. 2007)*, and states that "*Remmer* and *Smith* do not require more than what the Michigan trial court did." Maj. Op. at 11. True that may be, but the Michigan trial court in *Carroll* did significantly more investigation than what occurred here. In *Carroll*, "the trial court received a note from the jury that family members of one of the defendants harassed two jurors." *475 F.3d at 709*. The trial court "heard these two jurors' stories, [and] the trial judge assured the jury that deputies would protect them." *Id.* The note described the harassment in some detail. *Id.* After the jury convicted Carroll, "the trial judge asked the two jurors whether earlier events affected the verdict. Both jurors said **[**36]** that the earlier events did not affect their decisions as to defendants' guilt." *Id.* Thus, the trial court in *Carroll* had a detailed description of the potential extraneous influence on the jurors and received affirmative responses from the two jurors who had been exposed to this potential taint that they had remained impartial decisionmakers.

Phillips v. Bradshaw, 607 F.3d 199 (6th Cir. 2010), is similarly distinguishable. Maj. Op. at 10. The petit jurors in Phillips's trial had encountered a member of the grand jury who had made a comment about the case. *Phillips, 607 F.3d at 222*. In response, the trial court held a hearing at which "the court and both counsel questioned all of the jurors" and the grand juror. *Id. at 223*. This hearing elicited testimony about the jurors' actions following the remarks made by the grand juror and the jurors' assurances "that they could be fair and impartial arbiters." *Id. at 222-23*. Thus, the trial court in *Phillips* undertook a far more detailed investigation into potential juror bias than the inquiry in the case at bar, because it examined both the scope of the impermissible extraneous information and its potential impact.

The investigations in *Carroll* and *Phillips* varied in degree and kind from what occurred in this case. A sufficient investigation **[*819]** **[**37]** into potential juror bias must proceed along multiple dependent axes. A trial court cannot determine the prejudicial impact of potential extraneous influence upon a juror until it discovers all the means by which that extraneous influence may have touched the juror. It would be akin to a doctor trying to determine if a patient had caught an infectious disease from an afflicted acquaintance by asking only if the patient had shared a drink with that person, and not determining whether the two individuals had other interactions through which the disease could be communicated. Here, the trial court's one question directed to the entire panel did not sufficiently determine the potential scope of the extraneous influence on the remaining jurors, because it was such a limited question. Juror 386 may not have mentioned her relationship to the victim Cheek, but she could have made other prejudicial comments. The remaining jurors were not even aware to whom Juror 386 was related, so may not have realized that any other comments she may have made were inappropriate. The remaining jurors' silence to the trial court's one question leaves us unable to determine anything about the true extent of **[**38]** Juror 386's prejudicial impact. Therefore, the trial court could not have sufficiently investigated the effect of the tainted Juror 386 on the remaining jurors' ability to remain impartial.

The *Remmer* hearings in *Carroll* and *Phillips* may have satisfied the Supreme Court's requirement that a trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate," *Remmer, 347 U.S. at 230*, but the trial court's inquiry in Lang's case into the potential bias caused by having his victim's niece by marriage empaneled on his jury and serving for a day on the jury before being excused falls far below this minimum threshold. I believe, therefore, that the Supreme Court of Ohio unreasonably determined that the trial court's onequestion "hearing" was sufficient, because the one question asked was erroneously focused on only one means by which Juror 386 could have biased the jury. It was thus unreasonable to conclude that this one-question "hearing" could determine the potential prejudicial impact on the remaining jurors as required by

Remmer.[2]

Furthermore, to the extent that the Supreme **[**39]** Court of Ohio deemed the one-question hearing sufficient under *Remmer* because "[n]either the state nor the defense counsel objected to the questioning or requested an additional inquiry," *Lang, 954 N.E.2d at 615*, this was an unreasonable application of clearly established federal law, as the Supreme Court has held that the trial court has an independent duty to ensure an impartial jury and conduct an adequate *Remmer* hearing if required. *Smith, 455 U.S. at 217* **[*820]** ("Due process means . . . a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."). Consequently, I respectfully dissent from the majority's denial of Lang's first claim for relief. Lang is entitled to a new trial with an impartial jury.

III. MITIGATION PHASE

The mitigation phase of a capital case is premised on "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." *Foust v. Houk, 655 F.3d 524, 534-36 (6th Cir. 2011)* (omission in original) (quoting *Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)*, *abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*). Or, in other words, sometimes "[t]hose to whom evil is done [d]o evil in return." *Johnson v. Bagley, 544 F.3d 592, 605 (6th Cir. 2008)* (alterations in original) (quoting W.H. Auden, **[**40]** "September 1, 1939").

---

[2] The majority also states that the trial court could reasonably rely on the testimony of Juror 386 that she did not mention her relationship to Cheek to her fellow jurors because her testimony was not "inherently suspect." Maj. Op. at 12. This statement strains credulity. Certainly, the Supreme Court has stated that the testimony of a juror at a *Remmer* hearing is not "inherently suspect." *Smith, 455 U.S. at 217 n.7*. But it did so on the basis that "one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Id.* (internal quotation marks omitted). Juror 386 forfeited this presumption of credibility when she actively concealed her relationship to Cheek until she was confronted by the trial court. R. 22-2 (App'x Vol. 28 at 593) (Page ID #7428); *see also* R. 22-1 (App'x Vol. 27 at 227-39) (Page ID #6551-63); R. 55-1 (Juror Questionnaires Part 1a at 99-109) (Page ID #10969-79).

Before this court, Lang asserts two claims arising from the mitigation phase of his trial: (1) ineffective assistance of counsel due to the failure properly to investigate, develop, and present mitigation evidence; and (2) ineffective assistance of trial counsel based on the characterization of Lang's childhood as "normal." Lang presented both these ineffective-assistance-of-counsel claims to an Ohio state court. *Lang, 954 N.E.2d at 638-39*; *State v. Lang, No. 2009 CA 00187, 2010-Ohio-3975, 2010 WL 3314494, at *7-9 (Ohio Ct. App.)*. Pursuant to AEDPA, "we review the last state-court decision to reach the merits of the particular claims being considered." *Davis v. Lafler, 658 F.3d 525, 531 (6th Cir. 2011)* (en banc). In this case, the last state-court decision to adjudicate Lang's claim that his trial counsel ineffectively investigated and presented mitigation evidence was the Fifth District Court of Appeals in its affirmance of the denial of Lang's petition for post-conviction relief. *Lang, No. 2009 CA 00187, 2010-Ohio-3975, 2010 WL 3314494*. The Supreme Court of Ohio was the last state court to adjudicate Lang's claim that his counsel was ineffective in characterizing his childhood as "normal." *Lang, 954 N.E.2d at 638-39*. The majority rejects both of Lang's ineffective-assistance-of-counsel claims arising from the mitigation phase of Lang's trial. Maj. **[**41]** Op. at 16-17. I respectfully dissent.

A. The Standard for An Ineffective-Assistance-of-Counsel Claim

To prevail on an ineffective-assistance claim, Lang must meet the two-pronged standard articulated in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and show that: "(1) [his] counsel's performance was deficient, or put differently, 'fell below an objective standard of reasonableness'; and (2) the performance prejudiced [Lang]." *United States v. Mahbub, 818 F.3d 213, 230-31 (6th Cir. 2016)* (quoting *Strickland, 466 U.S. at 687-88*). "Because the *Strickland* standard is already 'highly deferential,' our review of a state-court decision on a *Strickland* claim is 'doubly deferential' under" AEDPA. *King v. Westbrooks, 847 F.3d 788, 795 (6th Cir. 2017)* (citations omitted). In other words, this court "take[s] a highly deferential look at counsel's performance through the deferential lens of *§ 2254(d)*." *Cullen v. Pinholster, 563 U.S. 170, 190, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* (quotation marks omitted). But this double deference does not fully apply when a state court adjudicated an ineffective assistance claim on only one prong of *Strickland*: "The unadjudicated prong is reviewed de novo." *King, 847*

F.3d at 795 (quoting Rayner v. Mills, 685 F.3d 631, 638 (6th Cir. 2012)).

[*821] B. The Mitigation Phase

At the mitigation phase of Lang's trial, his trial counsel called Lang's half-sister and his mother as mitigation witnesses. R. 22-3 (App'x Vol. 29 at 339-71) (Page ID #8015-47). His half-sister, Yahnena Robinson, testified that Lang's father, **[**42]** known as Coffee, abused their mother and was a drug addict. *Id.* at 341 (Page ID #8017). She described her relationship with her brother as "close" and said that they "had a typical brother sister relationship" before Lang was ten years old. *Id.* Robinson then explained that when Lang was ten, he went to visit his father in Delaware for what was supposed to be a two-week visit. *Id.* at 342-43 (Page ID #8018-19). According to Robinson, it took her mother two years to recover her son and during that time Robinson had no contact with her brother. *Id.* at 343-44 (Page ID #8019-20). After their mother found Lang and brought him back to Maryland, Robinson described Lang's emotional state as noticeably different. *Id.* at 344-45 (Page ID #8020-21).

After Robinson testified, Lang's trial counsel called Lang's mother, Tracy Carter. *Id.* at 348 (Page ID #8024). She told the jury that she met Coffee when she was eighteen; he was her landlord and, because she was a single, teenage mother with no money, she traded sex for free rent. *Id.* at 349 (Page ID #8025). Carter testified that Coffee was a violent drug addict. *Id.* at 349-50 (Page ID #8025-26). According to Carter, Coffee was around for some period of time after Lang was born, but he did not reconnect with his son until Lang was **[**43]** ten. *Id.* at 350 (Page ID #8026). In the interim, Coffee was incarcerated for setting Carter's apartment on fire, raping Carter, and molesting a child. *Id.* When Lang was ten, his father gained court-ordered visitation rights. *Id.* at 351 (Page ID #8027). Carter testified that Lang was supposed to visit his father for two weeks in Delaware, but Coffee kept Lang from Carter for two years. *Id.* at 351-55 (Page ID #8027-31). When Carter was finally reunited with Lang, he was wearing the same clothes and shoes he had worn when he left her two years prior and weighed less than ninety pounds. *Id.* at 355 (Page ID #8031). Lang had a cigarette burn on his shoulder, a gash on his hand, and bruises on his body. *Id.* at 356 (Page ID #8032). Furthermore, his emotional problems—which he had suffered from prior to this period—were exacerbated, and Carter testified that Lang visited a psychiatric facility twenty-eight times, including multiple times as an inpatient, during his childhood. *Id.* at 356-60 (Page ID #8032-36). Carter suspected that Coffee had sexually abused Lang, but testified that Lang had never admitted this to her. *Id.* at 361-61 (Page ID #8037-38).

Although Lang's mother and sister painted a fairly dire picture of Lang's childhood, their testimony did not accurately **[**44]** portray the extraordinary extent of the abuse and deprivation Lang endured as a child. In its decision on Lang's post-conviction appeal, the Ohio Court of Appeals summarized much of the mitigation evidence not presented by Lang's trial counsel. Lang, No. 2009 CA 00187, 2010-Ohio-3975, 2010 WL 3314494, at *6-*7. Contrary to the testimony presented and the arguments made at the mitigation phase, Coffee had substantial interactions with his son during Lang's early years. Coffee sexually and physically abused Lang when he was a toddler. 2010-Ohio-3975, Id. at *6. "During that same time period, appellant and his siblings also 'witnessed Coffee tying their mother up [for] 3-4 days, ordering her to perform fellatio, stabbing her in [the] chest with a pair of scissors, shooting her in the back of her leg, shooting windows out, cursing at her, beating her up, and attempting to set the house on fire with them in it.'" *Id.* (alterations in original). Lang and his siblings **[*822]** also "witnessed Coffee raping [their mother] on several occasions." *Id.* (alteration in original) (internal quotation marks omitted).

Furthermore, trial counsel did not develop the facts of Lang's abduction by Coffee during Carter's testimony. "During the time [Lang] lived with his father, he **[**45]** endured physical, sexual, and emotional abuse. [Lang] was forced to stay in his bedroom for days at a time, and he was repeatedly beaten with anything in reach. In addition to enduring the physical abuse, [Lang] was falsely told by Coffee that his mother was dead. [Lang], at this young age, began using drugs." *Id.* (internal citations and quotation marks omitted).

Trial counsel also failed to present evidence that Lang's older brother physically and sexually abused Lang and his sister, Robinson. Lang's brother hit Lang in the head with a baseball bat, and "acted out sexually towards [Lang and his sister], ordering them to perform oral sex on him." *Id.* Lastly, Lang's trial counsel did not present to the jury evidence that Carter frequently abandoned Lang and his siblings, leaving her children to care for themselves. 2010-Ohio-3975, Id. at *6.

C. Ineffective Investigation, Development, and

Presentation of Mitigation Evidence

Lang first argues that his trial counsel's investigation, development, and presentation of mitigation investigation was constitutionally inadequate. I agree.

Trial counsel began preparing for the mitigation phase in December 2006, requesting funds for a private investigator, psychological expert, **[**46]** and defense mitigation expert. R. 17-1 (App'x Vol. 1 at 1-23) (Page ID #195-217). However, the record shows that trial counsel did not obtain much of the corroborating documentary mitigation evidence until too late. On July 9, 2007, the expert psychologist sent a fax to trial counsel inquiring whether they had obtained Lang's records yet. R. 19-3 (App'x Vol. 13 at 69) (Page ID #2852) ("No Lang records yet, I gather . . . ???" (ellipses in original)). The record indicates that the psychologist did not receive the relevant records until the day after the mitigation phase, when the jury had already recommended that Lang be executed for the murder of Cheek. *Id.* at 70 (Page ID #2853). Additionally, the private investigator for the defense received only three-quarters of Lang's foster care records less than a week before the mitigation phase and it appears he may not have received the remaining records prior to the hearing. *Id.* at 68 (Page ID #2851). The investigation and preparation of mitigation witnesses was similarly sparse. His mother Carter—the supposed lynchpin of the mitigation strategy—had one twenty-five minute meeting with the mitigation specialist less than ten days before trial and met substantively **[**47]** with trial counsel only once: the day before she testified. R. 18-4 (App'x Vol. 9 at 98) (Page ID #2451). Despite these deficiencies, trial counsel repeatedly represented to the trial court that the investigation into mitigation evidence was proceeding or had proceeded smoothly. R. 22-1 (App'x Vol. 27 at 124) (Page ID #6448); R. 22-3 (App'x Vol. 29 at 378) (Page ID #8054); *see also* R. 22-1 (App'x Vol. 27 at 92) (Page ID #6416).

As the majority recognizes, "Lang's post-conviction materials suggest that counsel either chose not to present or perhaps overlooked other evidence about Lang and his family." Maj. Op. at 15. Either possibility leads to the conclusion that the performance of Lang's trial counsel during the mitigation phase was constitutionally deficient.

First, to the extent the record demonstrates that trial counsel "overlooked other evidence about Lang and his childhood," **[*823]** this constitutes constitutionally inadequate performance. The Supreme Court has relied on the American Bar Association's Guidelines on death-penalty representation in order to determine what constitutes objectively reasonable performance. *Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. Under this professional standard, "investigations into mitigating evidence **[**48]** 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id.* (emphasis in original) (quoting Am. Bar Ass'n, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989)); *see also* Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11 (rev. ed. 2003). Here, trial counsel spent minimal time interviewing and preparing a key mitigation witness, and they failed to ensure that significant mitigation evidence arrived in time. Merely ordering Lang's childhood records is an insufficient investigation. *See Sears v. Upton, 561 U.S. 945, 946, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010)*; *Wiggins, 539 U.S. at 524-25*; *Terry Williams v. Taylor, 529 U.S. 362, 395, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*; *Foust, 655 F.3d at 534-36*; *Johnson, 544 F.3d at 599-602*.

Second, if trial counsel's decision to present an incomplete picture of Lang's childhood is justified as strategic, Maj. Op. at 15, it can only be done so if it was a reasoned decision based on a complete investigation. *Terry Williams, 529 U.S. 362, 396 (2000)* ("[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision . . . [Instead, these omissions] clearly demonstrate that trial counsel did not fulfill their obligation to **[**49]** conduct a thorough investigation of the defendant's background."). "Buttressed by a reasonably adequate investigation, the defense team's ultimate presentation to the jury might have been justified as the product of strategic choice. But that is not what happened." *Johnson, 544 F.3d at 603* (citing *Wiggins, 539 U.S. at 536*).

Even if trial counsel's choice to present such a minimal description of Lang's life was an informed decision based on an adequate investigation, the Ohio Court of Appeals' rationalization of the trial counsel's strategy is insufficient. *Harrington v. Richter, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* ("[C]ourts may not indulge post hoc rationalization for counsel's decisonmaking that contradicts the available evidence of counsel's actions . . . ." (internal citation and quotation marks omitted)). The Ohio Court of Appeals concluded that trial counsel's minimal presentation was based on

the strategic choice to focus the witnesses' testimony on Lang's abduction by his father, to the exclusion of other traumatic events Lang experienced in his life. *Lang, No. 2009 CA 00187, 2010 Ohio 3975, 2010 WL 3314494, at *8-*9*. The state court reasoned that any additional information that could have been presented had the capacity for undermining the credibility of Lang's mother, as she was partially responsible for his traumatic **[**50]** childhood, or for being overly technical and thus harming the "humaniz[ing]" strategy undertaken by Lang's counsel. *2010 Ohio 3975, Id. at *8*. Additionally, the state court concluded that, even if Lang's counsel should have presented this additional mitigation evidence, there was no prejudice to Lang because it would have been cumulative. *2010 Ohio 3975, Id. at *9*.

Lang's counsel failed to present any evidence that Lang was a witness to and a victim of Coffee's physical and sexual violence from a very young age, as well as **[*824]** evidence that Lang's older brother physically and sexually abused him. *Lang, No. 2009 CA 00187, 2010 Ohio 3975, 2010 WL 3314494, at *6-*7*. The state court's conclusion that trial counsel was not constitutionally ineffective for failing to present this key mitigation evidence because of strategy is unreasonable: this evidence would not have undermined Lang's mother's credibility[3] or failed to "humanize" Lang because it was overly technical. *See Terry Williams, 529 U.S. at 396* ("[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession.").

Furthermore, the state court's holding that the failure to present this evidence was not prejudicial is an unreasonable **[**51]** application of clearly established federal law. The state court held that because the omitted evidence was merely "additional and more detailed," it would not have "created a reasonable probability that the jury would have recommended a life sentence." *Lang, No. 2009 CA 00187, 2010 Ohio 3975, 2010 WL 3314494, at *9*. First, the state court's articulation of what constitutes constitutional prejudice is incorrect. When a habeas petitioner is arguing that the presentation of mitigation evidence during the penalty phase of a capital case was prejudicial, the question is whether "there is a reasonable probability that at least *one juror* would have struck a different balance." *Wiggins, 539 U.S. at 537* (emphasis added). This standard does not require Lang to demonstrate that all of the jurors would have come to a different conclusion.

Second, the state court's characterization of the omitted evidence as cumulative is unreasonable. Lang's trial counsel failed at the mitigation phase to present any evidence of the sexual and physical abuse of Lang starting from when he was a toddler at the hands of both his father and brother. Thus, any evidence about this abuse could not have been cumulative. *See Jells v. Mitchell, 538 F.3d 478, 501 (6th Cir. 2008)* ("In short, rather than being cumulative, this evidence **[**52]** provides a more nuanced understanding of Jells's psychological background and presents a more sympathetic picture of Jells."). Furthermore, this kind of evidence is critically relevant during the mitigation phase of a capital case.[4] *Wiggins, 539 U.S. at 535*; *see also Foust, 655 F.3d at 534*; *Johnson, 544 F.3d at 605*.

Consequently, there is a reasonable probability that a juror—especially one sitting on a jury that had recommended life imprisonment and not death for the murder of the other victim, Jaron Burditte—would have weighed the mitigation evidence differently if he or she had heard the true nature and extent of the deprivations of Lang's childhood.[5] *Cf. Sears, 561 **[*825]** U.S. at 954* (holding that the prejudice inquiry under *Strickland* is not limited to cases in which there was no or minimal mitigation evidence presented, but that there can be "deficiency *and* prejudice" when "counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase"). Even with the doubly-deferential standard of AEDPA and

[3] The majority implies that if Lang's trial counsel had presented evidence of Lang's childhood trauma prior to his abduction, this would have harmed his mother's credibility as a mitigation witness. Maj. Op. at 16. This conclusion is puzzling. If Carter's credibility was not impugned by her failure to protect Lang from Coffee's abduction and rescue him, why would her credibility be hurt by her failure to protect Lang from the repeated physical and mental trauma to which he was exposed prior to his abduction? Alternatively, if the concern is that the jury would blame Carter for Coffee's abuse of Lang, then this potential opprobrium was already triggered by introducing some evidence of the abuse.

[4] That some of this evidence may have opened the door to the state's introduction of adverse evidence in response does not alter this conclusion. *See Harries v. Bell, 417 F.3d 631, 641 (6th Cir. 2005)*.

[5] The prejudice arising from the failure to introduce this evidence was compounded by trial counsel's misrepresentation of Lang's early childhood as "normal." *See* Section III.D *infra*.

Strickland, the failure of Lang's counsel to present critically relevant evidence about his early childhood violated Lang's right to constitutionally effective counsel. This failure could not have been the product of sound trial strategy, **[**53]** and there is a reasonable probability that one juror would have reached a different decision if he or she had heard this evidence. Thus, I respectfully dissent from the majority's conclusion to the contrary.

D. Ineffective Closing Argument at the Mitigation Phase

During the closing argument of the mitigation phase, Lang's counsel described Lang's childhood as "pretty normal . . . up until he was ten." R. 22-3 (App'x Vol. 29 at 389) (Page ID #8065). Lang argues that, by making this statement, his trial counsel was constitutionally ineffective because they misrepresented the evidence. Appellant Br. at 53. On direct review, the Supreme Court of Ohio held that this statement was not a misrepresentation of the evidence and that it "maintained defense credibility and allowed the defense to focus the jury's attention on defense counsel's argument that addressed Lang's abuse after his father abducted him." *Lang, 954 N.E.2d at 639*. The district court, while acknowledging that Lang did not have a "normal" childhood, concluded that the state court's decision was not unreasonable. R. 56 (Dist. Ct. Op. at 45) (Page ID #13130). The majority similarly does not dispute that Lang's childhood was horrific and not "normal," **[**54]** but it rejects Lang's argument on this claim in a scant paragraph. Maj. Op. at 17.

The warden also acknowledges that Lang did not have a "normal" childhood prior to age of ten, and instead centers his argument on the Supreme Court of Ohio's conclusion that this statement was not an inaccurate summary of the mitigation evidence that was actually presented. Appellee Br. at 49. Even considering the paucity of evidence presented regarding Lang's life prior to age ten, the state court's conclusion that the description of Lang's early childhood as "normal" was true strains credulity—as the majority recognizes, Maj. Op. at 17. Lang's mother, Carter, testified that Coffee was physically abusive towards her when she was pregnant with Lang. R. 22-3 (App'x Vol. 29 at 350) (Page ID #8026). Lang's sister, Robinson, corroborated the fact that Coffee was a physically abusive drug addict. *Id.* at 341 (Page ID #8017). Carter testified that Coffee was present in Lang's life after he was born, before he was incarcerated for setting her apartment on fire, raping her, and molesting a child. *Id.* at 350 (Page ID #8026). She also explained that Lang suffered from depression and behavioral problems prior to his abduction at age **[**55]** ten, and that he was prescribed Depakote, lithium, and Respiradol. *Id.* at 357 (Page ID #8033). A characterization of even this partial presentation of the level of abuse and mental illness endured by Lang prior to the age of ten as "normal" is absurd.

Furthermore, the Supreme Court of Ohio's post-hoc rationalization of this argument as strategically designed to "focus the jury's attention on defense counsel's argument that addressed Lang's abuse after his father abducted him," *Lang, 954 N.E.2d at 639*, is unreasonable. Lang's counsel could have accurately characterized Lang's childhood prior to age ten and focused the jury's attention on his abduction **[*826]** by his father; the two arguments are not mutually exclusive, and his counsel could have prioritized one without mischaracterizing the other. *See Wiggins, 539 U.S. at 535* ("While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder [as opposed to his history], the two sentencing strategies are not necessarily mutually exclusive."). Thus, it is objectively unreasonable for trial counsel to have summarized inaccurately the mitigation evidence they had presented and, in doing so, to have minimized the influential **[**56]** value of that information. "Counsel's conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as guides to determining what is reasonable." *Id. at 524* (internal quotation marks omitted); *see* Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11(L) (rev. ed. 2003). ("Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.").

Because it held that Lang's trial counsel was not constitutionally deficient for making this statement during closing argument, the Supreme Court of Ohio did not reach *Strickland*'s second prong: prejudice. *Lang, 954 N.E.2d at 639*. Thus, we determine de novo the prejudice to Lang from his counsel's argument. *Wiggins, 539 U.S. at 534*; *King, 847 F.3d at 795*. Closing argument is a critical aspect of advocacy in front of a trier of fact. "[N]o aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side . . . ." *Herring v. New York,*

422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). By minimizing the deprivations endured by Lang in his early childhood about which his mother and sister had testified, **[**57]** Lang's trial counsel undermined key mitigation evidence. The jury deliberated what sentence to impose upon Lang with the false summation of his early childhood as "normal" fresh in their minds. There is a reasonable probability that one juror would have weighed the balance of the mitigation evidence and aggravating circumstances differently if Lang's trial counsel had not misrepresented Lang's early childhood during closing argument. Wiggins, 539 U.S. at 537.

Lang has satisfied both prongs of *Strickland*: He has demonstrated that his counsel's erroneous characterization of his early childhood during closing arguments fell below an objectively reasonable standard, and there is a reasonable probability a juror would have reached the opposite decision with regards to the imposition of the death penalty in the absence of this deficiency. Consequently, I respectfully dissent from the majority's contrary holding.

IV. CONCLUSION

Although our habeas review is deferential, *28 U.S.C. § 2254(d)*, and our review of ineffective-assistance-of-counsel claims especially so, Pinholster, 563 U.S. at 190, I believe that Lang has overcome this high threshold and proven that he is entitled to relief on three of the five grounds presented. To take a step back: A relative of Lang's **[**58]** victim was empaneled on his jury. We have no record evidence of how this affected the jury's verdict of guilt because the trial court's one-question inquiry allowing a response via silence was less than minimal. Furthermore, trial counsel's investigation into mitigation evidence was so haphazard that they did not receive records until after Lang was sentenced to death and barely engaged with Lang's mother, the key mitigation witness. **[*827]** And in trial counsel's final argument to the jury prior to this sentence of death, counsel falsely described Lang's horrific childhood as "normal."

If the majority is correct that our constitutional rights to an impartial jury and legal representation are so minimal that Lang's trial was constitutionally acceptable, then this case is more about the parsimonious interpretation of our constitutional protections than about the reasonableness of executing a person following this paucity of due process. Caudill v. Conover, 881 F.3d 454, 483 (6th Cir. 2018) (Moore, J., dissenting). I do not believe, however, that the protections guaranteed by our Constitution are so minimal, or our review so constrained by the standard of review, that we are forced to condone the egregious mistakes that occurred during Lang's trial. **[**59]** Thus, for the foregoing reasons, I respectfully dissent.

End of Document

APPENDIX B

Lang v. Bobby

United States Court of Appeals for the Sixth Circuit

June 28, 2018, Filed

No. 15-3440

Reporter
2018 U.S. App. LEXIS 17866 *

EDWARD LANG, Petitioner-Appellant, v. DAVID BOBBY, WARDEN, Respondent-Appellee.

Prior History: *Lang v. Bobby, 889 F.3d 803, 2018 U.S. App. LEXIS 12319 (6th Cir. Ohio, May 11, 2018)*

Core Terms

petition for rehearing, en banc

Counsel: [*1] For Edward Lang, Petitioner - Appellant: Michael J. Benza, Law Office of Michael J. Benza, Chagrin Falls, OH; Karl David Schwartz, Karl D. Schwartz, Elkins Park, PA.

For DAVID BOBBY, Warden, Respondent - Appellee: Charles L. Wille, Brenda Stacie Leikala, Office of the Attorney General of Ohio, Columbus, OH.

Judges: BEFORE: SILER, MOORE and GIBBONS, Circuit Judges.

Opinion

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. Judge Moore would grant rehearing for the reasons stated in her dissent.

End of Document

APPENDIX C

Lang v. Bobby

United States District Court for the Northern District of Ohio, Western Division

March 27, 2015, Decided; March 27, 2015, Filed

Case No. 5:12 CV 2923

Reporter
2015 U.S. Dist. LEXIS 39365 *; 2015 WL 1423490

Edward Lang, Petitioner, -vs- David Bobby, Warden, Respondent.

Subsequent History: Affirmed by *Lang v. Bobby, 2018 U.S. App. LEXIS 12319 (6th Cir. Ohio, May 11, 2018)*

Prior History: *Lang v. Bobby, 2014 U.S. Dist. LEXIS 150916 (N.D. Ohio, Oct. 23, 2014)*

Core Terms

Juror, trial court, argues, trial counsel, mitigation, sentence, state court, murder, Amendments, merits, postconviction, ineffective, questioning, handgun, circumstances, due process, mitigating evidence, defaulted, Foster, grounds for relief, closing argument, credibility, procedurally, contends, gun, aggravating circumstances, direct appeal, speculative, asserts, witnesses

Counsel: **[*1]** For Edward Lang, Petitioner: Laurence E. Komp, LEAD ATTORNEY, Manchester, MO; Michael J. Benza, Chagrin Falls, OH.

David Bobby, Respondent, Pro se, Youngstown, OH.

For David Bobby, Respondent: Charles L. Wille, Seth P. Kestner, Office of the Attorney General - Capital Crimes Section, State of Ohio, Columbus, OH.

Judges: JACK ZOUHARY, UNITED STATES DISTRICT JUDGE.

Opinion by: JACK ZOUHARY

Opinion

MEMORANDUM OPINION AND ORDER DENYING PETITION

INTRODUCTION

A jury convicted Petitioner Edward Lang of the 2006 murders of Jaron Burditte and Marnell Cheek, recommending that Petitioner be sentenced to death for Cheek's murder and life imprisonment without the possibility of parole for Burditte's murder. He now challenges the constitutionality of his convictions and sentence, pursuant to *28 U.S.C. § 2254*. For the reasons below, this Court denies the Petition for Writ of Habeas Corpus (Doc. 16).

FACTUAL BACKGROUND

On direct appeal from his convictions and sentence, the Ohio Supreme Court described Lang's crimes as follows:

> The state's case revealed that at 9:36 p.m. on October 22, 2006, Canton police officer Jesse Butterworth was dispatched to a traffic accident with injuries on Sahara Avenue in Canton. At the scene, Butterworth observed that a Dodge **[*2]** Durango had crashed into the back of a parked car. He discovered that the two people inside the Durango had been shot in the back of the head. They were later identified as Jaron Burditte, the driver, and Marnell Cheek, the front-seat passenger.
> Police investigators found a bag of cocaine in Burditte's hand. Investigators examining the inside of the Durango recovered two shell casings in the backseat area and a spent bullet in the driver's side door pocket. Additionally, two cell phones were found in the car, and a third cell phone was found in Burditte's pocket.
> One of the cell phones recovered from the Durango showed that calls had been received at 9:13 p.m. and 9:33 p.m., which was close to the time of the

murders. Police learned that these calls had been made from a prepaid cell phone that was not registered in anyone's name. Phone records for the cell phone showed that two calls had been made to the phone number of Teddy Seery on the afternoon and evening of the murders.

On October 24, 2006, Sergeants John Gabbart and Mark Kandel interviewed Seery. Following that interview, the police identified Lang as a suspect in the murders.

At trial, Seery testified that he and Lang were together **[*3]** almost every day during the summer of 2006. Lang called Seery on the evening of October 22, but Seery did not recall what they discussed. On the morning of October 23, Seery was informed by another friend that someone had been murdered on Sahara Avenue. Lang came to Seery's house later that day.

During the visit, Seery asked Lang "what happened at Sahara," because Lang stayed in that area. Lang told Seery that "he killed two people up there" that "[t]hey were going to rob." Lang then described what had occurred: "[H]e had called the guy up and the guy came and he saw there was a girl in the car. The guy passed him up. He called him back. The guy came back around, and he got in the car." Lang then said that he had gotten into the car and had "shot them * * * [t]wice." However, Lang did not tell Seery whom he was with or explain why he had shot the two people.

The police obtained a warrant for Lang's arrest. On the evening of October 24, 2006, the police stopped Lang as he was parking his girlfriend's car at a local apartment. Lang gave police a false name when asked his identity, but police established his identity and arrested him. Police officers seized a 9 mm handgun and ammunition that had been wrapped **[*4]** inside a towel and were resting on the rear passenger floorboard of the car.

On October 25, 2006, Sergeants Gabbart and Kandel interviewed Lang. After waiving his Miranda rights, Lang told police that on October 22, Antonio Walker had come to his house and had told him "he had somebody that [they] could rob." Lang agreed to join him. After Walker gave him Burditte's phone number, Lang called Burditte and made arrangements to purchase a quarter-ounce of crack cocaine for $225. Burditte and Lang agreed to meet later that night "off of 30th Street and Sahara," and Burditte said he would call Lang when he got close to that location.

Lang stated that he gave his gun to Walker before they left the house because Walker had told him, "[A]ll [Lang] had to do was just be in the car with him basically." As they walked to the meeting location, Walker told Lang how the robbery was going to take place: Walker said they were going to get in the car and hold Burditte up, and he told Lang which direction to run afterwards.

After reaching the meeting location, Burditte called Lang and told him that he was "right around the corner." After Burditte drove past them, Lang said that Walker had called Burditte on **[*5]** Lang's cell phone and told him where they were. The car then pulled up in front of Lang and Walker. Lang then described what happened: "I walked like on the other side of the car [and] I get in the back seat behind the passenger and he got in the back seat behind the driver. * * * We jumped in the car and he put the gun up dude head [sic] and told dude that he wanted everything and like in a moment of seconds he fired two shots. And I jumped out the car."

Lang stated that they went to Walker's apartment after the shootings. Lang asked Walker why he shot the two people, and Walker said that "he felt as though dude was reachin' for somethin'. * * * And he wasn't * * * sure." Lang stated that he vomited in a bag. Lang also called "[his] home boy E" to get the gun melted down and disposed of. In the meantime, Walker wiped down the gun. Walker also told Lang that they needed to get rid of the cell phone, and Lang gave it to him. Walker then dismantled the phone and went outside to throw it in the dumpster.

During the interview, Lang told police that he was surprised that Walker had shot the victims because the "plan was just to rob him." Lang also said, "I did not wanna do it. * * * He wanted **[*6]** to do it. * * * I just went with him for, that was my gun I needed some money."

On October 26, 2006, Walker turned himself in to the police after learning that the police were looking for him. Walker then talked to the police about the murders.

At trial, Walker testified that on the evening of October 22, 2006, he, Lang, and Tamia Horton, a girlfriend of Lang, were at Horton's apartment. Lang had a gun out and said that he "needed to hit a lick" (commit a robbery) because he "needed some money." Lang mentioned that they could rob "Clyde," who was Jaron Burditte. Walker knew

Burditte because they had been in the same halfway house together in 2004.
Walker agreed to help Lang rob Burditte because he was also "short on money." Their plan was to arrange to buy drugs from Burditte and then rob him when he showed up for the sale. Lang then called Burditte and arranged to buy a quarter ounce of crack cocaine from him later that night.
Shortly thereafter, Lang and Walker walked to their meeting location on Sahara Avenue. Lang loaded his 9 mm handgun while they waited for Burditte to arrive.

When Burditte's Durango drove past them, Lang called Burditte and told him where they were. Burditte then **[*7]** arrived at their location and stopped in front of Lang and Walker.
According to Walker, Lang got into the backseat on the driver's side of the Durango. Walker did not get into the Durango, explaining, "It didn't feel right to me." Walker then heard two gunshots and saw Lang get out of the vehicle and start running. Walker saw the Durango "crash[ ] up into the yard."
Lang and Walker separately ran to Horton's apartment. Lang vomited in the bathroom. Walker asked whether Lang was all right, and Lang said, "[E]very time I do this, this same thing happens."
Walker testified that he never saw Lang's handgun after they reached his apartment. He also denied throwing away Lang's cell phone.
Michael Short, a criminalist with the Canton—Stark County crime lab, testified that none of the fingerprints collected matched Lang's or Walker's. Short also examined the handgun seized from Lang's vehicle and the spent bullet recovered from the Durango. He testified that testing showed that the handgun had fired the spent bullet. Testing also showed that the two cartridge cases found in the Durango's backseat had been ejected by this handgun.

Michele Foster, a criminalist with the Canton—Stark County crime lab, examined **[*8]** Lang's clothing. Blood was found on Lang's red T-shirt and pants, but DNA testing showed that it was Lang's blood. No blood was found on Lang's coat, knit hat, white T-shirt, or the athletic shoes that were taken from the car. Soiling was also noticed on Lang's athletic shoes, jacket, and pants.
Foster also examined Walker's clothing. She found no blood on the hooded sweatshirt or the athletic shoes that Walker said he was wearing on October 22. But tan-colored soiling with fragments of dried plant material was noticed on the exterior of both his shoes.

Foster conducted DNA testing of a swab taken from the trigger grips, slide, and magazine release on the 9 mm handgun. Foster detected low levels of DNA from at least two individuals on the swab. Foster testified, "Walker is not the major source of DNA that we detected from the swabbing of the pistol." She also testified, "[W]e can say that Edward Lang cannot be excluded as a possible minor source to the DNA that we found on the weapon." Because of the low level of DNA, Foster testified, "we can't say to a reasonable degree of scientific certainty that this person is the source. In this particular case, the chance of finding the major DNA **[*9]** profile that we found on that pistol is 1 in 3,461," which is to say that "1 of 3,461 people could possibly be included as a potential source of the DNA."
Dr. P.S.S. Murthy, the Stark County coroner, conducted the autopsies on Cheek and Burditte. Murthy testified that Cheek was shot at close range above the left ear. The gunshot traveled "left to right, downwards, and slightly backwards" and exited behind Cheek's right ear. Cheek's toxicology report was negative for the presence of any drugs or alcohol.
Dr. Murthy testified that Burditte was shot in the back of the head. The trajectory of the shot was downward, and the bullet exited through the left side of the victim's mouth. Dr. Murthy determined that the gunshot was a "near contact entrance wound" to the head. Burditte's toxicology report was positive for benzoylecognine, which is the metabolite for cocaine, and THCA, which is marijuana. Dr. Murthy concluded that a gunshot wound to the head was the cause of death for both victims.
The defense presented no evidence during the guilt phase.

State v. Lang, 129 Ohio St. 3d 512, 513—516, 2011 Ohio 4215, 954 N.E.2d 596 (2011) (footnote omitted).

PROCEDURAL BACKGROUND

State Court Proceedings

In December 2006, a grand jury charged Lang with the murders of Burditte and Cheek, **[*10]** returning an

indictment with two counts of aggravated murder in violation of Ohio Rev. Code § 2903.01(B), and one count of aggravated robbery in violation of Ohio Rev. Code § 2929.04(A)(7). For each aggravated-murder charge, the grand jury returned two capital specifications. First, the grand jury charged that each murder was part of a course of conduct involving the purposeful killing of two or more persons in violation of Ohio Rev. Code § 2929.04(A)(5). Second, the grand jury charged that each murder was committed in the course of an aggravated robbery in violation of Ohio Rev. Code § 2929.04(A)(7). All counts included a firearm specification under Ohio Rev. Code § 2941.145 (Doc. 17-1 at 47—52).[1]

Lang's trial began on July 10, 2007 (Doc. 22-2 at 348). Attorneys Frank Beane and Anthony Koukoutas served as Lang's trial counsel. On July 14, 2007, a jury found Lang guilty of all charges and specifications. Lang's mitigation hearing ended four days later, with the jury recommending **[*11]** the death penalty for Cheek's murder, and life imprisonment, without the possibility of parole, for Burditte's murder. The trial court adopted the jury's sentencing recommendation on July 26, 2007 (Doc. 17-5 at 1362—73). The court also sentenced Lang to a ten-year term of imprisonment for the aggravated-robbery count, and merged the gun specifications imposing an additional three-year term of imprisonment (*id.*).

Lang, represented by Joseph Wilhelm, Rachel Troutman, Benjamin Zober, and Jennifer Prillo, timely appealed his convictions and sentence to the Ohio Supreme Court raising twenty-one propositions of law:

> 1. A defendant's right to due process is violated when a juror who is related to one of the victims, and has a prejudice and bias, is seated on the jury. *U.S. Const. amends. VI, XIV*; *Ohio Const. art. I, §§ 5*, 10.
>
> 2. Expert scientific testimony that is not established to a reasonable degree of scientific certainty is unreliable and inadmissible. Admission of evidence that does not meet this standard violates a defendant's rights to equal protection, due process, and his rights to confrontation and to present a defense. *U.S. Const. amends. V, XIV*. It also violates Ohio R. Evid. 401—403.
>
> 3. A defendant's right to [a] [g]rand [j]ury indictment under the Ohio Constitution, and his rights to **[*12]** due process under both the State and Federal Constitutions are violated when the indictment fails to allege a mens rea element for the offense of aggravated robbery. *U.S. Const. amends. V, XIV*; *Ohio Const. art. I, §§ 10*, 16. This error also denies the defendant his rights against cruel and unusual punishment because it affects the jury's verdict on the O.R.C. § 2929.04(A)(7) specification. *U.S. Const. amends. VIII, XIV*; *Ohio Const. art. I, § 9*.
>
> 4. When a defendant is charged with aggravated felony murder and the O.R.C. § 2929.04(A)(7) specification as either the principal offender or an aider and abetter [sic], the jury must be given the option to find the defendant guilty under either the principal offender element or the prior calculation and design element of that specification. *U.S. Const. amends. VIII, XIV, Ohio Const. art. I, §§ 9*, 16.
>
> 5. An accused is deprived of substantive and procedural due process rights when a conviction results despite the State's failure to introduce sufficient evidence. *U.S. Const. amends. VI, XIV*; *Ohio Const. art. I, §§ 9*, 16.
>
> 6. The accused is denied the rights to due process and effective assistance of counsel when a trial court refuses to grant access to grand jury materials prior to trial. *U.S. Const. amends. V, VI, VIII, IX*, and *XIV*; *Ohio Const. art. I, §§ 1*, 2, 5, 9,10,16, and 20.
>
> 7. Admission of the prior consistent statements of a witness violates Ohio R. Evid. 801 and deprives a criminal defendant of a fair trial and due process. *U.S. Const. amend. XIV*; *Ohio Const. art. I, § 16*.
>
> 8. Admission of irrelevant and prejudicial **[*13]** evidence during a capital defendant's trial deprives him of a fair trial and due process. *U.S. Const. amend. XIV*; *Ohio Const. art. I, § 16*.
>
> 9. A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by *U.S. Const. amends. VIII* and *XIV*; *Ohio Const. art. I, §§ 9* and 16 when a prosecutor commits acts of misconduct during the trial phase of his capital trial.
>
> 10. The defendant's right to the effective assistance

[1] References to the Return of Writ's Appendices are to the electronic court filing ("ECF") number, designated as "Doc" and using the Appendix pagination. References to the trial transcript use the original transcript pagination. References to the Petition, Return, or Traverse use the ECF pagination, not the native pagination or Page ID for these documents.

of counsel is violated when counsel's performance during the culpability phase of a capital trial is deficient to the defendant's prejudice. *U.S. Const. amends. VI* and *XIV*; *Ohio Const. art. I, § 10*.
11. Where the jury recommends the death sentence for one count of aggravated murder, but recommends a life sentence on another count, and the aggravating circumstances and mitigating factors are identical, the resulting death sentence is arbitrary and must be vacated. *U.S. Const. amends. VIII, XIV*.
12. A capital defendant's rights to due process and a fair trial are denied when a prosecutor engages in misconduct during the penalty phase. *U.S. Const. amends. VIII, XIV*; *Ohio Const. art. I, § 10*.
13. The defendant's right to the effective assistance of counsel is violated when counsel's performance, during the penalty phase of his capital trial, is deficient to the defendant's prejudice. *U.S. Const. amend. VI*; *Ohio Const. art. I § 10*.

14. A capital defendant's rights to due process **[*14]** and against cruel and unusual punishment are violated by instructions that render the jury's sentencing phase verdict unreliable. *U.S. Const. amends. VIII, XIV, Ohio Const. art. I, §§ 9*, 16.
15. A capital defendant's rights against cruel and unusual punishment and to due process are violated by the admission of prejudicial and irrelevant evidence in the penalty phase of the trial. *U.S. Const. amends. VIII, XIV, Ohio Const. art. I, §§ 9*, 16.

16. A capital defendant's death sentence is inappropriate when the evidence in mitigation outweighs the aggravating circumstances. *O.R.C. §§ 2929.03, 2929.04*; *U.S. Const. amends. VIII, XIV*; *Ohio Const. art. I, §§ 9*, 16.

17. When the trial judge trivializes and minimizes mitigating evidence, it violates a capital defendant's right to a reliable sentence. *O.R.C. §§ 2929.03, 2929.04*; *U.S. Const. amends. VIII, XIV*; *Ohio Const. art. I, §§ 9*, 16.
18. The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. *U.S. Const. amends. VI, XIV*; *Ohio Const. art. I, §§ 5*, 16.
19. Imposition of costs on an indigent [d]efendant violates the spirit of the *Eighth Amendment*. *U.S. Const. amends. VIII*[,] *XIV*; *Ohio Const. art. I, §§ 10*, 16.

20. The accused's right to due process under the *Fourteenth Amendment to the United States Constitution* is violated when the State's burden of persuasion is less than proof beyond all doubt.

21. Ohio's death penalty law is unconstitutional. *O.R.C. §§ 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 Edward Lang. *U.S. Const. amends. V, VI, VIII*, and *XIV*; *Ohio Const. art. I, §§ 2*, 9, 10, and 16. Further, **[*15]** Ohio's death penalty statute violates the United States' obligations under international law.

(Doc. 18-1 at 1519—21). On November 1, 2010, with leave of court, Lang presented an additional proposition of law, arguing that the trial court erred by failing to properly notify him of the penalty for noncompliance with the terms of post-release control (Doc. 18-3 at 2028—35).

The Ohio Supreme Court affirmed Lang's convictions and sentence on August 31, 2011, but remanded his case to the trial court to impose the appropriate term of post-release control pursuant to *Ohio Rev. Code § 2929.191*. *State v. Lang, 129 Ohio St. 3d 512, 2011 Ohio 4215, 954 N.E.2d 596 (2011)*. Lang filed a motion for reconsideration, which the court denied on November 2, 2011 (Doc. 18-3 at 2107—16).

Lang next filed an application to reopen his direct appeal on January 27, 2012, asserting five propositions of law:

I. Trial Counsel Are Ineffective For Failing To Request, And A Trial Court Errs By Failing To *Sua Sponte* Provide, A Limiting Instruction To The Jur[y] Related To The Proper Use Of The Co-Defendant's Plea Of Guilty To Complicity To Commit Murder. *U.S. Const. amends. VI* And *XIV*.

II. The Trial Court's Treatment Of A *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)* Objection Was Error, And Trial Counsel's Conduct During The Consideration Of The *Batson* Objection Was Prejudicially Ineffective. **[*16]** *U.S. Const. amends. VI* And *XIV*.

III. The Trial Court Improperly Excluded Access To Mitigation In Violation Of *Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1992)* And *Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)* By Denying Access to the Grand

Jury Transcripts of the Co-defendant's Indictment. *U.S. Const. Amend. VII, XIV.*

IV. Gang Evidence Simply Is Not Allowed in a capital trial pursuant to *Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). U.S. Const. amends. VI, VIII* and *XIV.*

V. Trial Counsel Were Ineffective In Failing To Request Further Inquiry Regarding Potential Prejudice From A Victim's Family Member Sitting As A Juror In Lang's Capital Trial. *U.S. Const. amends. VI* and *XIV.*

(Doc. 18-3 at 2146, 2147, 2149, 2150, 2152). The Ohio Supreme Court denied the application on September 5, 2012 (Doc. 18-4 at 2158).

While his direct appeals were pending, Lang filed a petition for postconviction relief in the trial court on May 15, 2008, now represented by Richard Vickers and Tyson Fleming. He presented the following fourteen grounds for relief:

1. Petitioner's convictions and sentences are void or voidable because Ohio's post-conviction procedures do not provide an adequate corrective process in violation of the [C]onstitution. *U.S. Const. amends. V, VI, VIII,* and *XIV; Ohio Const. art. I, §§ 1,* 2, 5, 9, 10, 16, and 20.

2. Petitioner's convictions and sentence are void or voidable because his trial counsel failed to reasonably investigate, prepare, and present compelling evidence to mitigate the sentence of death. **[*17]** Therefore, Petitioner's rights were denied under the *Fifth, Sixth, Eighth* and *Fourteenth Amendments of the United States Constitution* and *§§ 1, 2, 5, 9, 10, 16,* and *20 of Article I of the Ohio Constitution.* Petitioner's trial counsel failed to timely obtain and utilize available records regarding Petitioner's history and background that prevented his sentencing jury from learning: that Petitioner was severely physically and sexually abused as a child; that Petitioner suffers from a severe mental illness with an onset early in his childhood; that his mental illness made him appear to be psychotic at times; that there is intergenerational mental illness in Petitioner's family; that Petitioner's family of origin was highly dysfunctional; and that Petitioner's home was a place of danger and chaos.

3. Petitioner Lang's death sentence is voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was thereby prejudiced. . . . Petitioner was prejudiced by defense counsel's unreasonable failure to investigate and present the testimony of Abigail Duncan.

4. Petitioner Lang's death sentences are voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and **[*18]** *Fourteenth Amendments to the United States Constitution* and he was prejudiced. . . . [T]here were available facts regarding Petitioner's life long mental health deficits that would have been presented to the sentencing jury if Petitioner's trial counsel had conducted a reasonable investigation. 5. Petitioner Lang's death sentence is voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was thereby prejudiced. . . . As early as age three Petitioner was the victim of highly traumatic physical and sexual abuse as a child.

6. Petitioner Lang's death sentence is voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was thereby prejudiced. . . . Records from the Baltimore Department of Social Services document that Petitioner's mother Tracie Robinson Carter, her mother and grandmother had histories of mental health problems, including diagnosis of bi-polar effective disorder.

7. Petitioner Lang's death sentence is voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was thereby prejudiced. **[*19]** . . . [T]here were available facts regarding Petitioner's life long mental health deficits that would have been presented to the sentencing jury if Petitioner's trial counsel had conducted a reasonable investigation.

8. Petitioner Lang's death sentence is voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was thereby prejudiced. . . . There was available evidence that could have been presented to the jury concerning Petitioner's in utero exposure to alcohol

if trial counsel would have conducted a reasonable investigation.

9. Petitioner Lang's death sentence is voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was thereby prejudiced. . . . There was available evidence that could have been presented to the jury concerning the Petitioner's prenatal exposure to extreme stress and that his birth was complicated by meconium staining if trial counsel would have conducted a reasonable investigation.

10. Petitioner Lang's convictions and sentences are voidable because he was denied the effective assistance of counsel at **[*20]** the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was prejudiced. . . . . The failure of Petitioner's trial counsel to present available mitigating evidence through a psychologist at the penalty phase of Petitioner's capital trial prejudiced Petitioner.

11. Petitioner Lang's convictions and sentences are voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was prejudiced. . . . . Petitioner's counsel failed to obtain the funds for, and secure the administration of[,] a neurological assessment of Petitioner's brain to adequately prepare the defense case in mitigation of the death penalty at Petitioner's trial.

12. The convictions and sentence imposed against Petitioner are void and/or voidable because trial counsel rendered ineffective assistance of counsel at Petitioner's trial. The trial court failed to act to ensure the inclusion of African American jurors on the panel that was to decide his guilt or innocence and whether he should live or die.

13. Petitioner Lang's death sentence is voidable because he was denied the effective assistance of counsel at the penalty phase of **[*21]** his capital trial as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and he was thereby prejudiced. . . . Petitioner's trial counsel . . . waited until shortly before his trial to begin investigating any mitigating evidence and therefore only uncovered a minute amount information. Had trial counsel conducted a reasonable investigation in Petitioner's case they would have discovered that the effects of his bipolar disorder would make him become extremely aggressive and violent especially when he was not taking his psychotropic medication.

14. Petitioner Lang's convictions and sentences are void or voidable because, assuming *arguendo* that none of the Grounds for Relief in this Post-Conviction Petition individually warrant the relief sought from this court, the cumulative effects of the errors and omissions as presented in the Petition in paragraphs one through thirteen have been prejudicial to the Petitioner and have denied the Petitioner his rights as secured by the United States and Ohio Constitutions.

(*id.* at 2210, 2212, 2215, 2218, 2220, 2223, 2226, 2228, 2231, 2234, 2237, 2239, 2242, 2245). Lang requested discovery and an evidentiary hearing on all grounds (*see id.* at 2247).

On May 23, 2008, Lang filed amendments to two of his postconviction claims with additional exhibits (Doc. 19-3 at 2647—55). Lang also **[*22]** moved for funds for a neurological examination (*id.* at 2656—65). On June 15, 2009, the trial court issued a thirty-one page decision granting the State's motion to dismiss Lang's petition, and denying the petition and motion regarding the neuropsychological examination (Doc. 19-5 at 2873—2903).

Lang, represented by Troutman and Fleming, appealed the trial court's denial of postconviction relief. He asserted the following assignments of error:

> I. Appellant's due process rights were violated because the trial court denied him essential mechanisms for off-record fact development despite sufficient operative facts presented by Appellant to justify his requests to further develop the factual basis for his claims.
>
> II. The trial court erred in dismissing Lang's post-conviction petition when he presented sufficient operative facts to merit relief or, at a minimum, an evidentiary hearing.

(Doc. 20-1 at 2953). The Ohio court of appeals affirmed the trial court judgment on August 23, 2010. *State v. Lang, 2010-Ohio-3975 (Ct. App.)*.

Lang then appealed to the Ohio Supreme Court, presenting two propositions of law:

> I. Capital post-conviction petitioners are entitled to

> discovery and expert assistance when the petition presents sufficient operative facts and **[*23]** exhibits in support of claimed violations of constitutional rights that render a capital conviction and/or death sentence void or voidable.
>
> II. Capital post-conviction petitioners are entitled to relief, or at least an evidentiary hearing, when the petition presents sufficient operative facts and exhibits in support of claimed violations of constitutional rights that render a capital conviction and/or death sentence void or voidable. Considered together, the cumulative errors set forth in appellant's substantive grounds for relief merit reversal or remand for a proper post-conviction process.

(Doc. 20-1 at 3097). The court declined to accept jurisdiction to hear the appeal on March 21, 2012 (Doc. 20-2 at 3149).

Federal Habeas Proceedings

On November 27, 2012, Lang filed a notice of intent to initiate this habeas action, and requested appointment of counsel and leave to proceed in forma pauperis (Docs. 1—3). This Court granted both motions and appointed Laurence Komp and Michael Benza to represent Lang (Docs. 7—8).

On September 16, 2013, Lang filed his Petition for Writ of Habeas Corpus (Doc. 16), the State of Ohio ("the State") filed a Return of Writ (Doc. 23), and Lang filed his Traverse **[*24]** (Doc. 33).

In May 2014, Lang filed three motions. First, he asked to supplement the record with certain missing portions of the state-court record (Doc. 36 at 1). Second, he sought discovery on his first through fourth, seventh, eighth, fourteenth, and sixteenths grounds for relief, and discovery of facts concerning whether his fifth, tenth, eleventh, and thirteenth grounds for relief had been procedurally defaulted (Doc. 37 at 9). Third, he requested an evidentiary hearing regarding his postconviction claims and his procedural default arguments (Doc. 38 at 4—6).

On October 23, 2014, this Court denied Lang's motions for evidentiary hearing and discovery as to his first through fourth, eighth, and fourteenth claims without prejudice, and denied with prejudice all remaining requests for discovery. This Court granted Lang's motion to supplement the record (*see* Doc. 47).

PETITIONER'S GROUNDS FOR RELIEF

Lang asserts seventeen grounds for relief. They are:

1. Mr. Lang was deprived of his right to the effective assistance of counsel under the *Sixth* and *Fourteenth Amendments* when counsel failed to adequately and properly investigate, develop, and present significant mitigation evidence.

2. Lang's due process rights and rights **[*25]** under the *Sixth* and *Fourteenth Amendments* to an unbiased jury were violated when a juror who is related to one of the victims, and has a prejudice and bias, is seated on the jury.

3. The defendant's right to the effective assistance of counsel is violated when counsel's performance during the culpability phase of a capital trial is deficient to the defendant's prejudice under the *Sixth* and *Fourteenth Amendments*.

4. Lang's direct appeal counsel were constitutionally ineffective.

5. Lang's rights to equal protection, due process, and his rights to confrontation and to present a defense as protected by the *Fifth*, *Sixth* and *Fourteenth Amendments* were violated by the admission of unreliable scientific evidence.

6. The State failed to introduce sufficient evidence to convict Lang in violation of the *Sixth* and *Fourteenth Amendments*.

7. The State suppressed favorable exculpatory evidence; and improperly destroyed potentially exculpatory evidence.

8. The accused is denied the rights to due process and effective assistance of counsel when a trial court refuses to grant access to grand jury testimony.

9. Admission of the prior consistent statement of the co-defendant violated Lang's rights under the *Sixth* and *Fourteenth Amendments*.

10. Admission of irrelevant and prejudicial evidence during Lang's trial deprived him of a fair trial **[*26]** and due process under the *Fourteenth Amendment*.

11. Lang's substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by the *Eighth* and *Fourteenth Amendments* were violated due to prosecutorial misconduct during the trial phase.

12. Where the jury recommends the death sentence for one count of aggravated murder, but recommends a life sentence on another count, and the aggravating circumstances and mitigating factors are identical, the resulting death sentence is

arbitrary and must be vacated under the *Eighth Amendment*.

13. A capital defendant's rights to due process and a fair trial are denied when a prosecutor engages in misconduct during the penalty phase in violation of the *Eighth* and *Fourteenth Amendments*.

14. The defendant's right to the effective assistance of counsel is violated when counsel's performance, during the penalty phase of his capital trial, is deficient to the defendant's prejudice under the *Sixth* and *Fourteenth Amendments*.

15. When the trial judge trivializes and minimizes mitigating evidence, it violates a capital defendant's right to a reliable sentence under *Eddings*.

16. The trial court failed to act to ensure the inclusion of African-American jurors on the panel of potential jurors.

17. The cumulative effect of trial error renders a capital **[*27]** defendant's trial unfair and his sentence arbitrary under the *Sixth*, *Eighth*, and *Fourteenth Amendments*.

(Doc. 16 at 32, 45, 50, 61, 70, 76, 80, 82, 84, 86, 88, 95, 98, 103, 108, 112, 115).

STANDARD OF REVIEW

Filed in 2012, Lang's Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*; *Murphy v. Ohio, 551 F.3d 485, 493 (6th Cir. 2009)*. AEDPA, which amended *28 U.S.C. § 2254*, was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003)* (quoting *(Michael) Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)*). AEDPA "recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013)*. The Act "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id.*

Section 2254(d) forbids a federal court from granting habeas relief with respect to a "claim that was adjudicated on the merits in State court proceedings" unless the state-court decision either:

(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 **[*28]** unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Habeas courts review the "last explained state-court judgment" on the federal claim at issue. *Ylst v. Nunnemaker, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)* (emphasis omitted). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 784—85, 178 L. Ed. 2d 624 (2011)*.

A state-court decision is contrary to "clearly established Federal law" under *§ 2254(d)(1)* only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *(Terry) Williams v. Taylor, 529 U.S. 362, 412—13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. "[R]eview under *§ 2254(d)(1)* is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011)*. "Clearly established Federal law" for purposes of the provision "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade, 538 U.S. 63, 71—72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. *See also White v. Woodall, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014)* (explaining that "only the holdings, as opposed to the dicta, of Supreme Court **[*29]** decisions" qualify as clearly established Federal law for purposes of *§ 2254(d)*) (internal quotation marks and citations omitted). "And an 'unreasonable application of' those holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Woodall, 134 S. Ct. at 1702* (quoting *Lockyer, 538 U.S. at 75—76*). "The critical point is that relief is available under *§ 2254(d)(1)*'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id. at 1706—07* (quoting *Harrington, 131 S. Ct. at 786*).

A state-court decision is an "unreasonable determination of the facts" under *§ 2254(d)(2)* only if the court made a "clear factual error." *Wiggins v. Smith, 539 U.S. 510, 528—29, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. This Court's review of state court factual findings is limited to "the evidence presented in the State court proceeding," and the petitioner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt, 134 S. Ct. at 15*; *Rice v. White, 660 F.3d 242, 250 (6th Cir. 2011)*. *See also 28 U.S.C. § 2254(e)(1)*. "[I]t is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice, 660 F.3d at 250*. "'[A] state-court factual determination is not unreasonable **[*30]** merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Burt, 134 S. Ct. at 15* (quoting *Wood, 558 U.S. at 301*).

Section 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Harrington, 131 S. Ct. at 785* (internal quotation marks omitted). Thus, a petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id. at 786—87*.

But AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* "[E]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. Rather, "under AEDPA standards, a federal court can disagree with a state court's factual determination and 'conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.'" *Baird v. Davis, 388 F.3d 1110, 1123 (7th Cir. 2004)* (quoting *Miller-El, 537 U.S. at 340*). Moreover, the deference AEDPA demands is not required if (for example) *§ 2254(d)* does not **[*31]** apply to a claim. Federal habeas courts may review *de novo* an exhausted federal claim that was not adjudicated on the merits in state court. *See Hill v. Mitchell, 400 F.3d 308, 313 (6th Cir. 2005)*.

EXHAUSTION AND PROCEDURAL DEFAULT

Exhaustion

Section 2254(b)(1) provides that a federal court may not grant habeas relief to an applicant in state custody "unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . or there is an absence of available State corrective process . . . or circumstances exist that render such process ineffective to protect the rights of the applicant." *28 U.S.C. § 2254(b)(1)*; *see also Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982)*. "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)*. "This requirement, however, refers only to remedies still available at the time of the federal petition." *Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)*. A habeas court cannot review a federal claim if the petitioner can still present the claim to a state court for merits consideration. *Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994)*. And *res judicata* bars an Ohio court from considering any issue that a petitioner could have, but did not, raise on direct appeal from his conviction or sentence. *State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967)*.

For good cause, a habeas court may stay **[*32]** the action so that the petitioner may present his unexhausted claim to state court, then return to federal court for review of his perfected petition. *Rhines v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005)*. But if the habeas court determines a return to state court would be futile, it need not wait for exhaustion to occur. *Lott v. Coyle, 261 F.3d 594, 608 (6th Cir. 2001)*. Where appropriate, *§ 2254(b)(2)* also allows a habeas court to deny an unexhausted federal claim on the merits. *See also Hanna v. Ishee, 694 F.3d 596, 610 (6th Cir. 2012)* (denying petitioner's claim on the merits "notwithstanding a failure to exhaust" the claim).

Procedural Default

Further, a federal court may not consider "contentions of general law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)*. If a "state prisoner has defaulted his federal

claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). A procedural bar is "independent" when a state court applies the rule without relying **[*33]** on federal law, id. at 732—33, and "adequate" when the procedural rule is "firmly established and regularly followed" by state courts, Beard v. Kindler, 558 U.S. 53, 60—61, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009). If a petitioner fails to fairly present a federal habeas claim to the state courts and no longer can present that claim to a state court, the claim is procedurally defaulted. O'Sullivan, 526 U.S. at 848; Rust, 17 F.3d at 160.

This Court employs a four-step analysis to assess procedural default, examining the last explained state-court decision. *See* Ylst, 501 U.S. at 805; Combs v. Coyle, 205 F.3d 269, 275 (6th Cir. 2000):

> First, the federal court must determine whether there is a state procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction -- that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must decide whether the state procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim. Fourth, if the federal court answers the first three questions in the affirmative, it would not review the petitioner's procedurally defaulted claim unless the petitioner **[*34]** can show cause for not following the procedural rule and that failure to review the claim would result in prejudice or a miscarriage of justice.

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir. 2001) (internal citations omitted). If the last state court rendering a reasoned opinion on a federal claim "clearly and expressly states that its judgment rests on a state procedural bar," then the claim is procedurally defaulted and barred from consideration on federal habeas review. Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989).

Even if a claim is procedurally defaulted, a federal court may excuse the default and consider the claim on the merits if the petitioner demonstrates either (1) cause for the petitioner not to follow the procedural rule and prejudice from the alleged constitutional error, or (2) that a fundamental miscarriage of justice would result from denying federal habeas review. Coleman, 501 U.S. at 750.

A petitioner can establish cause to excuse procedural default in two ways. A petitioner may "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Objective impediments include an unavailable claim or interference by state officials that made compliance with state procedural rules impracticable. *Id.* If the procedural default **[*35]** can be attributed to counsel's constitutionally inadequate representation, that failing can serve as cause, so long as the ineffective-assistance-of-counsel claim was presented to the state courts. Id. at 488—89. If the ineffective-assistance claim was not presented to the state courts in the manner that state law requires, that claim is itself procedurally defaulted and only can be used as cause for the underlying defaulted claim if the petitioner demonstrates cause and prejudice with respect to the ineffective-assistance claim. Edwards v. Carpenter, 529 U.S. 446, 452—53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

To establish prejudice, a petitioner must demonstrate that the constitutional error "'worked to his *actual* and substantial disadvantage.'" Perkins v. LeCureux, 58 F.3d 214, 219 (6th Cir. 1995) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)) (emphasis in original). "When a petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." Simpson v. Jones, 238 F.3d 399, 409 (6th Cir. 2000).

A narrow exception to the cause-and-prejudice requirement exists where a constitutional violation "probably resulted" in the conviction of one who is "actually innocent" of the crime for which the person was convicted in state court. Dretke v. Haley, 541 U.S. 386, 392, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004) (citing Murray, 477 U.S. at 495—96). The petitioner must show "'by clear and convincing evidence that, but for constitutional error, no reasonable juror **[*36]** would have found the petitioner eligible for the death penalty under the applicable state law.'" *Id.* (quoting Sawyer v. Whitley, 505 U.S. 333, 336, 112 S. Ct. 2514, 120 L. Ed.

2d 269 (1992)). **DISCUSSION**

First, Third, and Fourteenth Grounds for Relief

Ineffective Assistance of Trial Counsel

Lang claims that his trial counsel's performance denied him his *Sixth Amendment* right to effective assistance of counsel. Specifically, he complains that counsel:

1. Failed to investigate, develop, and present significant mitigation evidence;
2. Failed to challenge weak DNA evidence;
3. Compared the jury to a lynch mob;
4. Failed to question the entire jury regarding Juror 386, who was related to Cheek;
5. Failed to contest prejudicial testimony;
6. Failed to test Walker's clothing;
7. Failed to move to seal the prosecutor's file;
8. Failed to object to instances of prosecutorial misconduct and improper evidence admitted during the culpability phase of trial;
9. Failed to object to Walker's prior consistent statement;
10. Referred to Lang's childhood as "normal";
11. Broke promises made to the jury during opening argument in the mitigation phase of trial; and
12. Failed to object to various instances of prosecutorial misconduct during the mitigation phase of trial.

(Doc. 33 at 12—45, 59—74, 119—26). Because **[*37]** Lang presented each of these claims to a state court, which adjudicated each claim on its merits, each claim is preserved for federal habeas review.

Ineffective Assistance of Counsel: Standard

The *Sixth Amendment* right to the effective assistance of counsel at trial "is a bedrock principle in our justice system." Martinez v. Ryan, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012). The Court announced a two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." Id at 687. Counsel's performance must fall "below an objective standard of reasonableness." Id. at 688. A reviewing court must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." Id. at 689.

Second, a petitioner must show that he or she was prejudiced by counsel's errors with "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." Id. at 694. "It is not enough to show that the errors had some conceivable effect on the outcome of **[*38]** the proceeding." Id. at 693 (citation and quotation marks omitted). Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Because ineffective-assistance-of-counsel claims are mixed questions of law and fact, id. at 698, a habeas court reviews such claims under AEDPA's "unreasonable application" prong, § 2254(d)(1), see, e.g., Mitchell v. Mason, 325 F.3d 732, 737—38 (6th Cir. 2003).

Prevailing on an ineffective-assistance-of-counsel claim is no easy task. See Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011):

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve.

Id. (citations and internal quotation marks omitted). "Judicial scrutiny of a counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment,'" recognizing "the constitutionally **[*39]** protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1406—07, 179 L. Ed. 2d 557 (2011) (quoting Strickland, 466 U.S. at 689—90).

The Supreme Court has observed that the standards imposed by *Strickland* and § 2254(d) are both "highly deferential;" applying both standards together results in review that is "doubly" deferential. Harrington, 131 S. Ct. at 788.

Failure to Investigate and Present Mitigating Evidence

In his first ground for relief, Lang complains that his trial counsel were ineffective for failing to adequately investigate, develop, and present mitigating evidence. On postconviction review, the Ohio court of appeals was the last court to address this claim on its merits. Lang submitted forty-one exhibits with his petition to support the claim, comprising nearly 300 pages (Docs. 18-4, 18-5, 19-1, 19-2, 19-3 at 2248—2508, 2608—39; Doc. 19-3 at 2553—2655).[2] The Ohio court of appeals ruled:

> Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington*. Ohio adopted this standard in the case of *State v. Bradley*. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; **[*40]** i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different.
>
> As an initial matter, we note that shortly after appellant was indicted in December 2006, death penalty-qualified counsel was retained and/or appointed to represent him. That same month, counsel filed a request for discovery and a motion for funds to hire a defense investigator, a psychological expert and a mitigation expert. According to the court's docket, before the month of January 2007 was over, defense counsel had filed thirty seven motions on appellant's behalf. In all, counsel filed over eighty-two motions, including a motion to permit defense to admit all relevant mitigating evidence. . . .
>
> The focus of appellant's present argument pertains to his **[*41]** representation at his mitigation hearing. At that time, appellant's counsel called two witnesses, appellant's mother and half-sister, to relate the harsh circumstances of appellant's childhood. Appellant's mother, Tracie Carter, first described how she met Edward "Coffee" Lang, Sr., appellant's father, who was her landlord when she was a 19-year-old single mother of a two-year-old. Unable to afford the rent, she exchanged sex with Lang, Sr. (hereinafter "Coffee") for being able to stay in her apartment. According to Carter, she maintained a relationship with Coffee, even though he was physically abusive to her and abused heroin, cocaine, and alcohol. Carter, as well as his half-sister Yahnena, proceeded at the mitigation hearing to portray appellant's abuse-filled childhood.
>
> As part of his PCR petition, appellant provided additional documentation of his troubled life. Evidence was supplied that Coffee was around appellant for part of his toddler years, before Coffee went to prison. But during this period of time, according to a 1991 report, Coffee sexually abused appellant. During that same time period, appellant and his siblings also "witnessed Coffee tying their mother up [for] 3-4 **[*42]** days, ordering her to perform fellatio, stabbing her in [the] chest with a pair of scissors, shooting her in the back of her leg, shooting windows out, cursing at her, beating her up, and attempting to set the house on fire with them in it." In addition, the children reportedly had "witnessed Coffee raping [their mother] on several occasions."
>
> Furthermore, appellant's older brother began acting out towards his siblings and mother. When the brother was 6 years old, he reportedly attempted to smother his mother to death and "brutally beat his siblings," including pushing his half-sister Yahnena Robinson down the stairs and hitting appellant (then 3 years old) in the head with a baseball bat.

[2] These exhibits included: records pertaining to Lang's history of behavioral and emotional difficulties, as well as that of his mother and brother, including records from Johns Hopkins Hospital, family services agencies and child welfare services in Baltimore, Maryland, the Baltimore City Public Schools, Kennedy Krieger Children's Hospital, Baltimore City Counseling Center, Universal Counseling Services, Inc., Mercy Medical Center, the Gundry Glass Hospital, and Baltimore City Local Coordinating Counsel; affidavit of Abigail Duncan, a psychiatric therapist who provided therapy to Lang from January to October 2002; affidavit of Bob Stinson, a psychologist who evaluated Lang in conjunction with the post-conviction proceedings; **[*50]** affidavit of his mother, Tracie Carter; affidavit of Dorian Hall, a mitigation specialist employed by the Office of the Ohio Public Defender; and records reflecting the efforts of Lang's trial team to obtain mitigating evidence.

He also reportedly acted out sexually towards appellant and Yahnena, ordering them to perform oral sex on him. The brother was eventually admitted to a psychiatric hospital.

This phase of appellant's childhood ended when he was about ten years old. Because of court-ordered parenting time, Coffee took appellant from Maryland at that time on what was supposed to be a two-week visitation in Delaware. However, Coffee did not return appellant to his mother, Tracie Carter, for nearly two years. During the **[*43]** time appellant lived with his father, he endured physical, sexual, and emotional abuse. Appellant was forced to stay in his bedroom for days at a time, and he was repeatedly beaten with "anything in reach." In addition to enduring the physical abuse, appellant was falsely told by Coffee that his mother was dead. Appellant, at this young age, began using drugs.

When he was reunited with his mother, appellant was wearing the same clothes that he had been wearing when he left two years before. Tracie Carter described him at that time as "fragile" and undernourished. He was covered in bruises, had a cigarette burn on his back, and he had a gash on his hand. Emotionally, he was withdrawn, moody, and defiant.

The years that followed appellant's stay with his father included numerous psychiatric hospitalizations and more than one suicide attempt. During those years, appellant described to his counselors the abuse he suffered at the hands of his father, and he acknowledged anger and hatred toward him. Appellant's counselors observed his ongoing fear that his mother would abandon him, and they observed his inability to restrain himself from "'acting first' as a defense."

Apparently, appellant **[*44]** did experience frequent periods of abandonment by his mother. Appellant's psychiatric therapist, Abigail Duncan, who worked with appellant when he was approximately fourteen years old, recalled in her affidavit a time when Tracie Carter moved out of the family home with her boyfriend and appellant's youngest brother. She left appellant alone with his older brother and his sister Yahnena, "and would return just to check on them." According to Duncan, appellant's life lacked structure and consistent treatment.

Despite this, appellant later performed "well in school . . . when he was living in a group home receiving proper medication for his mood disorder." When he received needed psychotropic medication, "[h]e attended all his classes and performed above average academically." But as soon as "[h]e ceased taking his medication, his emotional and behavioral status quickly deteriorated."

In September 2004, appellant completed a residential treatment program at Woodbourne Residential Treatment Center in Maryland. He was returned to his mother's care with instructions that he needed to deal with the trauma from his early childhood, but he never really did. Furthermore, appellant never finished high **[*45]** school, but he got a job with the census department. He moved in with his baby daughter and the child's mother. But that potential for stability didn't last long, as appellant left the area he'd known his whole life and moved to Ohio.

Appellant's chief challenge under the *Strickland* standard for allegations of ineffective assistance is that his defense counsel allegedly waited until the last minute to gather mitigating evidence; thus, "compelling evidence was not available at the time of his mitigation hearing." Appellant points to an order from the trial court, filed June 13, 2007, ordering release of records from Baltimore Social Services as proof of counsel's delay in seeking mitigation evidence. Appellant also faults the allegedly brief time trial counsel spent with his mother, Tracie Carter, as another example of failing to fully investigate his background. As evidence dehors the record to document these assertions, appellant submitted the affidavit of Dorian Hall, LSW, a mitigation specialist employed by the Ohio Public Defender. In support, appellant directs us to *Rompilla v. Beard*, wherein the United States Supreme Court, quoting the 1982 version of the ABA Standards for Criminal **[*46]** Justice, recognized: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

Nonetheless, our review of the additional documentation at issue leads us to conclude that the impact thereof is largely speculative. Appellant's trial counsel had already presented mitigation evidence about appellant's youth and the horrors of his life growing up. The record further does little to persuasively show a lack of investigation by trial counsel of appellant's background. Regarding the release of records order, few conclusions can be

reached therefrom as to what records were provided in 2007 based on appellant's authorization and what value, if any, the records provided to appellant's mitigation team. Finally, in regard to the Ohio Public Defender affidavit, the evidence therein was given minimal weight because of the interest of the employee in the outcome of the litigation and because she had no direct knowledge of the conversations between Tracie Carter and the mitigation attorneys.

Furthermore, as the State correctly notes, appellant's **[*47]** mother and half-sister presented a detailed picture of his youth and development. They testified to his various excursions into the mental health system and his treatment at the hands of his biological father. Appellant does not deny that his trial counsel interviewed various members of his family. Although Tracie Carter was able to recall that appellant had been in a psychiatric facility more than twenty-eight times, appellant points out that his mother was unable to articulate the identity of his mental health disorders, other than in lay terms, and he calls into question trial counsel's decision not to utilize a psychologist or mental health counselor at mitigation.

However, we remain mindful that "[a] defendant is entitled to a fair trial but not a perfect one." Likewise, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. In the case sub judice, the trial court determined that the strategy of trial counsel was to treat appellant's mother as a sympathetic character and not to portray her in a negative light, a strategy that easily could have been derailed with excessive information about her role **[*48]** in appellant's unfortunate upbringing. It is also not unreasonable to surmise that additional records may have also damaged appellant himself. As the trial court aptly noted, trial counsel's approach at mitigation was to "humanize" appellant's difficulties, rather than present them in detailed scientific terms. Trial counsel thus developed a mitigation strategy which allowed the jury to adequately weigh the mitigation evidence against the evidence of dual murder produced at the guilt phase of the trial. We reiterate that the Ohio Supreme Court has recognized the effect of hindsight and has warned against second-guessing as to counsel's assistance after a conviction.

> Furthermore, considering the second prong of *Strickland*, we note that after reviewing the evidence presented by appellant in his PCR appendix, the trial court consistently reached the conclusion throughout its written decision that even if more evidence would have been presented at mitigation, the outcome would not have been different. We are unable to conclude the trial court's conclusions in this regard were unreasonable, arbitrary, or unconscionable. The record clearly indicates that appellant's mental illness and childhood **[*49]** were presented to the jury through the mitigation witnesses, which the jury most likely credited given its recommendation of a life sentence for the Burditte killing. We are unpersuaded that additional and more detailed evidence about appellant's upbringing and mental health issues would have created a reasonable probability that the jury would have recommended a life sentence, rather than the death penalty, for the Marnell Cheek killing.

Lang, 2010-Ohio-3975, at ¶¶ 31—46 (internal citations omitted).

Counsel in capital cases has an "obligation to conduct a thorough investigation of the defendant's background" for mitigation purposes. *Williams, 529 U.S. at 396*. In *Strickland*, the Court noted that a capital sentencing proceeding "is sufficiently like a trial in its adversarial format and in the existence of standards for decision" such that counsel's role in the two proceedings is comparable: "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland, 466 U.S. at 686*. *See also Wiggins v. Smith, 539 U.S. 510, 525, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* (counsel ineffective where petitioner had an "excruciating life history" but counsel focused exclusively on defendant's direct responsibility for murder). But, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard, 545 U.S. 374, 383, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)*. "In any ineffectiveness case, a particular decision not to investigate **[*51]** must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland, 466 U.S. at 691*.

Lang claims the state court of appeals decision denying

his ineffective-assistance failure-to-investigate claim was contrary to, or an unreasonable application of, *Strickland*. Thus, this Court must examine whether the Ohio court of appeals acted unreasonably in finding that Lang: had not overcome the strong presumption of competence by proving his counsel's deficient performance in his preparation for, and presentation during, the sentencing phase of the trial; or failed to demonstrate a reasonable probability that a jury presented with this additional mitigating evidence would have recommended a different sentence. *See Pinholster, 131 S. Ct. at 1403*.

Investigation. Lang faults his trial counsel for failing to discover "'all reasonably available mitigating evidence'" (Doc. 16 at 88 (quoting *Wiggins, 539 U.S. at 524*) (emphasis removed)). He argues that trial counsel did not "meet with mitigation witnesses, ensure experts and the investigator had sufficient resources, including time, to collect and review records, evaluate Lang and his family, develop a coherent mitigation strategy, and seek appropriate expert **[*52]** evaluation of Lang" (Doc. 16 at 18). For support, Lang points to his mother's affidavit, in which she avers that she met with his trial counsel only briefly in April 2007 and again for about three hours the day before she testified. She further states that she met with Lang's mitigation specialist, James Crates, for twenty-five minutes when he traveled to Baltimore in June 2007 requesting her help obtaining Lang's medical records (Doc.18-4 at 2255). Lang also notes that his expert psychologist, Jeffrey Smalldon, sent a fax to Lang's counsel on July 9, 2007, asking, "No Lang records yet, I gather . . . ??" (Doc. 19-3 at 2654). And, on July 18, 2007, Smalldon wrote in a note, "Per J. Crates — lots of case-relevant recs. just coming in now" (Doc. 19-3 at 2655). Finally, Lang cites a letter that Crates received from the Baltimore Department of Social Services on July 12, 2007, two days after the trial had begun, stating it was providing records regarding Lang's foster care and that additional records would be "forthcoming shortly" (Doc. 19-3 at 2653).

First, as the Ohio court of appeals noted, Lang's claim is speculative, and the record fails to show a constitutionally inadequate investigation. **[*53]** Rather, the record demonstrates that trial counsel, Crates, and Smalldon, did a substantial amount of mitigation investigation well before the trial began. As the Ohio court noted, shortly after their appointment, trial counsel filed a request for discovery and a motion for funds to hire a defense investigator, a psychological expert, and a mitigation expert, which the court granted. Within two months, trial counsel had filed thirty-seven motions on Lang's behalf. And by the end of trial, they had filed over eighty-two motions, including a motion to permit the defense to admit all relevant mitigating evidence (Doc. 17-1 at 1—23).

Moreover, Crates' first invoice indicates that he began reviewing documents as soon as he was hired, on January 8, 2007. He made consistent efforts to obtain records beginning with his "[i]nitial contact with Baltimore" on February 6, 2007. But on June 14, he wrote a memo regarding "difficulties in [r]etrieval" (Doc. 17-3 at 807—09). Similarly, Smalldon's invoice demonstrates that he spent several hours reviewing "discovery" soon after he was hired, repeatedly consulted with Crates and trial counsel from January through July, reviewed records in June, and interviewed and assessed **[*54]** Lang twice, in January and June, for more than eighteen hours (Doc. 17-5 at 1398).

Finally, the trial court confirmed with trial counsel during pretrial hearings that the mitigation experts had "everything they need[ed]" to proceed to trial, and that the mitigation specialist in particular was "on top of everything" (Doc. 22-1, Tr. of June 27, 2007 hearing at 30; Tr. of June 13, 2007 hearing at 24). In addition, after the parties rested in the mitigation phase, the trial court questioned trial counsel about their preparation efforts for this phase of the trial:

> The Court: I would indicate that just for the record, that as part of the trial preparation in this matter the Court had provided at the defense request various experts and other tools that were made available. The Court authorized the expenditure of funds for defense to explore the mitigation in this matter. And, counsel, that was followed through with all of that; is that correct?
> Mr. Koukoutas: Yes, Your Honor, it was.
> The Court: In fact, one of the experts was here today in the courtroom.
> Mr. Koukoutas: That is correct.
> The Court: That was?
> Mr. Koukoutas: James [Crates].
>
> The Court: And I note that you were advising with him from time to **[*55]** time throughout the course of the mitigation; is that correct?
> Mr. Koukoutas: That is correct.
> The Court: Anything further you want to put on the record?
> Mr. Koukoutas: Not at this time, Your Honor.

(Doc. 22-3, Mitig. Tr., at 85—86.)

Therefore, the Ohio court did not unreasonably decide

that trial counsel's efforts to prepare for the mitigation phase of trial were constitutionally adequate.

Presentation of Evidence. Nor did the Ohio court unreasonably conclude trial counsel's presentation of the mitigation evidence was constitutionally adequate. Lang argues that counsel's "cursory investigation" led to their "abandonment" of "substantial psychological, medical, social and education evidence" and the "presentation of uncorroborated, incomplete and inaccurate mitigation" through only two witnesses, Lang's mother, Tracie Carter, and his step-sister, Yahnena Robinson (Doc. 33 at 12, 28—29). He points to his trial counsel's remark in closing arguments that Lang had a "'pretty normal childhood up until he was ten'" as evidence that trial counsel "were utterly ignorant of their client's real history" (Doc. 33 at 29, quoting Doc. 22-3, Mitig. Tr., at 96).

This Court "begin[s] with the premise that 'under **[*56]** the circumstances, the challenged action[s] might be considered sound trial strategy.'" *Pinholster, 131 S. Ct. at 1404* (quoting *Strickland, 466 U.S. at 689*). Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland, 466 U.S. at 690*. Thus, the Court has held that counsel is not ineffective for deciding to offer little or no mitigation evidence where that decision is based on sound professional judgment. *See, e.g.*, *Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)*; *Burger v. Kemp, 483 U.S. 776, 793—95, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)*; *Darden v. Wainwright, 477 U.S. 168, 184, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*; *Strickland, 466 U.S. at 699—700*.

Here, the Ohio court accepted the trial court's determination that trial counsel's decision to offer the testimony of only Lang's mother and step-sister was based on sound trial strategy. It concluded that counsel sought "to treat [Lang's] mother as a sympathetic character and not to portray her in a negative light" and to "humanize [Lang's] difficulties, rather than present them in detailed scientific terms." *Lang, 2010-Ohio-3975, at ¶ 45* (quotation marks omitted).

A court may infer from record trial counsel's strategic basis for presenting (or not presenting) certain evidence in mitigation:

> Although courts may not indulge post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions, . . . neither may they insist counsel confirm every **[*57]** aspect of the strategic basis for his or her actions. There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect.

Harrington, 131 S. Ct. at 790 (internal citations omitted). Trial counsel articulated their strategy for the mitigation phase of the trial during opening arguments:

> I'm here to tell you about Edward Lang or Eddie as I have come to know him as I have been meeting with him quite often. I am here to tell you about Eddie Lang, the person, the human being, not Eddie Lang the name on a case number, the Defendant. You will hear from two witnesses today. They will tell you a little bit about Eddie and the kind of person he is. And you will hear from his mom, Tracey [*sic*] Carter and you'll also hear from his half-sister, Yahnene [*sic*] Robinson.

(Doc. 22-3, Mitig. Tr., at 31.). Trial counsel reiterated the same strategy during closing argument:

> I told you that I wanted all of you to learn something about Eddie, learn about who he was, is, where he came from, I want to show you that he's not just a name on a case file or a name that appears in the newspaper, that he's an actual human being, he's an actual person.

(Doc. 22-3, **[*58]** Mitig. Tr., at 95—96). The record supports the Ohio court's conclusion that trial counsel pursued a "humanizing" strategy.

Moreover, as the Ohio court reasoned, much of the evidence Lang claims should have been presented to the jury in mitigation would have been cumulative of other evidence that was presented. The Ohio court carefully examined and summarized the evidence Lang presented during postconviction review. It concluded that Lang's mother and step-sister presented "a detailed picture" of Lang's mental illness and the "horrors of his life growing up." *Lang, 2010-Ohio-3975, at ¶¶ 43—44*. "'[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation.'" *Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010)* (quoting *Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007)*).

The Ohio court also reasonably concluded that the mitigating evidence Lang argues should have been presented at trial may have exposed him to potentially devastating rebuttal and cross-examination. *See, e.g.,*

Wong v. Belmontes, 558 U.S. 15, 130 S. Ct. 383, 391, 175 L. Ed. 2d 328 (2009) (rejecting petitioner's "'more-evidence-is-better' approach to mitigation" where it would have opened door to evidence of past murders); *Strickland, 466 U.S. at 699* ("Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary **[*59]** character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in.").

The records trial counsel did not offer in mitigation are replete with references to Lang's violent and defiant behavior. For example, Lang's postconviction expert psychologist summarized hospital records from 2001 as indicating that:

> Edward's mother had reported that Edward was unable to make or maintain friendships. He struggled to accept consequences for his behavior or take responsibility for his actions. Edward had numerous psychiatric hospitalizations that year, with extremely aberrant behaviors that included repeated incidents of suicidal ideation, threatening others, fire setting, and engaging in inappropriate sexual behaviors . . . . Edward struggled with frustration tolerance and impulse control problems and had become aggressive and violent with peers.

(Doc. 18-4 at 2299). She wrote that in July 2003, Lang "act[ed] out so severely that he was denied a placement at the Chesapeake Youth Center, a residential treatment center for violent and behaviorally disturbed youth[,] because he was considered too violent for placement at that site" (*id.* **[*60]**). In addition, in 2003 a school psychologist reported:

> On one occasion, Edward came to school stating that he had been pursued in an attempted assault by drug dealers who wanted to kill him for stealing their stash of drugs. He was soon thereafter arrested for destroying the interior of his mother's home in a violent outburst. During this period of time, Edward was assigned to participate in outpatient therapy through Johns Hopkins, but he did not comply with his medication regimen.

(Doc. 18-5 at 2372). And in December 2006, Lang pled guilty to a felonious assault while in county jail awaiting his capital murder trial (Doc. 19-3 at 2610—20).

The records also contain a substantial amount of information about Lang's mother that could have undermined her credibility and the jury's sympathy for her. Numerous governmental agencies documented how she neglected, abused and abandoned Lang and his siblings (*see, e.g.*, Doc. 19-3 at 2627—39).

Thus, Lang has not "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland, 466 U.S. at 689* (quotation marks omitted).

Prejudice. Nor did the Ohio court unreasonably conclude that trial counsel's performance during **[*61]** mitigation did not prejudice Lang under *Strickland*. Lang's mother and step-sister testified to his troubled childhood and mental health problems. The records Lang submitted during postconviction review as overlooked mitigation evidence also contained evidence that could have damaged his mitigation case. Considering these factors, together with the aggravating circumstances the jury found, the Ohio court reasonably decided that Lang cannot show a reasonable probability that the jury would have imposed a lesser sentence if it had been presented the additional "mitigation" evidence.

Failure to Challenge Weak DNA Evidence

Lang asserts several claims regarding trial counsel's performance during the guilt phase of his trial. He first argues that trial counsel were ineffective for failing to mount a "forceful" challenge to the State's DNA evidence and "incorrectly conceding [during closing argument] that there was a DNA 'match' that identified Lang as the principal offender" (Doc. 16 at 51). He contends that trial counsel's deficient performance regarding the DNA evidence prejudiced him because it undermined his otherwise strong defense that Walker was the shooter (*id.* at 51—53).

The Ohio Supreme Court **[*62]** rejected this claim:

> First, Lang argues that his counsel were ineffective by failing to forcefully challenge the state's DNA evidence. However, the record belies this claim. During cross-examination, defense counsel elicited from Michele Foster, the state's DNA expert, that there was such a small amount of DNA obtained from the handgun that the DNA profile could not be entered into the CODIS database. Counsel also elicited from Foster, "[W]hen we say to a reasonable degree of scientific certainty this person is a source, that statistic has to be more than 1 in 280 billion."
>
> Lang also argues that defense counsel should have moved to suppress the DNA evidence under *Evid. R. 401 through 403* (relevant evidence). As

discussed in proposition II, the state's DNA evidence was relevant because it tended to connect Lang to the handgun used to kill the victims. In addition, the trial court could have determined that the admission of the DNA evidence outweighed any danger of unfair prejudice, confusion of the issues, or misleading the jury. Thus, this ineffectiveness claim also lacks merit.

Next, Lang argues that his counsel were ineffective by conceding that the DNA found on the handgun matched his DNA. **[*63]** During closing argument, his counsel stated:

> "The gun. I was interested in noting how Mr. Barr misstated the facts. He said Eddie Lang's DNA is on the gun.
> "That's not what I heard. I think the Crime Lab people said that he can't be excluded. I think that's what they said. I don't think they said it is conclusive.
>
> "Plus, there was some minor DNA that they couldn't identify whose DNA it was. *But maybe I am wrong. Maybe they did say that. It is conclusively Eddie Lang's DNA. Maybe that's true*." (Emphasis added.)

Counsel's argument was a poor attempt to rectify his previous misstatements about the DNA evidence. But Lang contends that defense counsel's concession was unduly prejudicial because there was no conclusive proof that his DNA was found on the handgun. Even assuming that counsel's approach was deficient, Lang fails to establish prejudice under the *Strickland* test. Evidence that Lang's DNA might be on the handgun was not surprising, because the handgun was his. Moreover, such evidence was not crucial to the outcome of the defense case. Lang's defense was that he gave Walker his handgun, and Walker shot the victims. Thus, testimony that Walker's DNA was not found on the handgun was **[*64]** the key evidence, and testimony about Lang's DNA was not. This ineffectiveness claim is rejected.

Lang, 129 Ohio St. 3d at 538—39.

Lang argues the Ohio court acted unreasonably by finding trial counsel's cross-examination of the State's DNA expert adequate. The expert's testimony, Lang argues, was "worthless, unreliable, unscientific, and junk science" (Doc. 33 at 60). But he does not specify what trial counsel should have done differently in his cross-examination or explain why the State's expert's testimony was "junk science," as opposed to just weak evidence. Lang only states that trial counsel should have moved to suppress the DNA evidence and objected to Foster's testimony (Doc. 16 at 52). The Ohio Supreme Court reasonably concluded that a motion to suppress or objections at trial would not have been successful.

With regard to trial counsel's DNA-related remarks during closing argument, Lang first argues the Ohio Supreme Court assumption that trial counsel's conduct was deficient is a "binding" determination under AEDPA, or, alternatively, allows *de novo* review in this Court because no state court adjudicated the issue on its merits (Doc. 33 at 60). But aside from providing no authority for this assertion, **[*65]** and aside from the rule that even summary adjudications by state courts are considered adjudications on the merits for purposes of AEDPA, *see Harrington, 131 S. Ct. at 784—85*, Lang must still satisfy both prongs of *Strickland* to prevail on an ineffective-assistance claim, *Strickland, 466 U.S. at 687*. (Lang asserts this argument in connection with many of his ineffective-assistance subclaims; this Court rejects the argument as it relates to those claims as well.)

Lang further asserts that the Ohio court's conclusion that Lang suffered no prejudice as a result of counsel's remarks during the closing argument is predicated on an unreasonable determination of fact. He argues that the Ohio court "found that the absence of Walker's DNA was the critical fact but a review of the evidence and the prosecutor's arguments reveal that the critical fact was Lang's DNA and Foster's junk science testimony" (Doc. 33 at 61). He points to the following statement of the prosecutor during his closing argument:

> Then what else tells us that Eddie Lang is the principal offender? This gun, right here, tells you beyond a reasonable doubt that Eddie Lang is the principal offender.
>
> Why? Because it is not human. It is the only thing in this trial that is not capable **[*66]** of being dishonest.

(*id.* at 61, quoting Doc. 22-3 at 1273—74). This statement does not contradict the state court's conclusion that the key issue in the case with respect to DNA evidence was the absence of Walker's DNA on the gun pointing to Lang as the principal offender, not the possible presence of Lang's DNA on the gun.

Moreover, as the State notes, while trial counsel may have misstated the expert's conclusion regarding the

DNA on the gun as being "conclusively Eddie Lang's," trial counsel never conceded that the DNA identified Lang as the principal offender (Doc. 23 at 59—60). The distinction is important. The Ohio court could reasonably conclude that, during closing argument, trial counsel dismissed as unimportant the presence of Lang's DNA on his own gun.

Comparison of the Jury to a Lynch Mob

Lang further claims that his attorney lost credibility and alienated the jury when he compared the jury to a lynch mob. He argues the all-white jury could have perceived the argument as accusing them of racial bias against Lang (Doc. 16 at 54—55).

The Ohio Supreme Court addressed this claim on the merits:

> Second, Lang argues that counsel were ineffective during final argument by comparing the jury **[*67]** to a lynch mob. During final argument, trial counsel stated:
>
> "A lynch mob is made up of the same people that make up a jury. They are citizens of the community, employers, employees, taxpayers, voters, they are the same people.
>
> "So what separates them? One thing separates a lynch mob from a jury and one thing only. That's your oath of office.
>
> " * * *
>
> "They (a lynch mob) are not interested in evidence. They are not interested in the fact that there is no forensic evidence linking Eddie Lang to either one of those murders. They are not interested in that.
>
> "A jury is. A jury is interested, and they want to know of four people in that vehicle on October 22, why do you run tests on three of them and not the guy that got the deal?
>
> "Why run tests on Jaron Burditte's clothes? Why run tests on Marnell Cheek's clothes? Why run tests on Eddie Lang's clothes, and stop, come to a halt with Antonio Walker's clothes? Why?
>
> "A jury, not a lynch mob, would be interested in that. They are made up of the same people.
>
> "Now, just because a jury takes an oath of office does not mean that they have to act like a jury. They can go in the jury room, close the jury door, hey, let's flip a coin. So guilty, let's go. **[*68]** Okay. Jury has spoken.
>
> "But the problem is violence was done to not only the Defendant but beyond that. Violence was done to the system. If I am indicted, if the Court is indicted, Prosecutor is indicted, if Mr. Koukoutas is indicted, even if one of those Deputies are indicted, the only safeguard we have is the oath of office.
>
> "Life will go on for everybody in this courtroom. If you act like a jury or if you act like a lynch mob."
>
> Lang argues that trial counsel lost credibility and alienated the jury when he made his lynch-mob argument. Lang contends that the jury may have perceived counsel's lynch-mob comparison as an attempt to play the race card, particularly because an African-American counsel made the argument on behalf of an African-American defendant.
>
> Counsel for both sides are afforded wide latitude during closing arguments. Debatable trial tactics generally do not constitute a deprivation of effective counsel. Trial counsel's lynch-mob argument focused the jury's attention on their oath and obligation as jurors. Counsel's argument also highlighted the lack of forensic testing conducted on Walker's clothing. Lang's claim that counsel's argument alienated the jury by presenting **[*69]** the imagery of racist brutality is speculative. Thus, counsel's decision to make this argument was a "tactical" decision and did not rise to the level of ineffective assistance.

Lang, 129 Ohio St. 3d at 539—40 (internal citations omitted).

The right to effective assistance of counsel extends to closing arguments. *Yarborough v. Gentry, 540 U.S. 1, 5, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003)*. "[C]ounsel has wide latitude in deciding how best to represent a client," and counsel's tactical decisions in closing argument are accorded deference "because of the broad range of legitimate defense strategy at that stage." *Id. at 5—6*. "Judicial review of a defense attorney's summation is therefore highly deferential and doubly deferential when it is conducted through the lens of federal habeas." *Id. at 6*.

Lang argues that the Ohio Supreme Court's decision was unsupported by the record and that trial counsel's remarks "could have no genesis in tactic" (Doc. 33 at 62). Here, the state court reasonably determined that defense counsel's lynch-mob argument was a strategic attempt to emphasize to the jury their obligation to view

the evidence carefully and critically. This strategy falls "well within the range of professionally reasonable judgments." *Strickland, 466 U.S. at 699*.

Failure to Question the Entire Jury Regarding Excused Juror

Lang next asserts **[*70]** that trial counsel were ineffective because they did not request permission from the court to question each juror about their possible discussions with a juror who was removed from the jury because she was related to Cheek (though not by blood) (Doc. 16 at 55—58). The Ohio Supreme Court summarily rejected this claim, reasoning that even if it were to assume deficient performance by counsel, Lang suffered no prejudice. *Lang, 129 Ohio St. 3d at 542*. As this Court finds no merit in Lang's underlying claims regarding the trial court's failure to question each juror, Lang cannot show prejudice for purposes of this *Sixth Amendment* claim.

Failure to Contest Prejudicial Testimony

Lang complains that trial counsel failed to contest prejudicial testimony that Lang's nickname was "Tech," and that Lang vomited after the murders and said "every time I do this [*i.e.*, commit violence or murder someone], this same thing happens" (Doc. 16 at 58—59). The Ohio Supreme Court denied this claim, finding the statements did not prejudice Lang. *Lang, 129 Ohio St. 3d at 542*. This Court agrees. The supposed connection between the name "Tech" and gangs and gun violence was never explained to the jury, nor is there an indication that the jurors were aware of the connection. Similarly, **[*71]** there were no additional references during the trial to other acts of violence committed by Lang, so it would be speculative to assume the jury gave any weight to the vomit comments, either.

Failure to Test Walker's Clothing

Lang also argues that trial counsel were ineffective because they failed to secure a forensic expert to independently test the clothes Walker wore during the murder. Lang asserts such testing would have produced evidence to support his claim that Walker was the principal offender (Doc. 16 at 59—60). The Ohio Supreme Court addressed this claim:

> The police seized Walker's shoes and the hooded sweatshirt he was wearing on the night of the murders, but not his pants. Foster examined Walker's shoes and hooded sweatshirt and found no blood or trace evidence. Gunshot-residue tests were not conducted on these clothes, because the state never requested it.
>
> Lang argues that defense counsel were ineffective by failing to secure a forensic expert to test the pants that Walker was wearing on the night of the murders for bloodstains and gunshot residue. However, counsel could not make such a request, because the police never seized his pants. Thus, this ineffectiveness claim lacks **[*72]** merit.
>
> As for the other clothing, counsel's failure to pursue independent testing of them appears to have been a tactical decision. Moreover, defense counsel used the state's failure to conduct testing of Walker's clothing during closing arguments as a reason for finding [Lang] not guilty. Finally, resolving this issue in Lang's favor would be speculative. "Nothing in the record indicates what kind of testimony an * * * expert could have provided. Establishing that would require proof outside the record, such as affidavits demonstrating the probable testimony. Such a claim is not appropriately considered on a direct appeal."

Lang, 129 Ohio St. 3d at 540—41 (internal citations omitted). This decision does not unreasonably apply *Strickland*.

Shifting his focus to postconviction proceedings, Lang contends that "[t]he failure of postconviction counsel to conduct this testing constitutes ineffective assistance of postconviction counsel and serves as cause and prejudice permitting this Court to grant discovery and an evidentiary hearing on this matter." He cites for support *Martinez v. Ryan, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, *Trevino v. Thaler, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013)*, and *Sutton v. Carpenter, 745 F.3d 787 (6th Cir. 2014)* (Doc. 33 at 70). These cases, however, are inapposite.

In *Martinez*, the Supreme Court held that the "[i]nadequate assistance of counsel at initial-review collateral **[*73]** proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id. at 1315*. The Court emphasized that its holding in *Martinez* represents a "narrow exception" to the procedural-default bar. *Id. at 1319*. In *Trevino*, the Supreme Court expanded the scope of *Martinez* to apply when a state, by reason of the "design and operations" of its procedural framework, permits but

"makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino, 133 S. Ct. at 1921*. And in *Sutton*, the Sixth Circuit applied *Trevino* to Tennessee ineffective-assistance claims. *Sutton, 745 F.3d at 790*. These cases apply only to excusing the procedural default of ineffective-assistance-of-trial-counsel claims in federal habeas actions; they have no bearing on discovery or evidentiary hearings relating to such claims.

Lang also argues that the state postconviction court's denial of his request for discovery "means that the state courts did not adjudicate this claim on the merits and therefore the limitations of the AEDPA do not apply" (Doc. 33 at 68). Lang cites no authority for this proposition, which also fails.

Failure [*74] to Move to Seal the Prosecutor's File

Lang contends that trial counsel were ineffective because they failed to ask the trial court to seal the prosecutor's file for appellate review (Doc. 16 at 60). The Ohio Supreme Court rejected this claim:

> Sixth, Lang argues that his counsel were ineffective by failing to request the court to seal the prosecutor's file for appellate purposes. Lang contends that sealing was necessary to ensure the complete disclosure of exculpatory evidence as required by *Brady v. Maryland*. But the court was not required to seal the prosecutor's file based on speculation that the prosecutor might have withheld exculpatory evidence. Moreover, we denied a defense motion to seal the prosecutor's file that was filed with this court. Thus, this claim is also rejected.

Lang, 129 Ohio St. 3d at 542 (internal citations omitted).

Lang argues this decision contradicts *State v. Brown, 115 Ohio St. 3d 55, 2007 Ohio 4837, 873 N.E.2d 858 (2007)* (Doc. 33 at 68—69). In *Brown*, the trial court granted a defense motion to seal the prosecutor's files and make the files part of the record for appellate review. *Brown, 115 Ohio St. 3d at 63*. The Ohio Supreme Court later determined that several documents in the file satisfied the *Brady* standard for exculpatory evidence that should have been disclosed to the defense. **[*75]** *Id. at 63—65*. It vacated the judgment against the defendant and remanded the case for a new trial. *Id. at 69—70*.

Brown does not help Lang. "[F]ederal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990)*. *See also Estelle v. McGuire, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)* ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005)*.

Failure to Object to Instances of Prosecutorial Misconduct and Improper Evidence Admitted During the Culpability Phase of Trial

Lang complains that trial counsel failed to object to numerous instances of prosecutorial misconduct and the improper admission of evidence during the guilt phase of trial (Doc. 16 at 60—61). The Ohio Supreme Court summarily rejected this claim on the ground that even if it were to assume deficient performance by counsel, trial counsel's performance would not have prejudiced Lang. *Lang, 129 Ohio St. 3d at 542*. As this Court finds no merit in Lang's underlying claims regarding prosecutorial misconduct and trial error, Lang cannot show prejudice for purposes of this *Sixth Amendment* claim. **[*76]**

Failure to Object to Walker's Prior Consistent Statement

Lang contends that trial counsel were ineffective for failing to object to admission of Walker's prior consistent statement (Doc. 16 at 61). The Ohio Supreme Court again summarily rejected this claim on the ground that even if it were to assume deficient performance by counsel, it would not have prejudiced Lang. *Lang, 129 Ohio St. 3d at 542*. This Court finds no merit in Lang's underlying claim regarding Walker's testimony. As a result, Lang cannot show prejudice on this *Sixth Amendment* claim.

Reference to Lang's Childhood as "Normal"

Lang asserts trial counsel was ineffective for remarking in closing argument that Lang had a "pretty normal childhood up until he was ten." He argues the comment was a "gross misrepresentation of the record and

detrimental to [Lang]'s interest" (Doc. 16 at 106). The Ohio Supreme Court addressed this claim:

> Lang argues that his counsel misrepresented the evidence during closing argument by telling the jury, "You learned that [Lang] had siblings, that * * * like the prosecutor said, *pretty normal childhood up until he was ten.*" Lang argues that counsel's argument misrepresented the evidence about his childhood and was prejudicial.
>
> Defense counsel's **[*77]** argument did not misrepresent the evidence. Carter testified that Lang did not meet his abusive father until he was ten years old. As discussed in proposition XII, Robinson also testified that before Lang was ten years old, they "had a typical brother sister relationship."
> Counsel's argument also maintained defense credibility and allowed the defense to focus the jury's attention on defense counsel's argument that addressed Lang's abuse after his father abducted him. Thus, counsel's characterization of Lang's early childhood did not result in ineffective assistance of counsel.

Lang, 129 Ohio St. 3d at 551—52 (internal citations omitted).

Considering all the evidence -- including the evidence presented on postconviction review --Lang did not have a "normal" life before age ten. But the Ohio court reasonably determined that trial counsel's comment during closing did not misrepresent the testimony presented in mitigation. That evidence centered on Lang's experiences at the hands of his father who, as Lang's mother testified, was absent until Lang was ten years old.

Broken Promises Made to the Jury During Opening Argument in the Mitigation Phase of Trial

Lang complains that trial counsel were ineffective because they **[*78]** failed to carry through on a promise made during opening argument to present certain mitigating evidence (Doc. 16 at 106—07). Specifically, trial counsel promised to provide evidence that the neighborhood in which Lang grew up was "one of the most dangerous ones in the State of Maryland" (Doc. 16 at 107(quoting Doc. 22-3, Mitig. Tr., at 96)). Trial counsel also promised to offer evidence that Lang suffered from suicidal thoughts (Doc.16 at 107). Lang claims that this evidence would have "explained where Lang came from, his emotional state, and shed light on whether death was the appropriate sentence in this case" (*id.*). He further argues that trial counsel's failure to present this evidence "hampered their credibility in the jurors' eyes [and] weaken[ed] Lang's overall mitigation case" (*id.*).

The Ohio Supreme Court addressed this claim:

> Lang claims that his counsel broke his promise to present evidence showing that he grew up in "one of the most dangerous" neighborhoods in Baltimore. However, counsel did not make a direct promise that he would present such evidence. Rather, trial counsel told the jury, "[Y]ou will *probably* hear the neighborhood is now known as one of the most dangerous ones in the **[*79]** State of Maryland." Thus, Lang has failed to show that his counsel broke such a promise to the jury.
> Lang also argues that his counsel broke a promise to present testimony that he suffered from thoughts of suicide. During opening statements, defense counsel stated that Lang was a "different person" after he returned home following his abduction. Counsel also stated, "You'll hear about Eddie's thoughts of suicide."
>
> Defense counsel presented no evidence during the mitigation case that Lang had considered suicide. Thus, counsel were deficient in failing to keep this promise. But Lang has not established that this deficiency was prejudicial. He merely speculates that such an omission caused the defense to lose credibility and weakened the overall defense case. Accordingly, this claim is rejected.

Lang, 129 Ohio St. 3d at 552. The Ohio Supreme Court's decision is neither contrary to, nor an unreasonable application of, *Strickland*.

Failure to Object to Various Instances of Prosecutorial Misconduct

Lang complains that trial counsel failed to object to various instances of prosecutorial misconduct during the mitigation phase of trial (Doc. 16 at 107). The Ohio Supreme Court denied this claim because it found no merit in the **[*80]** underlying prosecutorial-misconduct claims. *Lang, 129 Ohio St. 3d at 552—53*. This Court rejects the claim for the same reasons.

Cumulative Effect of Errors

Lang contends that the cumulative effect of his trial counsel's performance violated his right to effective assistance of counsel (Doc. 33 at 74). However, Lang has not overcome the strong presumption that trial counsel's performance lies within the wide range of reasonable professional conduct. *Strickland, 466 U.S. at 689*. Nor has he shown prejudice from trial counsel's conduct. *Id. at 694*. Because Lang has not shown that any of the alleged instances of ineffective assistance of counsel deprived him "of a fair trial, a trial whose result is reliable," *id. at 687*, he cannot show that the cumulative effect of these alleged deficiencies amounted to ineffective assistance of counsel, *see, e.g., Campbell v. United States, 364 F.3d 727, 736 (6th Cir. 2004)* (concluding the accumulation of non-errors cannot establish constitutionally ineffective assistance of counsel).

Fourth Ground for Relief

Ineffective Assistance of Appellate Counsel

Lang contends he received ineffective assistance from his appellate counsel. He complains that appellate counsel did not present the following issues on direct appeal to the Ohio Supreme Court:

> 1. Trial counsel were ineffective for failing **[*81]** to request, and the trial court erred by failing to sua sponte provide, a limiting instruction to the jury regarding the proper use of a co-defendant's guilty plea to complicity to commit murder;
>
> 2. The trial court violated *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*, and trial counsel were ineffective for failing to object to the *Batson* violation;
> 3. The trial court erred by denying access to the grand jury transcripts of Walker's indictment;
> 4. The trial court erred by admitting evidence of Lang's gang involvement; and
> 5. Trial counsel were ineffective for failing to request permission from the court for a more substantial group inquiry regarding the excluded juror.

(Doc. 16 at 62—70).

Because Lang presented these claims in a timely application to reopen his direct appeal before the Ohio Supreme Court, an application that was summarily denied (Doc. 18-4 at 2158), he preserved the claims for federal habeas review.

A criminal defendant is entitled to effective assistance of counsel in the defendant's first appeal as a matter of right. *See Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)*. *Strickland* analysis applies to claims of ineffective assistance of appellate counsel. *See Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)*. Thus, Lang must demonstrate that appellate counsel's performance was deficient, and that the deficient **[*82]** performance so prejudiced the appeal that the appellate proceedings were unfair and the result unreliable. *See Strickland, 466 U.S. at 687*.

But a criminal defendant does not have a constitutional right to have every non-frivolous issue raised on appeal, *Jones v. Barnes, 463 U.S. 745, 750—54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)*, and tactical choices regarding issues to raise on appeal are left to the sound professional judgment of counsel, *United States v. Perry, 908 F.2d 56, 59 (6th Cir. 1990)*. "[O]nly when issues are clearly stronger than those presented[] will the presumption of effective assistance of [appellate] counsel be overcome." *Joshua v. DeWitt, 341 F.3d 430, 441 (6th Cir. 2003)* (internal quotation marks and citations omitted).

Jury Instruction Regarding Walker's Plea

On direct appeal, appellate counsel did not argue that (1) Lang's trial counsel was ineffective for failing to request a limiting instruction related to the proper use of Walker's plea of guilty to complicity to commit murder, or (2) the trial court erred by failing to *sua sponte* provide such an instruction (Doc. 16 at 62—64). For all of Lang's ineffective-assistance-of-appellate-counsel claims relating to failure to raise arguments regarding his trial counsel's performance, the State argues it is "apparent" that appellate counsel reviewed the record to identify viable ineffective-assistance-of-trial-counsel arguments; **[*83]** indeed, appellate counsel raised other *Strickland* arguments. The State argues appellate counsel reasonably could have concluded that omitted *Strickland* claims were less likely to succeed than were the *Strickland* claims that were raised on direct appeal (Doc. 23 at 61). The State does not address the standalone claim of error regarding the trial court's failure to *sua sponte* issue a jury instruction regarding the jury's use of the Walker plea.

"To warrant habeas relief because of incorrect jury instructions, [a petitioner] must show that the instructions, as a whole, were so infirm that they rendered the entire trial fundamentally unfair." Murr v. United States, 200 F.3d 895, 906 (6th Cir. 2000). Lang notes the well-established principle that the guilty plea of a co-defendant cannot be used as substantive evidence of a defendant's guilt, and that any use of a co-defendant's guilty plea to impeach a witness must be paired with a limiting jury instruction. *See, e.g.*, United States v. Dougherty, 810 F.2d 763, 767—68 (8th Cir. 1987); United States v. Bright, 1995 U.S. App. LEXIS 4706, 1995 WL 98816, at *4 (6th Cir. 1995). But Lang does not cite any controlling Supreme Court precedent finding constitutional error in the failure to give a limiting instruction in these circumstances. *Cf.* Carey v. Musladin, 549 U.S. 70, 76, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom **[*84]** conduct of the kind involved here, it cannot be said that the state court 'unreasonably appli[ed] clearly established Federal law.'").

Moreover, even if AEDPA deference did not apply because the state courts unreasonably applied clearly established federal law in failing to grant a limiting instruction, Lang cannot establish this error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). "If [the court] is sure that the error had no or very slight effect or influence on the jury's decision, the verdict and judgment must stand." Murr, 200 F.3d at 906 (citing O'Neal v. McAninch, 513 U.S. 432, 436—38, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)). Given the overwhelming weight of the evidence of Lang's guilt, Lang has not established that the absence of the limiting instruction he proposes had a substantial effect on the jury's verdict.[3]

The Ohio Supreme Court did not contravene or unreasonably apply clearly established **[*85]** federal law in denying Lang's claim of ineffective assistance of appellate counsel based on the trial court's failure to instruct the jury regarding Walker's plea or trial counsel's failure to object to the jury instructions on that ground. ***Batson* violation**

Lang's next sub-claim is based on Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which bars a party from striking potential jurors on the basis of race. Lang asserts appellate counsel should have raised on direct appeal claims that (1) the trial court violated the *Equal Protection Clause* when it excused an African-American man from serving on the jury, and (2) trial counsel was ineffective for failing to object on that ground (Doc. 16 at 64—66). The State did not specifically address this claim.

Under the *Equal Protection Clause of the Fourteenth Amendment*, "no State shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. XIV, § 1. The *Equal Protection Clause* prohibits a state from trying a defendant before a jury from which members of his race purposefully have been excluded. *See, e.g.*, United States v. Harris, 192 F.3d 580, 586 (6th Cir. 1999) (citing Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879)). The "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [Such procedures] undermine public confidence in the fairness of our system of justice." Batson, 476 U.S. at 87.

Under *Batson*, a **[*86]** three-step process applies to evaluate a claim that a prosecutor used peremptory challenges to strike a potential juror on the basis of race. Id. at 96—98. First, the court must determine if the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. Id. at 96—97. Second, if the defendant makes such a *prima facie* showing, the prosecutor must present a race-neutral explanation for the strike. Id. at 97—98. "Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (quoting Purkett v. Elem, 514 U.S. 765, 767—68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)). Indeed, "[t]he fact that a prosecutor's reasons may be founded on nothing more than a trial lawyer's instincts about a prospective juror does not diminish the scope of acceptable invocation of peremptory challenges, so long as they are the actual reasons for the prosecutor's actions." United States v. Power, 881 F.2d 733, 740 (9th Cir. 1989). Third, the trial court must determine whether

[3] As noted above, Lang argues strenuously throughout his Petition that the evidence against him at trial was weak and therefore the constitutional errors that occurred during his trial prejudiced him (*see, e.g.*, Doc. 16 at 62, 85—86). This Court rejects this argument, as will be discussed in greater detail in relation to Lang's sufficiency-of-the-evidence claim.

the defendant has carried his burden of proving purposeful discrimination. *See* Batson, 476 U.S. at 98. "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, **[*87]** but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice, 546 U.S. at 338* (quoting *Purkett, 514 U.S. at 768*). "'[T]he court presumes that the facially valid reasons proffered by the [party exercising the peremptory challenge] are true.'" *Braxton v. Gansheimer, 561 F.3d 453, 459 (6th Cir. 2009)* (quoting *Lancaster v. Adams, 324 F.3d 423, 433 (6th Cir. 2003)*). Therefore, a *Batson* challenge ultimately "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Miller-El v. Cockrell, 537 U.S. 322, 339, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.*

Trial-court findings on the issue of discriminatory intent must be afforded "great deference." *See Hernandez v. New York, 500 U.S. 352, 364—66, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)*.

> There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province.

Id. at 365 (quoting *Wainwright v. Witt, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)*). "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that **[*88]** has been settled, there seems nothing left to review." *Id. at 367*. Thus, "in the absence of exceptional circumstances, [habeas courts should] defer to state-court factual findings." *Id. at 366*.

Lang argues the trial court improperly excused Juror 405, an 81-year-old African-American man. The prosecutor offered a race-neutral reason for the peremptory challenge: Juror 405's apparent confusion during questioning, confusion that deputies and the jury commissioner confirmed (Doc. 22-2 at 746—47). Lang's counsel objected on the ground that Juror 405 was one of only four African-Americans left on the venire panel (*id.* at 747). The judge then questioned the man as follows:

> The Court: . . . I think maybe you are the senior member of this jury panel in terms of you are 81, is that correct?
> Juror No. 405: Yes.
> The Court: Is your health okay that you are able to be able to stay with us and everything is okay from that standpoint?
> Juror No. 405: Well, the only thing is my wife is sick and under a doctor's care. I don't have nobody but my daughters to take care of her, and they are working.
> So that's the only consideration that I have.
> The Court: How about your own personal health?
>
> The reason I ask is that one of the Jury **[*89]** Commissioners had indicated to me that you had had some confusion as to when you were supposed to come back or not come back.
> Juror No. 405: Yeah, I did have.
> The Court: Okay. Are you being able to understand everything that has been going on here in the courtroom?
> Juror No. 405: Yeah.
> The Court: Have you? Okay.

(*Id.* at 748—49). The prosecutor again stated the basis for his challenge, adding Juror 405's concerns about his wife and his own physical condition. The trial court agreed that it had noticed the potential juror was "a little unstable on his feet." The trial court explained that it questioned Juror 405 to confirm the jury commissioner's account of his confusion, and not because the trial court doubted the prosecutor's basis for the challenge (*id.* at 751). The trial court then granted the prosecutor's challenge (*id.*).

Apparently believing the trial court addressed the *Batson* challenge in too cursory a fashion, Lang argues the decision to excuse Juror 405 was constitutional error. Not so. The trial court adhered to *Batson*'s three-step burden-shifting framework. The prosecutor presented a reasonable rationale for challenging the juror, grounded in record facts. "Once a prosecutor has offered a race-neutral **[*90]** explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Hernandez, 500 U.S. at 359*. *See also United States v. McAllister, 693 F.3d 572, 579 (6th Cir. 2012)*. The trial court confirmed the prosecutor's reasons for the challenge, and independently concluded that Lang had failed to meet his burden of proving intentional discrimination. This is

sufficient under *Batson*. "[A] state court need not make detailed findings addressing all the evidence before it" to reach a proper *Batson* ruling. *Miller-El, 537 U.S. at 322*. *See also Purkett, 514 U.S. at 766, 769—70* (holding that a federal court failed to adequately defer to the state trial court's factual finding of no racial motive, even though the trial court rejected the *Batson* objection "without explanation"); *Braxton, 561 F.3d at 462* ("In the absence of clearly established Supreme Court authority requiring further elaboration," the state trial court, "albeit in abbreviated fashion, adequately and reasonably conveyed its decision.").

Further, Lang has not demonstrated that "exceptional circumstances" exist in this case that would permit this Court to reject the trial court's *Batson* findings. *See Hernandez, 500 U.S. at 365—66*. The Ohio Supreme Court did not contravene **[*91]** or unreasonably apply *Batson* nor make an unreasonable determination of fact when it rejected Lang's ineffective-assistance-of-appellate-counsel claim based on Juror 405's removal.

Access to Grand Jury Transcripts

On direct appeal, Lang's appellate counsel argued the trial court erred when it failed to release certain grand jury transcripts that led to Walker's indictment. Lang now argues appellate counsel was ineffective for failing to argue the grand jury transcripts contained relevant mitigating evidence (Doc. 16 at 66—67). The State counters that Lang essentially argues appellate counsel failed to make convincing arguments in support of the transcript-disclosure claim, not that appellate counsel failed to raise that claim. "[A]ppellate counsel's choice of arguments should be deemed virtually unchallengeable," the State argues, especially "given the lack of any indication that counsel failed to fully review the record or conduct necessary research" (Doc. 23 at 61—62). This Court agrees. Moreover, the claim is speculative. Counsel could not have argued that the transcripts provided any particular evidence, much less mitigating evidence, when appellate counsel had no access to the sealed transcripts. **[*92]**

Evidence of Gang Activity

Lang contends that appellate counsel failed to cite the "seminal Supreme Court authority" in support of his argument, raised on direct appeal, regarding admission of evidence that suggested Lang was a gang member (Doc. 16 at 67—68). But Lang has not demonstrated that counsel's failure to cite a particular case was objectively unreasonable, or that the citation failure so prejudiced Lang's appeal that the appellate proceedings were unfair and the result unreliable. *Strickland, 466 U.S. at 687*.

Voir Dire of Jurors Regarding Excluded Juror

Lang argues he received ineffective assistance of appellate counsel because appellate counsel did not argue trial counsel was ineffective for failing to request that the trial court individually question jurors about whether an excused juror spoke to them about her relation to one of the victims (Doc. 16 at 68—70). For reasons described below, this Court finds the trial court did not err by failing to conduct juror-by-juror questioning on this topic. Therefore, trial counsel was not ineffective for not requesting juror-by-juror questioning, and appellate counsel was not ineffective for failing to raise a losing argument regarding trial counsel's performance. **[*93]**

Second and Sixteenth Grounds for Relief

Jury Challenges

Lang argues he was denied a fair and impartial jury in violation of the *Sixth* and *Fourteenth Amendments*, raising juror-bias and jury-composition claims. His juror-bias claim argues the trial court erred in the way it removed a juror who was related to Cheek, one of the murder victims (Doc. 16 at 48). His jury-composition claim finds error in the trial court's failure to seat African-American jurors (*id.* at 112).

Procedural Posture

Lang raised the juror-bias claim on direct appeal to the Ohio Supreme Court, which adjudicated the claim on the merits. *Lang, 129 Ohio St. 3d at 520—23*. He preserved the claim for federal habeas review.

The State argues Lang procedurally defaulted his jury-composition claim because the "Ohio courts" found *res judicata* barred review of the claim (Doc. 23 at 92—94). Lang raised the jury-composition claim in his postconviction petition (Doc. 18-4 at 2239—41), and submitted three exhibits to support the claim: (1) information from the Stark County Jury Commissioner's

Office explaining its juror selection process; (2) the report of the Ohio Commission on Racial Fairness, Commissioned by the Supreme Court of Ohio, published in 1999; and (3) information from the U.S. Census **[*94]** Bureau regarding Stark County's population (Doc. 19-2 at 2509—85; Doc. 19-3 at 2586—2607). He asserted that trial counsel were ineffective for failing to ensure that the jury included African-Americans (*see* Doc. 18-4 at 2239, ¶ 125). Ruling on Lang's postconviction petition, the trial court found it "unclear" whether Lang was asserting an ineffective-assistance-of-trial-counsel claim or a trial-error claim (Doc. 19-5 at 2898). But it concluded that in either case *res judicata* barred both claims because the issues could have been raised on direct appeal, but were not (*see id.* at 2899).

Lang then appealed the denial of his postconviction petition to the Ohio court of appeals, raising both the ineffective-assistance and trial-error claims (*see* Doc. 20-1 at 2953—54). The Ohio court of appeals addressed only the ineffective-assistance-of-trial-counsel claim (*see id.* at 3087—88), affirming the trial court's application of *res judicata* to that claim. The court noted that the Ohio Commission on Racial Fairness report Lang offered in support of his postconviction claim was published in 1999, "well before [Lang's] . . . trial, and [that Lang] point[ed] to no part of the report that would have made a difference in his case" (***[*95]*** *id.*). The Ohio court of appeals' decision is the last-explained state-court judgment regarding procedural default of the jury-composition claim, and is therefore the focus of this Court's review for procedural default. *See* *Ylst v. Nunnemaker, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)*; *Combs v. Coyle, 205 F.3d 269, 275 (6th Cir. 2000)*.

Under Ohio law, *res judicata* precludes postconviction relief on "any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at trial*, which resulted in that judgment or conviction, *or on an appeal* from that judgment," *State v. Cole, 2 Ohio St. 3d 112, 113, 2 Ohio B. 661, 443 N.E.2d 169 (1982)* (emphasis in original), unless the petition presents extra-record evidence to support a postconviction-review claim, *see, e.g.*, *State v. Smith, 17 Ohio St. 3d 98, 101 n.1, 17 Ohio B. 219, 477 N.E.2d 1128 (1985)*; *State v. Perry, 10 Ohio St. 2d 175, 179, 226 N.E.2d 104 (1967)* (concluding that if defendant "had no means of asserting the constitutional claim there asserted until his discovery, after the judgment of conviction, of the factual basis for asserting that claim," then the claim "was not one that could have been raised . . . before the judgment of conviction, and hence could not reasonably be said to have been . . . waived").

However, extra-record evidence will not overcome the *res judicata* bar when "the allegations outside the record upon which [a petitioner] relies appear so contrived, when measured against the overwhelming evidence in **[*96]** the record . . . as to constitute no credible evidence . . . justify[ing] the trial court's application of the principles of *res judicata*" despite the extra-record evidence. *Cole, 2 Ohio St. 3d at 114*. Ohio courts have limited this "new evidence" exception to extra-record evidence that "demonstrate[s] that the petitioner could not have appealed the constitutional claim based upon information in the original record." *State v. Lawson, 103 Ohio App. 3d 307, 315, 659 N.E.2d 362 (Ct. App. 1995)*.

The extra-record evidence must be "competent, relevant and material," and meet a "threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery."[4] *Id.* (internal quotation marks and citation omitted).

If *res judicata* applies to a claim, it serves as an adequate and independent state ground to bar review of **[*97]** the claim by a habeas court. *See, e.g.*, *Durr v. Mitchell, 487 F.3d 423, 432 (6th Cir. 2007)*; *Buell v. Mitchell, 274 F.3d 337, 349 (6th Cir. 2001)*; *Seymour v. Walker, 224 F.3d 542, 555 (6th Cir. 2000)*. But, "an incorrect application of a state *res judicata* rule does not constitute reliance on an adequate and independent state ground." *Wogenstahl v. Mitchell, 668 F.3d 307, 341 (6th Cir. 2012)* (citing *Durr, 487 F.3d at 434—35*, and *Richey v. Bradshaw, 498 F.3d 344, 359 (6th Cir. 2007)* (noting the Sixth Circuit has "declined to observe Ohio's procedural bar and instead [has] proceeded to the merits of an ineffective-assistance claim when we have concluded that Ohio improperly invoked its *res judicata* rule")).

Lang argues that his jury-composition claim is not procedurally defaulted because the Ohio postconviction

---

[4] For example, Ohio courts have found the following extra-record evidence sufficient to overcome the *res judicata* bar: evidence withheld by the state; a post-trial affidavit by a witness stating that his trial testimony was false; and a DNA finding in a case tried to conviction before the trial use of DNA evidence. *State v. Jones, 2002-Ohio-6914, at ¶19 n.2 (Ct. App.)*.

court improperly applied the *res judicata* rule to the claim. He points to Hill v. Mitchell, 400 F.3d 308 (6th Cir. 2005), for the proposition that "[u]nder Ohio law, a petitioner properly presents a claim in postconviction when the claim relies on evidence *de hors* the record" (Doc. 33 at 134).

But it is clear in *Hill* and related cases that a habeas court cannot circumvent Ohio's *res judicata* doctrine and reach the merits of any claim dismissed on *res judicata* grounds because a petitioner presented *some* supporting, extra-record evidence on postconviction review. Rather, a habeas court may disregard the procedural bar only where the extra-record evidence is competent, relevant, and material. In *Hill*, a capital habeas **[*98]** case, the petitioner presented an affidavit of an addiction specialist who testified during the mitigation phase of petitioner's trial. The addiction specialist stated that trial counsel contacted him only after the guilt phase of the trial; he did not meet the petitioner until the morning he testified; and, had he earlier evaluated the petitioner, he could have testified about the petitioner's specific addictions, not simply addiction in general. *Hill, 400 F.3d at 314*.

This Court has thoroughly examined the extra-record evidence Lang submitted with his postconviction petition in support of his jury-composition claim. For the reasons explained more fully below, this Court finds that the extra-record evidence would not have materially changed the jury-composition claim that Lang could have presented on direct appeal without the evidence. Because the Ohio courts properly applied *res judicata* to the jury-composition claim, it is procedurally defaulted. *See Wogenstahl, 668 F.3d at 342*.

Lang further argues that his postconviction review counsel's ineffective assistance should excuse procedural default of the jury-composition claim, asserting counsel failed "to fully and exhaustively develop the factual predicate, including rebuttal of **[*99]** facts that were only to be created by the court of appeals" (Doc. 33 at 135). He cites to *Martinez v. Ryan, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, in which, as explained above, the Supreme Court held that the "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id. at 1315*. *Martinez* applies only to claims of ineffective assistance of trial counsel. *See Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013)* ("The Court in *Martinez* purported to craft a narrow exception to *Coleman [v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991))]*. We will assume that the Supreme Court meant exactly what it wrote.").

Finally, Lang claims that the procedural posture of this case makes procedural default "inappropriate." He contends that because he filed his postconviction petition before completion of his direct appeal, the postconviction court "suggest[ed] that the petitioner brought this claim too soon, not too late" (Doc. 33 at 135). There is no authority for this argument. Lang procedurally defaulted his jury-composition claim.

Merits Analysis

The *Sixth Amendment* commands that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" *U.S. CONST. amend. VI*. The *Sixth Amendment* "reflect[s] a profound judgment about the way in which law should be enforced **[*100]** and justice administered. . . . Providing an accused with the right to be tried by a jury of his peers g[ives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana, 391 U.S. 145, 155—56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)*. Indeed, the right to a trial by an impartial jury "lies at the very heart of due process." *Smith v. Phillips, 455 U.S. 209, 224, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*. Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id. at 217*.

Juror Bias

The Ohio Supreme Court addressed on direct appeal Lang's second ground for relief, predicated on juror bias. It first provided the following summary of the relevant facts:

> In proposition of law I, Lang argues that he was denied a fair trial because one of the jurors was related to Marnell Cheek, one of the victims.
>
> Before she was seated as a juror, [Juror 386] failed to disclose that her stepfather was Cheek's brother. [Juror 386] failed to mention this relationship on either her juror questionnaire or her pretrial-publicity questionnaire. When asked to disclose her "personal knowledge" about the shooting deaths,

[Juror **[*101]** 386] wrote, "Well the newspaper stated that both of them were shot execution style in the back of the heads over drugs." When asked to disclose what she had "heard, read, discussed or seen" concerning the shootings "from any source including * * * friends, neighbors, relatives, co-workers or family," [Juror 386] wrote, "None."

[Juror 386] also failed to disclose her relationship to Cheek during voir dire. [Juror 386] indicated that she learned about the shootings from reading the newspaper but provided no further information about her relationship to Cheek during the questioning.

Following the testimony of the state's first two witnesses, the prosecutor notified the court that Cheek's father had informed him that "[Juror 386]'s mother is married to Marnell's brother." The trial court stated that he would address the matter during the "very next break."

After the testimony of two more witnesses, the trial court, the prosecutor, and the defense counsel questioned [Juror 386] about her relationship to Cheek. [Juror 386] acknowledged, "My mom is married to [Cheek's] brother" and that she had failed to previously disclose that information. [Juror 386] also stated that she knew two of the spectators **[*102]** in the courtroom who were related to her mother through marriage. [Juror 386] stated that she had met Cheek and had attended her funeral. However, [Juror 386] said that she had not talked to her mother, other relatives, or anybody else about the case. Despite her relationship to Cheek, [Juror 386] stated that she could remain fair. Finally, [Juror 386] stated that she had not talked to any of the other jurors about her relationship to Cheek.

Following questioning, the prosecution moved to excuse [Juror 386], and the defense agreed. The trial court excused [Juror 386] and instructed her not to talk with any of the jurors about the case or why she was excused from the jury. Before leaving the courtroom, [Juror 386] reiterated that she had not previously talked to other jurors about this matter.

Before the trial continued, the trial court informed the jurors that [Juror 386] had been excused because "she may have had a relative relationship with either a witness or a party or somebody that was involved in the case." The trial court then asked the jurors as a group whether any of them had had any discussions with [Juror 386] about this matter, and they indicated that they had not. The trial **[*103]** then resumed.

Lang, 129 Ohio St. 3d at 520—21 (paragraph numbers omitted).

The Ohio Supreme Court first addressed Lang's claim that Juror 386's presence on the panel tainted the rest of the jury. It ruled:

> First, Lang argues that the presence of [Juror 386] on the jury, even for a short period of time, deprived him of an unbiased jury. Yet "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. * * * Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer [v. United States (1954), 347 U.S 227, 74 S.Ct. 450, 98 L.Ed. 654, 1954-1 C.B. 146]* * * *." *Smith v. Phillips (1982), 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78*; *see also Remmer* (when integrity of jury proceedings is in question, court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate"). Moreover, "a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown." *State v. Keith (1997), 79 Ohio St. 3d 514, 526, 1997 Ohio 367, 684 N.E.2d 47*.
>
> Nothing in the record supports Lang's claim that the **[*104]** jury was tainted by the presence of [Juror 386]. Before being excused, [Juror 386] assured the court that she had not talked to any of the other jurors about her relationship to Cheek. The other jurors also indicated during group questioning that they had had no conversations with [Juror 386] about this matter. Thus, Lang's bias claim is speculative and unsupported by the evidence.

Id. at 521 (paragraph numbers omitted).

Right to an Impartial Jury

The *Sixth Amendment* "guarantees to the criminally

accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)* (quoting *In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955)*). An impartial jury is one in which every juror is "'capable and willing to decide the case solely on the evidence before [the juror]." *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)*. However, the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*. "Qualified jurors need not . . . be totally ignorant of the facts and issues involved." *Murphy v. Florida, 421 U.S. 794, 799—800, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975)*. The Supreme Court has explained:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient **[*105]** if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 723. Moreover, in addition to AEDPA's statutory presumption that state-court factual findings are correct, the Court has emphasized that habeas courts must give "special deference" to a trial court determination of juror credibility. *See, e.g., Darden v. Wainwright, 477 U.S. 168, 176—78, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*; *Patton v. Yount, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)*.

McDonough Power Equip. v. Greenwood. Lang argues that the Ohio Supreme Court's analysis of his juror-bias claim contravened or unreasonably applied *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* (plurality opinion), which governs claims that a juror deliberately concealed information during voir dire. *Zerka v. Green, 49 F.3d 1181, 1185 (6th Cir. 1995)*.[5] He claims that Juror 386 "lied in response to a material voir dire question," and that her presence on the jury "even for a moment" violated Lang's right to an impartial jury, warranting "automatic reversal" of his conviction (Doc. 16 at 45—46, 34; Doc. 33 at 47—48).

McDonough ***[*106]*** involved a products liability claim based on a lawnmower accident. During voir dire, plaintiffs' counsel asked prospective jurors, as a group, whether anyone in the jurors' immediate family had sustained "severe" injuries. A three-week trial resulted in a defense verdict. Soon thereafter, plaintiffs discovered a juror failed to disclose during voir dire that the juror's son suffered a broken leg when a tire exploded. Plaintiffs moved for a new trial, in part because the court had denied their motion to approach the jury (a motion not specifically based on the juror's failure to respond to questioning about family member injuries). The district court denied the motion for a new trial, finding the trial had been fair in all respects. The Tenth Circuit reversed the district court's judgment and ordered a new trial, holding the juror's failure to respond to questioning about a family member's injuries prejudiced the plaintiffs' right to a peremptory challenge. The Supreme Court reversed, holding that the plaintiffs were "not entitled to a new trial unless the juror's failure to disclose denied [them] their right to an impartial jury." *McDonough, 464 U.S. at 549*.

McDonough thus recognized that a litigant "is entitled **[*107]** to a fair trial but not a perfect one, for there are no perfect trials." *Id. at 553* (internal quotation marks and citations omitted). Harmless error rules, the Court explained, embody the principle "that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Id.* The Court also observed that voir dire is designed "to protect [the right to an impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors." *Id. at 554*. But on balance, the Court concluded the "important end of finality" would be ill served if it were "[t]o invalidate the result of a three-week trial because of a juror's mistaken, though honest, response to a question, [as that would] insist on something closer to perfection than our judicial system can be expected to give." *Id. at 555*. "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id. at 556*. "The motives for concealing information may vary," the Court explained, **[*108]** "but only those reasons that affect a juror's impartiality can

---

[5] The Ohio court did not mention *McDonough* in its decision. A state court has adjudicated a claim "on the merits," and AEDPA deference applies, regardless of whether the state court provided little or no reasoning at all for its decision. "[A] state court need not cite or even be aware of our cases under ***§ 2254(d)***." *Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011)*.

truly be said to affect the fairness of a trial." *Id.*

The Sixth Circuit has interpreted the rule announced in *McDonough* to apply only in cases where the juror's failure to disclose information was deliberate, not merely a mistake. Zerka, 49 F.3d at 1185; *see also* Dennis v. Mitchell, 354 F.3d 511, 520 (6th Cir. 2003). In cases where a juror's failure to respond to voir dire questioning is the result of an honest mistake, the pre-existing rule applies, requiring proof of actual juror bias or, in exceptional circumstances, implied bias. Zerka, 49 F.3d at 1186 n.7. This view is supported by Justice Blackmun's concurring opinion in *McDonough*, joined by Justices Stevens and O'Connor, in which he noted:

> [I]n most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial. . . . I understand the Court's holding not to foreclose the normal venue of relief available to a party . . . . [R]egardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are **[*109]** such that bias is to be inferred.

McDonough, 464 U.S. at 556—57 (Blackmun, J., concurring).

Lang argues that he is entitled to relief under *McDonough*. First, Lang claims Juror 386 "lied" about her relationship to Cheek during voir dire by not answering the questions posed to her "fully, fairly or truthfully," and that "her dishonesty was neither a result of a misunderstanding nor a technical falsehood." Second, Lang claims that if Juror 386 had been honest, Juror 386 would have been challenged for cause (Doc. 33 at 47—48). But the Ohio Supreme Court made no finding of deliberate concealment; it determined only that Juror 386 "failed to disclose" the information. *See* Lang, 129 Ohio St. 3d at 520. And Lang offers no evidence of the juror's deliberate dishonesty other than conclusory assertions.

Moreover, the record does not establish that Juror 386 intentionally withheld information about her relationship to Cheek. As noted by the Ohio court, many questions posed to the jurors through questionnaires and voir dire focused on the depth and source of the jurors' knowledge about the victims' deaths and the criminal case arising from their deaths (*see, e.g.*, Doc. 22-1 at 142—48). The jurors also were asked if they had any relationship to **[*110]** the judge, witnesses, or counsel in the case (*see, e.g., id.* at 26, 54, 56—57, 59). This Court reviewed the voir dire proceedings and questionnaires, but found no question specifically asking jurors if they were related to either Burditte or Cheek. However, the trial court did ask if any of the potential jurors or "someone [who] is very close to [them]" had any involvement in the criminal justice system, including as a victim or offender (*id.* at 63—64). However, as explained below, based on Juror 386's responses to the trial court's questions after the parties learned of Juror 386's relationship to Cheek, Juror 386 apparently did not consider Cheek someone "very close" to her. Thus, Lang has not demonstrated that Juror 386 deliberately concealed information, and McDonough does not apply to this case.

Doctrine of Implied Bias. Lang argues in the alternative that because Juror 386 concealed her personal relationship with one of the victims, her bias and the resulting prejudice should be "presumed" (Doc. 16 at 46). Lang points to Justice O'Connor's concurring opinion in Smith v. Phillips, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), and Dyer v. Calderon, 151 F.3d 970, 984—85 (9th Cir. 1998), as authority for such a presumption (Doc. 16 at 46; Doc. 33 at 47—48). This Court interprets Lang's presumed-prejudice argument as based on the **[*111]** doctrine of implied bias, the traditional avenue for relief in juror-bias cases before *McDonough*.

Implied bias is found only in "certain 'extreme' or 'exceptional' cases." Johnson v. Luoma, 425 F.3d 318, 326 (6th Cir. 2005) (quoting United States v. Frost, 125 F.3d 346, 379 (6th Cir. 1997)). A finding of implied bias is appropriate "only 'where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.'" Id. (quoting Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988)).

However, the implied-bias doctrine is not supported by clearly established Supreme Court precedent. In *Smith*, the defendant discovered after his trial that, while the trial was pending, the prosecutors handling his case had learned (but not disclosed) that a juror applied for a job in the prosecutor's office. Smith, 455 U.S. at 212—24. The Court held neither the juror's conduct nor the prosecutor's failure to disclose the juror's job application denied the defendant due process. Id. at 220—21. It refused to impute bias to the juror, explaining:

> due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, **[*112]** such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.

Id. at 217.

Further, the Sixth Circuit repeatedly has expressed doubt over the continued viability of the implied-bias doctrine since *Smith*. *See* *Johnson, 425 F.3d at 326* ("Courts that have reviewed the *Smith* decision, including this circuit, have suggested that the majority's treatment of the issue of implied juror bias calls into question the continued vitality of the doctrine."); *see also* *Treesh v. Bagley, 612 F.3d 424, 437 (6th Cir. 2010)* (same).

Moreover, even if the implied-bias doctrine were clearly established federal law, Lang has not demonstrated the doctrine applies here. When the trial court questioned Juror 386 about her relationship to Cheek, she immediately admitted her stepfather was Cheek's brother (Doc. 22-2 at 940). **[*113]** She explained to the court that she lived with her grandparents in Ohio, not with her mother and stepfather in Florida, and does not "really talk to her [mother] that much" (*id.* at 941); "[i]t had been a while" since she had seen Cheek (*id.* at 942); while she attended Cheek's funeral with her stepfather, she denied knowing anything about her death or the case, other than what she read in the newspaper (*id.* at 943—46); and she did not talk to anyone in her family about the case (*id.* at 944). She assured the court that her relationship to Cheek did not "cause [her] any personal problem" or prevent her from being impartial (*id.* at 943).

Juror 386's relationship to Cheek is not the type of close relationship that permits application of the implied-bias doctrine. *See* *United States v. Weir, 587 Fed. Appx. 300, 2014 WL 5002080, at *4 (6th Cir. 2014)* (unpublished) ("Even assuming implied bias is still a basis for finding juror disqualification (a question we do not answer), the relationship at issue in this case (where the juror's sister's husband's brother had been married to the victim's daughter) is not sufficiently close to warrant the doctrine's application."); *Hedlund, 750 F.3d at 808 n.11 (9th Cir. 2014)* (finding that even if implied bias doctrine were clearly established federal law, doctrine would not apply where one of the victims had been married **[*114]** to a cousin of the juror's stepfather).

Reasonableness of State Court Decision. The Ohio Supreme Court's decision is consistent with *McDonough* and *Smith*. The Supreme Court defined the key inquiry in *McDonough* as whether "the juror's failure to disclose denied [the plaintiffs] their right to an impartial jury." *Id. at 549*; *see also* *id. at 556* (Blackmun, J., concurring) ("I agree with the Court that the proper inquiry in this case is whether the defendant had the benefit of an impartial trier of fact."); *Zerka, 49 F.3d at 1187* ("The pertinent issue [in *McDonough*] is whether a party received a fair trial by an impartial jury, keeping in mind that '[a litigant] is entitled to a fair trial but not a perfect one, for there are no perfect trials.'") (quoting *McDonough, 464 U.S. at 553*). *McDonough* is based in harmless-error principles. In *Smith*, the Court stressed due process principles, finding the procedural safeguards of an evidentiary hearing sufficient to protect a defendant's right to an impartial jury. *Smith, 455 U.S. at 217*.

The Ohio court could reasonably conclude that Juror 386's brief presence on the jury did not affect the fundamental fairness of Lang's trial by denying him the right to an impartial jury. Juror 386's relationship to Cheek was brought to the trial **[*115]** court's attention on July 12, 2007, only hour into the trial and long before the start of jury deliberations (Doc. 22-2 at 864). The trial court found "no risk" that Juror 386 would talk to other jurors prior to the first break on July 12, when Juror 386 was questioned about her relationship to Cheek (*id.* at 866). Juror 386 readily confirmed her relationship to Cheek and admitted to attending Cheek's funeral with her stepfather (*id.* at 940, 943—44). She denied saying anything to the other jurors about the relationship (*id.* at 944—45). The trial court then granted the parties' joint motion to exclude Juror 386 (*id.* at 948, 950), and questioned, as a group, the remaining jurors about whether Juror 386 had spoken to them about her relationship to Cheek. The remaining jurors were silent (*id.* at 953). Trial counsel did not object to trial resuming or move for a new trial on the ground of juror bias at any time.

Reasonableness of Ohio Court Determination of Facts. Lang also argues that the state-court decision resolving this sub-claim violates *§ 2254(d)(2)*, because "the state courts had no basis for making the credibility determination that is the foundation for full and proper state court review of this issue" (Doc. 33 at 50). This argument lacks merit. **[*116]** Lang first asserts that "[t]he presumption of correctness does not apply because [the question of] juror bias is 'essentially one of credibility,'"citing *Patton v. Yount, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)* (Doc. 33 at 50). True, the Supreme Court there observed that the determination of juror bias is "essentially one of credibility." *Patton, 467 U.S. at 1038*. But it continued: "As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.' . . . The respect paid such findings in a habeas proceeding certainly should be no less." *Id.*

Lang next contends that "[t]he state courts could not make a credibility determination because no evidence was taken about the impact of Juror 386 on the remaining jurors" (Doc. 33 at 50). But as discussed below, the Ohio Supreme Court reasonably determined that the trial court conducted a hearing that comported with due process, a hearing in which "[t]he other jurors . . . indicated . . . that they had had no conversations with [Juror 386] about this matter." *Lang, 129 Ohio St. 3d at 521*.

Accordingly, in rejecting this claim, the Ohio Supreme Court did not contravene or unreasonably apply clearly established Supreme Court precedent, nor did it make an unreasonable determination of fact. Lang's **[*117]** juror-bias claim fails.

Timeliness of Juror's Removal. Lang further claims that the trial court erred by not removing Juror 386 as soon as it learned of Juror 386's relationship to Cheek. The Ohio Supreme Court addressed this argument:

> Second, Lang argues that the trial court erred by failing to excuse [Juror 386] from the jury immediately after being informed of the juror's relationship to the victim. Lang contends that the continued presence of [Juror 386] during the testimony of two more witnesses tainted the jury.
>
> Defense counsel requested that the trial court talk to [Juror 386] before other witnesses testified, to eliminate any risk that the juror's presence might taint the jury. The trial court replied, "There is no risk at this point. * * * We will do it at the very next break. We will do it before this juror has any opportunity to go down and talk to the jury. We won't let the juror leave the courtroom before she has a chance to go down and talk to them." The trial court then questioned [Juror 386] at the next break, and the juror was excused before she had had an opportunity to talk with the other jurors. Thus, this claim lacks merit.

Lang, 129 Ohio St. 3d at 521 (paragraph numbers omitted).

Lang does not **[*118]** explain why the trial court's decision violates *§ 2254(d)(1)* or *(d)(2)*. *See, e.g., United States v. Crosgrove, 637 F.3d 646, 663 (6th Cir. 2011)* ("Because there is no developed argumentation in these claims, the panel declines to address [the defendant's] general assertions of misconduct in witness questioning and closing statements."). Moreover, as discussed below, the Ohio Supreme Court reasonably decided that the trial court's actions with regard to Juror 386 comported with due process. This sub-claim fails.

Failure to Conduct a *Remmer* Hearing. Lang also asserts that the trial court should have conducted a proper hearing regarding Juror 386, following the standards set forth in *Remmer*. The Ohio Supreme Court denied this claim, reasoning,

> Finally, Lang argues that the trial court failed to conduct a hearing into the juror's misconduct and its possible effect on the other jurors as required by *Remmer, 347 U.S. 227, 74 S. Ct. 450, 98 L.Ed. 654, 1954-1 C.B. 146*, and *State v. Phillips (1995), 74 Ohio St. 3d 72, 88—89, 1995 Ohio 171, 656 N.E.2d 643*. *Remmer* set forth the procedures that a trial court should follow for inquiring into possible jury misconduct: "The trial court should not decide and take final action ex parte * * * but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer at 229—230, 74 S. Ct. 450, 98 L.Ed. 654* **[*119]** .
>
> The trial court conducted a *Remmer* hearing in the presence of the prosecutor, defense counsel, and the accused. The trial court and both counsel questioned [Juror 386]. During questioning, [Juror 386] discussed her relationship to Cheek, admitted that she had failed to disclose this information to the court, and assured the court that she had not discussed this matter with any of the other jurors. Thereafter, the trial court questioned the other

jurors as a group and obtained their assurance that they had not discussed this matter with [Juror 386]. Neither the state nor the defense counsel objected to the questioning or requested an additional inquiry. Under these circumstances, we hold that no further inquiry was required.
Nevertheless, Lang argues that the trial court was obligated to individually question each of the jurors to ensure that [Juror 386] had not spoken to them about Cheek. The trial court asked the jurors as a group: "Is there any member of the jury -- I will take your silence if none did -- but is there any member of the jury that she did discuss this with at all?" The trial court then stated, "I take it by your silence that she did not."

No case authority support's **[*120]** [*sic*] Lang's position. "The scope of voir dire is generally within the trial court's discretion, including voir dire conducted during trial to investigate jurors' reaction to outside influences." The trial court's questioning and the jurors' negative response obviated the need for individual questioning. Moreover, neither the state nor the defense requested that the trial counsel individually question the jurors following this response. Thus, the trial court did not abuse its discretion by stopping there. . . .

However, Lang contends that the trial court should have individually questioned [Juror 387], because the judge noted that [Juror 386] and [Juror 387] were seated next to each other and had been friendly. But [Juror 386] assured the court that she had not talked to [Juror 387] about Cheek. [Juror 387's] silence during group questioning indicated that she had not talked to [Juror 386] about her relationship to any parties involved in the case. The trial court was permitted to rely on [Juror 387's] silence in determining that juror's impartiality. Trial counsel's failure to ask [Juror 387] any questions about possible conversations with [Juror 386] also indicated that the defense **[*121]** was satisfied with [Juror 387's] response. Thus, the trial court did not abuse its discretion by failing to interrogate [Juror 387]individually.

Lang, 129 Ohio St. 3d at 521—23 (paragraph numbers and internal citations omitted).

"[T]rial judges are afforded considerable discretion in determining the amount of inquiry necessary, if any, in response to allegations of jury misconduct," *United States v. Logan, 250 F.3d 350, 378 (6th Cir. 2001) superseded by rule on other grounds as recognized in McAuliffe v. United States, 514 F. App'x 542, 549 (6th Cir. 2013)*, because "'the trial judge is in the best position to determine the nature and extent of the alleged jury misconduct,'" *United States v. Griffith, 17 F.3d 865, 880 (1994)* (quoting *United States v. Shackelford, 777 F.2d 1141, 1145 (6th Cir. 1985)*).

In *Remmer*, a criminal tax evasion case, the Court observed that "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions." *Remmer, 347 U.S. at 229*. Thus, once a jury in a criminal case is empaneled, "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Id.* While the presumption is not conclusive, the Court in *Remmer* held that the government bears the burden of showing the contact with the juror was harmless to the defendant. *Id.* When informed of any improper communication with a juror, the trial court "should **[*122]** determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id. at 229—30*.

Lang contends that the Ohio court unreasonably applied *Remmer* by shifting the burden to Lang to prove prejudice when Juror 386's conduct was "presumptively prejudicial" (Doc. 33 at 49). Lang is mistaken. The Supreme Court modified the *Remmer* rule in *Smith v. Phillips*, placing the burden on the defendant to show actual prejudice from juror misconduct. *Smith, 455 U.S. at 215* ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). *See also Sheppard v. Bagley, 657 F.3d 338, 348—49 (6th Cir. 2011)* (Batchelder, J., concurring) ("*Remmer* was abrogated in part by the Supreme Court in *Smith v. Phillips*, which held that the defendant has the burden to show that there has been *actual* prejudice.") (emphasis in original). The Court explained in *Smith*, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact **[*123]** or influence that might theoretically affect their vote." *Smith, 455 U.S. at 217*. The Court also noted that state-court findings are presumptively correct in habeas actions. *Id. at 218*.

Lang also argues that the Ohio Supreme Court

improperly applied *Remmer* by failing to question Juror 386 more extensively, or to question each juror individually to determine bias (Doc. 16 at 48; Doc. 33 at 48—49). This Court disagrees. The Ohio Supreme Court complied with *Remmer* and *Smith* when it decided that the trial court's inquiry into Juror 386's potential misconduct and its effect on the other jurors was sufficient to comport with due process. The Ohio court also reasonably determined the facts supporting its decision.[6]

Jury Composition. Lang, an African-American, claims the trial court and Stark County failed to ensure that there were African-Americans on his jury in violation of the *Due Process and Equal Protection Clauses of the Fourteenth Amendment* and the *Sixth Amendment's* "fair cross-section" requirement (Doc. **[*124]** 16 at 112). Though this Court finds Lang procedurally defaulted the claim, on its merits the claim fails.

"[T]he selection of a petit jury from a representative cross section of the community is an essential component of the *Sixth Amendment* right to a jury trial." *Taylor v. Louisiana, 419 U.S. 522, 528, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)*.

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). However, a defendant "must show more than that their particular panel was unrepresentative. *Duren* requires [this Court] to look at the 'venires' from which 'juries' are selected, . . . and it has long been the case that defendants are not entitled to a jury of any particular composition -- only to a panel from which distinctive groups were not 'systematically excluded.'" *United States v. Allen, 160 F.3d 1096, 1103 (6th Cir. 1998)* (quoting *Taylor, 419 U.S. at 538*).

Lang alleges the following facts to support this claim:

> (1) there were no African-Americans **[*125]** on his jury;
> (2) after challenges for cause, only four African-Americans remained out of "around" 140 prospective jurors;
> (3) the prosecutor "promptly" used a peremptory challenge to remove Juror 405, to which defense counsel objected and stated, "that's all that is left from the initial jury pool of 140 some odd jurors";
> (4) Stark County relies on voter registration as the basis for gathering potential jurors;
> (5) although African-Americans make up 7.5 percent of Stark County's population, "very few" African-Americans were included in Lang's petit venire.

(Doc. 16 at 112). The only evidence Lang offers to support these allegations or to demonstrate racial disparity is the Ohio Commission on Racial Fairness's 1999 report. The 1999 report is insufficient evidence to meet the *Duren* test or otherwise establish that the racial composition of Lang's jury violated his constitutional rights. In relevant part, the 1999 report merely notes various comments made at Commission public hearings and lists recommendations for improving minority representation in jury pools, like the use of "driver's license records[or] state identification records" as additional sources for potential jurors (Doc. 16 **[*126]** at 112—13). Lang does not cite to portions of the 1999 report showing "systemic exclusion" in Stark County, Ohio. Indeed, the 1999 report recommends further research to "determine accurately the pattern of minority under-representation in juries in Ohio state courts" (*id.* at 113).

Fifth, Eighth, Ninth, Tenth, and Fifteenth Grounds for Relief

Trial Court Error

Lang claims the trial court committed numerous errors, including:

1. Admitting unreliable scientific evidence (fifth ground for relief);
2. Denying access to grand jury transcripts (eighth ground for relief);
3. Admitting prior consistent statements (ninth ground for relief);
4. Admitting prejudicial evidence (tenth ground for

[6] Lang requests discovery, an evidentiary hearing, and *de novo* review on this, and several of his other claims. Because the claims fail on other grounds as explained in this Memorandum Opinion and Order, this Court denies this and all other such requests made in Lang's Petition as moot.

relief), including

a. Walker's testimony that Lang wore red clothing;

b. Dittmore's testimony that he was part of the police gang unit;

c. Testimony regarding Lang's nickname, "Tech";

d. Dittmore's testimony about drug dealing;

e. Walker's testimony that Lang vomited after the murders;

f. Lang's recorded statement to the police;

g. Walker's testimony that he only learned later what kind of gun Lang had; and

h. Testimony about unreliable DNA evidence; and

5. Trivializing mitigating evidence (fifteenth ground for relief).

(*See* Doc. **[*127]** 16 at 70, 82, 84, 86—88, 95—98, and 108). Lang claims each of these errors (or all the errors together) violated his constitutional rights.

Procedural Posture

The Ohio Supreme Court addressed on the merits claims 2, 4.a and 4.f, and 5, as enumerated above. Lang preserved these claims for federal habeas review. *See* Lang, 129 Ohio St. 3d at 518—20, 529—30, 531—32, 554—55.

However, Lang procedurally defaulted the remaining trial-error claims (*see* Doc. 23 at 69—70, 72, and 84). The Ohio Supreme Court found Lang waived these claims because his trial counsel failed to object to the evidence at trial. *See* Lang, 129 Ohio St. 3d at 523, 528, 530—31, 532. Failure to adhere to Ohio's well-established "contemporaneous objection rule" is an independent and adequate state ground that bars federal habeas review. *See, e.g.*, Keith v. Mitchell, 455 F.3d 662, 673 (6th Cir. 2006). The procedural bar remains even if the state appellate court affirmed the trial court's ruling on plain-error review. *See, e.g.*, Lundgren v. Mitchell, 440 F.3d 754, 765 (6th Cir. 2006) ("[A] state court's plain error analysis does not save a petitioner from procedural default"); Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000) ("[P]lain error review does not constitute a waiver of state procedural default rules[.]").

Lang responds that because he received ineffective assistance of trial counsel, this Court must excuse the procedural defaults (Doc. 33 at 87—88, 99—100, 105). Even considered **[*128]** on their merits, this Court finds the trial court either did not err in admitting certain evidence, or committed only harmless error. Therefore, Lang cannot show trial counsel's failure to object to the evidence prejudiced him.

Merits Analysis

"[F]ederal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). The Supreme Court declared in Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991):

> Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.

Id. at 67—68. Generally, "alleged errors in evidentiary rulings by state courts are not cognizable in federal habeas review." Moreland v. Bradshaw, 699 F.3d 908, 923 (6th Cir. 2012). Evidentiary rulings made by state courts may "rise to the level of due process violations [if] they 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Seymour v. Walker, 224 F.3d 542, 552 (6th Cir. 2000) (quoting Montana v. Egelhoff, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996)).

An erroneous evidentiary ruling is subject to harmless-error review. A habeas petitioner may be entitled to relief based on a constitutional error at trial only if the petitioner "can establish that [constitutional **[*129]** error] resulted in 'actual prejudice.'" Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). A petitioner suffers actual prejudice when an error has a "substantial and injurious effect or influence in determining the jury's verdict." Id. at 623. "The proper standard by which to gauge the injurious impact of the admission of constitutionally infirm evidence is to consider the evidence before the jury absent the constitutionally infirm evidence." Brumley v. Wingard, 269 F.3d 629, 646 (6th Cir. 2001).

Admission of DNA Evidence. Lang argues that the expert testimony identifying him as a possible source of DNA found on the murder weapon was unreliable and should not have been admitted. Even if this claim were preserved for habeas review, it is meritless.

This Court reviews this claim *de novo*. As noted above, the Ohio Supreme Court found that Lang waived this claim and conducted a plain-error review of the issue. The Sixth Circuit has held that a state court's review of a procedurally barred claim for plain error does not constitute an "adjudication on the merits" under AEDPA. Because AEDPA deference does not apply to such a claim, a federal court reviews the claim *de novo*. *See, e.g.*, Frazier v. Jenkins, 770 F.3d 485, 496 n.5 (6th Cir. 2014) (collecting cases); Benge v. Johnson, 474 F.3d 236, 246 (6th Cir. 2007) ("Because Benge could have met his burden under *Strickland* despite not being able to demonstrate **[*130]** plain error, this analysis did not constitute an 'adjudication on the merits' of Benge's ineffective-assistance-of-counsel claim."); Lundgren, 440 F.3d at 765 ("Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits.").[7]

The Ohio Supreme Court provided the following factual account:

> Michele Foster provided expert testimony about the DNA found on the handgun used in the killings. She stated that DNA was detected from "at least two individuals" at three different locations on the handgun. The prosecutor then questioned Foster about the comparison of Lang's and Walker's DNA with the DNA found on the handgun:
>
> Q: Do you have an opinion as to a reasonable degree of scientific certainty as to whose DNA appears on that handgun?
>
> A: In this particular case, we can say that Antonio Walker is not the major source of DNA that we detected from the swabbing of the pistol.
>
> In this case we, based on our comparison, we can say that Edward Lang cannot be excluded as a possible minor source to the DNA that we found on the weapon.
>
> Q: When you say not excluded, what do you mean by that?
>
> A: Well, in this particular case, because we had such low level DNA, we can't say to a reasonable degree of scientific certainty that this **[*132]** person is the source.
>
> In this particular case, the chance of finding the major DNA profile that we found on that pistol is 1 in 3,461," meaning that "1 of 3,461 people could possibly be included as a potential source of the DNA."

Lang, 129 Ohio St. 3d at 523 (paragraph numbers omitted).

Lang complains that Foster's opinion was unreliable, and the trial court erred in admitting it. First, Lang argues that the DNA evidence's admission violated the *Equal Protection Clause of the Fourteenth Amendment*. He asserts that Ohio evidentiary rules and governing case law allow a scientific expert to testify in a criminal case in terms of "possibility." In civil cases, an expert must express opinions in "probability" terms. By lowering the standard of admissibility for expert opinions in criminal cases, he argues, Ohio's expert-opinion evidentiary rules undermine the reliability of evidence and infringe on a criminal defendant's right to a fair trial (Doc. 16 at 71—73).

The Ohio Supreme rejected this claim on plain-error review, reasoning:

> Ohio has a split application of Evid. R. 702. Criminal cases adhere to the *D'Ambrosio* standard in allowing expert opinion in terms of possibilities to be admitted under Evid. R. 702. In contrast, Ohio courts require expert opinions in civil cases **[*133]** to rise to the level of probabilities before being admitted under Evid. R. 702.
>
> The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section 1, commands that no state shall "deny to any person within its jurisdiction the equal

---

[7] The Sixth Circuit generally follows this rule, "refus[ing] to give AEDPA deference to a state appellate court review for plain error." Vasquez v. Bradshaw, 345 F. App'x 104, 111 n.1 (6th Cir. 2009) (citing *Benge* as support for the general rule). But in at least one other case, the Sixth Circuit has "focused on the reasoning actually followed by the state court and not the standard of review applied." *Id.* (citing Fleming v. Metrish, 556 F.3d 520 (6th Cir. 2009), for the exception). In *Fleming v. Metrish*, the Sixth Circuit held that AEDPA deference applied to a claim reviewed by a state court for plain error and distinguished *Benge* on the ground that, in *Fleming*, the state appellate court first determined the merits of the claimed error before holding that it did not effect substantial rights. Fleming, 556 F.3d at 531—32 ("*Benge* does not demonstrate, as the dissent suggests, that the state court's application of plain-error review *per se* insulated the claim from AEDPA deference."). *See also* Frazier, 770 F.3d at 505—06 (Sutton, J., dissenting). **[*131]** Here, the Ohio Supreme Court reviewed Lang's claim only under a plain-error analysis, and the general rule, permitting *de novo* review of habeas claims reviewed only for plain error in state court, applies.

> protection of the laws." The *Equal Protection Clause* does not prevent all classification, however. It simply forbids laws that treat persons differently when they are otherwise alike in all relevant respects. Nordlinger v. Hahn (1992), 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1. Lang's equal protection argument can be rejected because criminal defendants and civil litigants have vastly different stakes and concerns and are not similarly situated.

Lang, 129 Ohio St. 3d at 525 (paragraph numbers and internal citations omitted). This Court agrees with the state court's analysis.

The *Equal Protection Clause* "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)). Thus, "[t]he threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 260 (6th Cir. 2006).

As the Ohio Supreme Court reasoned, Lang cannot prevail on this claim because he cannot show that criminal defendants and civil litigants are similarly situated. Criminal prosecutions and civil litigation are governed by different **[*134]** laws and separate rules of evidence and procedure; they implicate and protect entirely distinct rights and interests. Indeed, the Supreme Court has observed that "the *equal protection clause* [does not] exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another." Dohany v. Rogers, 281 U.S. 362, 369, 50 S. Ct. 299, 74 L. Ed. 904 (1930). *See also* Glatz v. Kort, 650 F. Supp. 191, 198—99 (D. Colo. 1984) (finding individual committed pursuant to criminal procedures not similarly situated to those committed involuntarily pursuant to civil procedures); Higgs v. Neven, 2013 U.S. Dist. LEXIS 148847, 2013 WL 5663127, at *16 (D. Nev. 2013) ("Because [p]etitioner, a criminal defendant, is not similarly situated to a civil litigant, the fact that different state rules exist in criminal and civil contexts provides no basis for an equal protection claim."); Harris v. Ashby, 2001 U.S. Dist. LEXIS 11760, 2001 WL 863601, at *6 (N.D. Tex. 2001) ("For equal protection purposes, it is clear from the purpose and nature of the penalties that civil contemnors are not similarly situated with criminal contemnors.").[8]

Lang further argues that the admission of Foster's testimony violated his *Sixth Amendment* right to confrontation because "[n]o amount of cross-examination could remedy the improper admission of this evidence and the subsequent argument of the prosecutor" (Doc. 33 at 93). The *Sixth Amendment's Confrontation Clause* protects a defendant's right "to be confronted with the witnesses against him." *U.S. CONST. amend. VI*. Lang's counsel effectively cross-examined Foster, eliciting favorable testimony. Lang is entitled to nothing more. "'[T]he *Confrontation Clause* guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (per curiam) (emphasis in original)). *See* Lang, 129 Ohio St. 3d at 525.

Finally, Lang argues this evidence should have been excluded under due **[*136]** process principles because the prosecutor used it in an unfair manner during closing arguments to show that Lang was the principal offender (Doc. 16 at 73—76). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993) (internal quotation marks and citations omitted). Nothing in Foster's testimony was improper. She did not "tell the jury that Lang's DNA was on the gun" as Lang argues (Doc. 16 at 73). Rather, she

---

[8] The State contends that granting habeas relief based on Lang's equal protection argument would violate limitations on the retroactive application of a new constitutional rule of criminal procedure in violation of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (Doc. 23 at 69). The State also asserts this defense in relation to Lang's seventh, eighth, eleventh, twelfth, thirteenth, **[*135]** and seventeenth grounds for relief (*see* Doc. 23 at 63, 78—79, 81, 84—85, 87, 95—96). Here, and with regard to each of those other claims, this Court will not address the complex rules that govern application of *Teague* because the claims lack merit on other grounds. *See* Byrd v. Wilson, 1995 U.S. App. LEXIS 35483, 1995 WL 649423, at *2 (6th Cir. 1995) (declining to address the "byzantine rules that govern whether a subsequent decision should be applied retroactively" where the petitioner's claim lacked merit for other reasons).

clearly and accurately explained to the jury the results of her testing, which showed that Lang "could not be excluded" as a source of the DNA on the weapon.

Denial of Access to Grand Jury Transcripts. Lang argues that the trial court erred by denying his request for access to grand jury transcripts. The Ohio Supreme Court addressed this claim:

> Lang made various pretrial motions requesting the names of the witnesses who testified before the grand jury and the transcripts of the grand jury testimony. The trial court ruled that the defense had failed to provide "any particularized need" for the transcripts and denied the request. **[*137]** The trial court also denied the defense motion to disclose the names of the grand jury witnesses. In a subsequent judgment entry, the trial court stated that it had reviewed the grand jury transcripts, which included the testimony of four witnesses, and determined that "the defendant has not provided a particularized need for the transcripts" and has "not met the burden to establish the disclosure" of them. The trial court also found that "no exculpatory or other information which must be disclosed to the defendant exists within said transcripts." The transcripts were sealed and made part of the appellate record.
>
> We have recognized a limited exception to the general rule of grand jury secrecy: an accused is not entitled to review the transcript of grand jury proceedings "unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." A particularized need is established "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial." Determining whether a particularized need exists is a matter within the trial court's **[*138]** discretion.
> Lang argues that the trial court erred by failing to disclose the grand jury testimony of his codefendant, Walker. But review of the grand jury testimony shows that Walker never testified before the grand jury. Thus, this claim lacks merit.
> Lang also makes a generalized argument that he needed the grand jury testimony to prepare for cross-examination of the witnesses and to adequately prepare for his defense. Lang also argues that he was unable to establish a particularized need without knowing who testified at the grand jury or the content of their testimony. Lang's speculative claim that the grand jury testimony might have contained material evidence or might have aided his cross-examination does not establish a particularized need.
>
> Lang's assertion that he did not know who testified during the grand jury or what they said provides no excuse for failing to establish a particularized need. Lang was required to show that nondisclosure of the grand jury transcripts would probably deprive him of a fair trial. Lang has failed to make such a showing, and nothing in the record (including the testimony under seal) supports it here. We find that the trial court did not abuse its discretion **[*139]** in ruling that Lang failed to establish a particularized need for the grand jury testimony.

Lang, 129 Ohio St. 3d at 518—19 (paragraph numbers and internal citations omitted).

Lang claims that AEDPA does not apply to this claim because the Ohio Supreme Court did not refer to or discuss "federal standards" (Doc. 16 at 83). As already discussed, a state court need not cite any federal law for AEDPA deference to apply. Lang argues in the alternative that the Ohio court's decision rejecting this claim violates both *§ 2254(d)(1)* and *(d)(2)* (Doc. 16 at 84).

There is no clearly established Supreme Court precedent recognizing a constitutional right to obtain access to grand jury transcripts under any circumstances. "Of course, the standard practice since approximately the 17th century has been to conduct grand jury proceedings in secret, without confrontation, in part so that the defendant does not learn the State's case in advance." *Giles v. California, 554 U.S. 353, 371, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008)* (parentheses omitted) (citing S. Beale, W. Bryson, J. Felman, & M. Elston, Grand Jury Law and Practice § 5.2 (2d ed. 2005)). Lang also does not specify any unreasonable state court factual findings.

Admission of Walker's Prior Consistent Statement. Lang asserts the trial court erred by admitting co-defendant Walker's **[*140]** prior consistent statements. Walker testified at trial that his trial testimony matched statements he made to police before he entered into a plea agreement. Even if this claim were not procedurally defaulted, it would fail. This Court reviews this claim *de novo*.

The Ohio Supreme Court explained the context of the testimony at issue. It recounted:

> During his opening statement, defense counsel told the jury that Walker had entered into a plea agreement that allowed him to plead guilty to lesser charges. Defense counsel also informed the jury that in exchange for this deal, Walker signed an agreement to "testify truthfully at any proceeding, including trials, involving the case of [his] Co—Defendant, Edward Lang." Defense counsel recited Walker's agreement: "I further understand that if I fail to cooperate and testify truthfully as agreed, this agreement and sentence can be voided by the State of Ohio, and I can be prosecuted to the fullest extent as allowed by law including have a consecutive sentence imposed." Defense counsel then concluded his opening statement by stating: "[A]fter you have heard all of the evidence you will come to the conclusion that the only evidence against Eddie Lang **[*141]** are *the statements of a person or persons with an interest in the case*."

Lang, 129 Ohio St. 3d at 528 (emphasis in original). Defense counsel's suggestion that Walker may have a motive to lie in exchange for a favorable plea agreement, the state court explained, allowed the State to introduce Walker's prior consistent statements to rehabilitate his testimony. It summarized:

> During the state's direct examination, Walker testified about his plea deal. He said that he had pleaded guilty to two counts of complicity to murder with firearm specifications and one count of complicity to commit aggravated robbery with a firearm specification. Walker also testified that he had received concurrent sentences for these offenses of "18 to life." The prosecutor then elicited the following testimony:
>
> > Q: And what were you asked to do because you were given that sentence?
> > A: Testify.
> > Q: Testify, how?
> > A: To give truthful testimony of the events of October 22.
> > Q: And that's the same story that you gave Detective Kandel when you were arrested on October 27?
> > A: Yes.
> > Q: Before you had any deal?
> > A: Yes.

Id. at 527.

Lang agues that Walker's prior consistent statement violated his right to confrontation because Walker was not subject to cross-examination **[*142]** when he made the earlier statement to the police. He cites *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, arguing hearsay statements, including prior consistent statements, are inadmissable unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant with respect to the hearsay statement (Doc. 16 at 84—85).

Lang misstates *Crawford's* holding. As the Ohio Supreme Court noted in its plain-error analysis of this claim, the Court in *Crawford* held that the *Confrontation Clause* bars "testimonial statements 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." *Crawford, 541 U.S. at 53—54*. However, the Court also noted, "[W]e reiterate that, when the declarant appears for cross-examination at trial, the *Confrontation Clause* places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id. at 59 n.9* (citing *California v. Green, 399 U.S. 149, 162, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)*). Walker testified at trial and was subject to cross-examination. Therefore, admission of his prior statement to police did not violate the *Confrontation Clause*.

Admission of Prejudicial Evidence. Lang argues that, on eight occasions during trial, the trial **[*143]** court erred by admitting irrelevant and prejudicial evidence. Lang argues these errors deprived him of a fair trial and due process under the *Fourteenth Amendment*. This Court disagrees.

Walker's Testimony that Lang Wore Red Clothing. Lang complains that the trial court permitted Walker to testify, over defense objection, that Lang wore red "all the time." Although the trial court then sustained a defense objection when the prosecutor asked Walker whether he was "familiar with the significance of red," Lang claims the exchange implied that he was a member of the notorious Bloods street gang (Doc. 16 at 87).

The Ohio Supreme Court addressed this claim on the merits:

> Lang argues that Walker's testimony about the color red should not have been admitted because the implication was that Lang was a member of the "Bloods" gang. The state counters that the testimony that Lang wore red was relevant in showing his familiarity with firearms and the drug culture, and it contends that the very nature of these crimes pointed to gang-related homicides.

> However, no evidence was presented at trial linking the two murders to gang activity. Accordingly, testimony that Lang frequently wore red was irrelevant and should not have **[*144]** been admitted. But the testimony was brief, and no explanation was presented linking the color red to gang activity. Given the substantial evidence of Lang's guilt, such testimony constituted harmless error.

Lang, 129 Ohio St. 3d at 529—30.

Lang argues that evidence regarding a defendant's gang involvement is "inherently prejudicial." He cites *Dawson v. Delaware, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)*, which found constitutional error in a stipulated admission that the defendant belonged to a white racist prison gang. The evidence was irrelevant at the punishment phase of his trial (Doc. 33 at 104).

Here, the Ohio court found the gang evidence of which Lang complains irrelevant and inadmissable, but went on to find the error harmless, a conclusion not contrary to, or an unreasonable application of, *Dawson*. The majority opinion in *Dawson* concluded by stating, "The question whether the wrongful admission of the Aryan Brotherhood evidence at sentencing was harmless error is not before us at this time, and we therefore leave it open for consideration by the Supreme Court of Delaware on remand." *503 U.S. at 168—69*. Justice Blackmun, in a concurring opinion, noted his "understanding that the Court . . . does not *require* application of harmless-error review on remand." *Id. at 169* (Blackmun, J., concurring) **[*145]** (emphasis in original).

As courts have noted since *Dawson*, the Supreme Court has yet to resolve whether harmless error applies in this context. *See, e.g., United States v. Kane, 452 F.3d 140, 143 n.1 (2nd Cir. 2006)*; *Watts v. Quarterman, 448 F. Supp. 2d 786, 813 (W.D. Tex. 2006)*. In light of absence of clearly established federal law, § 2254*(d)(1)* bars relitigation of this issue. Further, the Ohio court's finding of harmless error was reasonable.

Dittmore's Testimony that he was Part of the Gang Unit. Lang next complains that Sergeant John Dittmore improperly testified that he supervised the Canton police department's "Gang Unit." Lang argues the evidence was irrelevant and again implied he was a gang member (Doc. 16 at 87). This claim is both procedurally defaulted (as discussed above) and meritless.

As the Ohio court explained in its plain-error analysis, this testimony was irrelevant and should have been excluded. But the error was harmless, because Dittmore never testified that Lang was involved in a gang. Dittmore also testified that he worked closely with narcotics investigators, testimony that provided an alternative explanation for his involvement in this murder investigation. *See Lang, 129 Ohio St. 3d at 530*.

Testimony regarding Lang's Nickname, "Tech". Lang makes a similar argument about testimony from Walker and his friend Teddy Seery **[*146]** about Lang's nickname, "Tech" or "Tek." Lang claims that "Tech" or "Tek" is "shorthand" for a type of gun, suggesting that Lang was familiar with guns, violent, and therefore likely to be guilty of the murders (Doc. 16 at 87). This Court again agrees with the Ohio Supreme Court's decision finding no plain error in admission of this testimony. As the Ohio Supreme Court explained, it is speculative that the jury understood "Tech" or "Tek" as Lang now explains the term, or that the jury made a connection between Lang and guns based on the testimony. *See Lang, 129 Ohio St. 3d at 530*.

Dittmore's Testimony about Drug Dealing. Lang further claims that Dittmore's testimony about drug dealing improperly suggested that Lang had previously purchased illegal drugs. He complains about the following testimony: that drug dealers do not sell drugs to strangers; that a dealer's decision to sell drugs to a stranger may be affected by the quantity of drugs for sale; that large amounts of cocaine cannot be bought on the street, but must be bought surreptitiously; and that a dealer might sell drugs to a stranger if someone the dealer knows vouches for the stranger (Doc. 16 at 87). On plain-error review the Ohio Supreme explained:

> **[*147]** Dittmore's redirect testimony showed the likelihood that Lang knew Burditte when he called him and set up the drug deal for a quarter ounce of crack cocaine. Such testimony was relevant because Lang told police he did not know Burditte prior to calling him. It also suggested that Lang's motive to kill Burditte was to avoid identification. Thus, Dittmore's redirect testimony was relevant and did not constitute plain error.

Lang, 129 Ohio St. 3d at 531. This Court agrees.

Testimony Lang Vomited After the Murders. Lang contends that the trial court should not have admitted Walker's testimony that Lang (1) vomited and (2) stated "every time I do this, this same thing happens." He

argues that the testimony implied that Lang had previously committed murder (Doc. 16 at 87). Again, this Court agrees with the Ohio Supreme Court's plain-error analysis:,

> Lang's conduct and comments after the murders were relevant in reflecting his consciousness of guilt. Moreover, the prosecution made no attempt to use Lang's comments as showing that he had previously murdered other people. No plain error occurred.

Lang, 129 Ohio St. 3d at 531 (internal citation omitted). This claim also fails.

Lang's Recorded Statement to the Police. Lang argues that the trial court erred **[*148]** by permitting the State to play for the jury Lang's recorded statement to the police in which he states that he may be guilty of conspiracy to commit murder (Doc. 16 at 87). The Ohio Supreme Court decided this claim on the merits, stating:

> Lang argues that his statement admitting that he might be guilty of conspiracy to commit murder was improperly admitted. During the state's case-in-chief, the prosecution played the tape-recorded statement that Lang made to the police. The trial court, over defense objection, allowed the prosecutor to play a segment of the tape that included Lang's admission to conspiracy to commit murder:
>
> "(Officer) Kandel: * * * When everything went bad and you felt so bad about it, why didn't you call the police?
>
> "Lang: Basically that he used my gun and then that I was in the car when that shit happenin'. And then as though, you know what I'm sayin', that's *conspiracy to murder*.
> " * * *
>
> "Kandell: That's what you believe?
>
> "Lang: Yeah. If you right there at the scene of a crime and you witness somethin' or you bein' a part of somethin' no matter how much you played a part in it, if you involved in it, * * * that's *conspiracy to murder*."
>
> After the tape was played, the trial **[*149]** court provided the jury with the following limiting instructions: "You may have heard in the statement some references by both sides to a concept known as conspiracy to murder. I would indicate to you that there are no charges in this case that alleged conspiracy to murder. You may take the Defendant's statement or the statements of the officers if they deal with the facts of this case, but not as they may discuss any legal conclusions because they may be correct or incorrect legally." Lang's opinion that he might be guilty of conspiracy to commit murder was irrelevant. No prejudicial error, however, resulted from playing this segment of Lang's statement, because the trial court's limiting instructions ensured that the jury did not improperly consider it.

Lang, 129 Ohio St. 3d at 531—32 (emphasis in original) (paragraph numbers and internal citation omitted).

Lang does not explain how the Ohio Supreme Court's reasoning was contrary to, or an unreasonable application of, clearly established federal law. The state court's decision is reasonable, and Lang's claim fails.

Testimony that Walker Only Learned Later About Lang's Gun. Lang maintains that Walker falsely testified that he did not know the make and model of **[*150]** the murder weapon (Doc. 16 at 87). Walker testified, "It was a grey and black gun. I didn't know what kind of gun it was at the time, but I found out it was a .9 [*sic*] millimeter" (Doc. 22-2 at 879). Lang points out that Walker later testified that while waiting for Burditte to arrive at the meeting point, Lang had trouble placing a round in the handgun, and Walker knew how to chamber a round in a 9 millimeter handgun (*id.* at 882—83). This Court agrees with the Ohio Supreme Court's plain-error analysis finding the testimony admissible. As the Ohio Supreme Court explained, "Walker's statement that he knew how to load a 9 mm handgun does not establish that Walker lied when he stated, 'I didn't know what kind of gun it was at the time.' Walker's credibility was a matter for the jury to decide after they heard his testimony." *Lang, 129 Ohio St. 3d at 532*.

Testimony About Unreliable DNA Evidence. Finally, Lang again complains about Foster's "unreliable" DNA testimony and evidence (Doc. 16 at 88). This Court already has determined that the trial court did not err in admitting Foster's testimony about the DNA evidence.

Comments Regarding Mitigating Evidence. Lang claims, during its review of the jury's death-sentence recommendation, **[*151]** the trial court improperly "minimized and trivialized" Lang's mitigating evidence, presented at trial. Lang focuses on the court's treatment of evidence supporting three mitigating circumstances: (1) his age at the time of the murders, (2) the nature and circumstances of his offense, and (3) his history, character, and background (Doc. 16 at 108—11).

The Ohio Supreme Court addressed this claim on the merits, explaining:

> Third, Lang argues that the trial court did not properly consider his youth as a mitigating factor and erroneously concluded that his conduct and taped statement show a street-hard individual." The "assessment and weight to be given mitigating evidence are matters for the trial court's determination." Here, the trial court identified Lang's youth (he was 19 at the time of the offense) as his strongest mitigating factor and fully discussed the weight it was giving to this mitigation. The trial court could reasonably assign minimal weight to this evidence.
>
> Fourth, Lang claims that the trial court improperly considered the nature and circumstances of the offense even though the defense never raised it as a mitigating factor. Lang also argues that the trial court's finding **[*152]** that there was nothing mitigating in the nature and circumstances of the offense transformed them into an aggravating factor.
>
> The trial court did not err in considering the nature and circumstances of the offense. R.C. 2929.04(B) provides that the court, in determining whether death is an appropriate penalty, "*shall consider*, and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense*." (Emphasis added.). Accordingly, the trial court was required to review these factors. Nothing, however, in the sentencing opinion indicates that the trial court viewed the nature and circumstances of the offense as an aggravating circumstance rather than a mitigating factor.
>
> Finally, Lang argues that the trial court trivialized mitigating evidence about his history, character, and background. Lang claims that the trial court glossed over testimony about his father's abusive relationship with his mother, failed to fully consider the mental and psychological abuse he suffered after being abducted by his father, and faulted him for not always taking his medications.
>
> Nothing in the sentencing opinion indicates that the trial court trivialized or glossed over **[*153]** mitigating evidence. The trial court thoroughly discussed mitigating evidence about his father's abuse, mentioned that Lang was treated at various psychiatric facilities on over 30 occasions, and properly summarized evidence that Lang did not always take his medications. The trial court also stated that it had "weighed all of the evidence presented as it relates to Mr. Lang's history, character, and background." Thus, this claim also lacks merit.

Lang, 129 Ohio St. 3d at 554—55 (paragraph numbers and internal citations omitted).

Lang first argues that the Ohio Supreme Court's conclusion that the trial court properly assessed his youth was an unreasonable application of *Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*, *Eddings v. Oklahoma, 455 U.S.104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)*, and *Graham v. Collins, 506 U.S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993)*. He contends the trial court effectively "failed to consider his youth or age" when it discounted the fact that he committed the crime just three days after his nineteen birthday because he was a "street-hard[ened] individual." He posits, "Regardless of the offender's sophistication, it is their actual age that is most significant in their adjudication" (Doc. 33 at 129—30). In *Lockett*, the Supreme Court held:

> [T]he *Eighth* and *Fourteenth Amendments* require that [a] sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any **[*154]** aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604. In *Eddings*, the Court held that the sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings, 455 U.S. at 115* (emphasis in original). "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* The Court noted that "the chronological age of a minor is itself a relevant mitigating factor of great weight," but stressed that "the background and mental and emotional development of a youthful defendant [must also] be duly considered in sentencing.' *Id. at 116*. In *Graham*, the Court found that the Texas death penalty statute

> satisfied the commands of the *Eighth Amendment*: It permitted petitioner to place before the jury whatever mitigating evidence he could show, including his age, while focusing the jury's attention upon what that evidence revealed about the defendant's capacity for deliberation and prospects

for rehabilitation.

Graham, 506 U.S. at 472.

The Ohio Supreme Court's resolution of Lang's claim regarding the mitigating factor **[*155]** of his youth is consistent with these cases: it found the trial court properly considered Lang's age a mitigating factor, but assigned Lang's age minimal weight because Lang was a "street-hard[ened] individual."

The Sixth Circuit has rejected arguments like Lang's. In Sheppard v. Bagley, 657 F.3d 338 (6th Cir. 2011), the Ohio Supreme Court assigned little mitigation weight to the petitioner's youth (he was eighteen-years-old at the time of his crime) because he was a "man of full legal age" and an "adult with all the privileges and responsibilities of an adult." Id. at 346. The Sixth Circuit found the state court's conclusion complied with *Eddings*. The Ohio Supreme Court's analysis was "not a refusal to consider [the petitioner's] youth 'as a matter of law'; it [was] a decision on how to weigh the factor." *Id.* (citing Eddings, 455 U.S. at 115). The Sixth Circuit rejected the petitioner's contention that the state court decision was unreasonable because "he could not have been any younger and still be eligible for the death penalty [because that contention]. . . assume[s] that, for purposes of this factor, youth must be measured strictly by chronological age." *Id.* "Ohio courts see the factor as more complicated than that," the court continued. "That is their prerogative . . . ." **[*156]** *Id.* Lang, too, argues for a strict application of chronological age in mitigation, a rule that is not supported by Eddings or its progeny.

Lang next argues that the Ohio Supreme Court unreasonably concluded that the trial court did not err in considering the nature and circumstances of the offense, even though trial counsel never raised offense factors as a mitigating evidence. He contends that, in doing so, the trial court violated Ohio law and Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (Doc. 33 at 130—31). This argument fails because Ohio law requires trial courts to "consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense" in assessing a death sentence. Ohio Rev. Code § 2929.04(B). This statute provided sufficient notice to Lang and his counsel, and the state court did not misapply *Gardner*.

Finally, Lang argues that the Ohio Supreme Court unreasonably applied Eddings and Porter v. McCollum, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (per curiam), when it rejected his argument that the trial court "reduced to irrelevance and inconsequence" his history, character and background (Doc. 33 at 131—32). In *Porter*, the Supreme Court found petitioner's trial counsel ineffective for failing to present mitigating evidence regarding the petitioner's mental **[*157]** health, family background, or military service. The Court further found that the Florida Supreme Court's decision that the petitioner was not prejudiced by counsel's deficient performance at the mitigation phase of trial was an unreasonable application of federal law; the finding "either did not consider or unreasonably discounted the mitigation evidence adduced in the post-conviction hearing." Id. at 454. That is not the case here. The Ohio Supreme Court reasonably found that the trial court carefully considered the mitigating evidence (*see* Doc. 17-5 at 1385—92).

Furthermore, the Ohio Supreme Court conducted a thorough, independent review of the mitigating and aggravating circumstances presented at the penalty phase of Lang's trial. Lang, 129 Ohio St. 3d at 556—60. It concluded:

> the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Lang's murder of Cheek during an aggravated robbery as the principal offender and his course of conduct in murdering Cheek and Burditte are grave aggravating circumstances. Lang's mitigating evidence pales in comparison to these aggravating circumstances.

Id. at 560. Lang does not object to the Ohio Supreme Court's reweighing of the evidence. The Ohio Supreme Court's **[*158]** review of Lang's sentence cured any constitutional error the trial court may have made in its sentencing opinion. *See, e.g.*, Sheppard, 657 F.3d at 347; Hoffner v. Bradshaw, 622 F.3d 487, 498 (6th Cir. 2010); McGuire v. Ohio, 619 F.3d 623, 630 (6th Cir. 2010).

Sixth Ground for Relief

Sufficiency of the Evidence

Lang argues in his sixth ground for relief that the State failed to produce sufficient evidence demonstrating that Lang murdered Burditte and Cheek while "committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnaping, rape, aggravated arson, aggravated robbery, or aggravated

burglary, and . . . was the principal offender in the commission of the aggravated murder" (Doc. 16 at 76—80 (citing Ohio Rev. Code § 2929.04(A)(7))). Lang raised this claim on direct appeal to the Ohio Supreme Court, which addressed it on the merits. Lang, 129 Ohio St. 3d at 542—45. Lang preserved this claim for federal habeas review.

The *Due Process Clause of the Fourteenth Amendment* requires a state to prove every element of a crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315—16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A habeas court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original). "[T]he *Jackson* inquiry does not focus on whether the trier of fact made the correct guilt **[*159]** or innocence determination, but rather whether it made a rational decision to convict or acquit." Herrera v. Collins, 506 U.S. 390, 402, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319. This Court must limit its review to evidence adduced during trial. Herrera, 506 U.S. at 402. Sufficiency-of-the-evidence claims are assessed "with explicit reference to the substantive elements of the criminal offense as defined by state law." Jackson, 443 U.S. at 324 n.16. Because both *Jackson* and AEDPA apply to Lang's sufficiency claim, this Court's review requires deference at two levels. "'First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson*; second, deference should be given to the [state court's] consideration of the trier-of-fact's verdict, as dictated by AEDPA.'" Davis v. Lafler, 658 F.3d 525, 531 (6th Cir. 2011) (quoting Tucker v. Palmer, 541 F.3d 652, 656 (6th Cir. 2008)).

The Ohio Supreme Court addressed this claim on the merits:

> In proposition of law V, Lang challenges both the sufficiency and manifest weight of the evidence to convict him as the principal offender of the aggravated murders as charged in Specification Three of Counts One and Two.
>
> A claim raising the sufficiency **[*160]** of the evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the jury verdict as a matter of law. In reviewing such a challenge, "[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.
>
> A claim that a jury verdict is against the manifest weight of the evidence involves a different test. "'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Lang's sufficiency claims lack merit. Walker's and Seery's testimony, evidence that the murder weapon was found in Lang's possession, and DNA evidence **[*161]** sufficiently established Lang's guilt as the principal offender. The evidence showed that on the night of October 22, 2006, Lang and Walker agreed to rob a drug dealer. Lang suggested that they rob Burditte. Their plan was to meet Burditte, enter his car, and rob him. Lang then called Burditte and arranged a meeting to purchase crack cocaine from him that evening.
>
> Lang and Walker went to the meeting location later that night. Lang carried a 9 mm handgun and loaded it while they waited for Burditte to arrive. Shortly thereafter, Burditte and Cheek arrived. According to Walker, Lang got into the backseat of their vehicle and shot Burditte and Cheek.
>
> On the following day, Lang went to Seery's house and admitted to him that he had shot the victims. When the police later arrested Lang, they found a 9 mm handgun in the backseat of the car that he was driving. Forensic examination of the handgun identified it as the murder weapon. Additionally, Foster testified that Lang could not be excluded as a possible source of DNA that was found on the handgun.
>
> Nevertheless, Lang argues that the evidence is insufficient to convict him. Lang asserts that Walker's testimony was not credible, because he accepted **[*162]** a plea deal in exchange for his

testimony against him. He also argues that Seery's testimony should be discounted because Seery had initially told police that he did not know anything about the killings. But these claims call for an evaluation of Walker's and Seery's credibility, which is not proper on review of evidentiary sufficiency.

Lang also argues that none of his clothing was found with blood or gunshot residue, and Walker's clothing was untested. But Foster testified that she examined Walker's hooded sweatshirt and shoes and found no blood or other trace evidence linking Walker to the murders.

Finally, Lang argues that none of the scientific evidence established that he was the principal offender. This argument overlooks evidence tending to show that Lang's DNA was found on the handgun and Walker's DNA was not. However, Lang continues to argue that the DNA evidence was unreliable because testing did not establish that his DNA was found on the handgun to a reasonable degree of scientific certainty. As discussed in proposition II, questions about the certainty of the DNA results went to the weight of the evidence and not its admissibility.

Despite some discrepancies, the jury accepted **[*163]** the testimony of the state's witnesses. Furthermore, a review of the entire record shows that the testimony was neither inherently unreliable nor unbelievable. Therefore, witness testimony, circumstantial evidence, and forensic evidence provided sufficient evidence to prove beyond a reasonable doubt that Lang was guilty of the R.C. 2929.04(A)(7) specifications.

Although Lang does not raise the point, we note that Foster provided conflicting testimony about the DNA evidence found on the handgun. Foster testified that Lang could not be excluded as a possible minor source of DNA. Foster then testified that the chance of finding the major DNA profile that was found on the pistol is 1 in 3,461. Foster also testified that there was a minor contributor to the DNA but "[t]here wasn't enough there of that second person * * * to compare to anyone * * * [and] we couldn't say anything about that minor person that was present." Thus, Foster's testimony that there was insufficient DNA to identify the minor contributor is inconsistent with her testimony that Lang could not be excluded as a possible minor source of the DNA that was found.

It is apparent from the context of Foster's testimony that she misspoke about Lang's DNA. **[*164]** It appears that Foster meant to say that Lang could not be excluded as a possible major source rather than a minor source of DNA found on the handgun. Even discounting Foster's testimony, sufficient evidence was presented to prove beyond a reasonable doubt that Lang is guilty of the aggravated murders as the principal offender. Walker's and Seery's testimony established that Lang was the principal offender. The murder weapon belonged to Lang, and the police found it in the back of the car that Lang was driving. Moreover, the presence of Lang's DNA on the handgun was not crucial to the state's case, because it was Lang's handgun, and his DNA could be expected to be found on it. Accordingly, the jury could have found Lang guilty of Specification Three of Counts One and Two without the DNA testimony. With respect to Lang's manifest-weight challenges, this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" Lang's challenge to the credibility of Walker's and Seery's testimony is unpersuasive. Thus, the jury neither lost its way nor created a manifest miscarriage of justice in convicting Lang of Specification Three of Counts One and Two.

Lang, 129 Ohio St. 3d at 542—45 (paragraph **[*165]** numbers and internal citations omitted).

Lang argues that the Ohio court's decision was contrary to, or an unreasonable application of, *Jackson*, and was based on an unreasonable determination of the facts. Lang contends that the evidence presented at his trial did not prove that he was the principal offender, or "actual killer," because it consisted primarily of Walker's and Seery's testimony, which was not credible, and unreliable DNA evidence (Doc. 16 at 79). This claim fails.

This Court already has rejected Lang's claims regarding the reliability of the DNA evidence. Consistent with *Jackson*, the Ohio Supreme Court rejected attacks on Walker and Seery's credibility. *See, e.g., Johnson v. Mitchell, 585 F.3d 923, 931 (6th Cir. 2009)* (explaining that a habeas court reviewing a state-court judgment for sufficiency of the evidence "do[es] not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [the habeas court's] judgment for that of the jury"). The Ohio Supreme Court's analysis *Jackson* analysis was not an unreasonable application of clearly established federal law. And Lang identifies no unreasonable factual determinations on the part of the state courts.

Seventh Ground for Relief

Suppression of Exculpatory Evidence

Lang **[*166]** claims the State violated his constitutional rights by hiding exculpatory evidence and improperly destroying potentially exculpatory evidence in violation of *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. He contends the police did not fully investigate Walker, Lang's accomplice. And in ending their investigation "prematurely," Lang argues, the police "prevented the preservation of any other evidentiary materials; the effect was the equivalent of spoliation of collected evidence" (Doc. 16 at 80—81).

Procedural Posture

The State argues that Lang did not present this claim to state courts. The claim is unexhausted but procedurally defaulted (Doc. 23 at 79). Lang replies that he did in fact raise this claim as his fifth proposition of law on direct appeal to the Ohio Supreme Court. However, he argues that because the Ohio Supreme Court "refused to order the prosecutor to deliver the files so that *Brady* material could be discovered . . . . he could not develop this claim in that forum." (Doc. 33 at 96).

The State is correct. The claim to which Lang refers challenged the sufficiency of the evidence offered at trial to convict him as the principal offender; it was not a *Brady* claim (*see* Doc. 18-1 at 1519—21, 1576—84). Although Lang's **[*167]** sufficiency-of-the-evidence claim is related to his habeas *Brady* claim in that they both concern evidence regarding Walker's role in the murders, they are different claims with distinct legal theories. Lang did not present a *Brady* claim to a state court.

A federal habeas claim that was not raised in state court may be deemed unexhausted "if the state still provides a remedy for the habeas petitioner to pursue, thus providing the state courts an opportunity to correct a constitutionally infirm state court conviction." *Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994)*. On the other hand, "if a state remedy is no longer available at the time of the federal petition, the exhaustion doctrine poses no bar to federal review." *Wagner v. Smith, 581 F.3d 410, 415 (6th Cir. 2009)* (citing *28 U.S.C. § 2254(b)(1)(B)* and *Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)*). *Brady* claims generally rely on new evidence not found in the trial record, so a return to state court to litigate those claims is possible in some situations under Ohio law. *See Ohio Criminal Rule 33(B)* (defendant may be entitled to new trial after deadline for filing motion for new trial if he was "unavoidably prevented" from filing motion or there is "newly discovered evidence"); *Ohio Rev. Code § 2953.21(A)(1)* (second, successive, or untimely postconviction petition permitted if petitioner shows: (1) that he was "unavoidably prevented from discovery of **[*168]** the facts" of the claim, or the claim is based on a new federal or state right the Supreme Court has recognized that applies retroactively; and (2) but for constitutional error at trial, no reasonable factfinder would have found petitioner guilty of an offense or eligible for a death sentence); *Hanna v. Ishee, 694 F.3d 596, 613—14 (6th Cir. 2012)* (recognizing that Ohio's postconviction statute codifies Ohio's *res judicata* rules, which generally bar courts from considering any issue that could have been, but was not, raised on direct appeal, unless the claim relies on evidence outside the record).

However, in this case Lang does not offer any evidence outside the record. Instead he notes the absence of evidence, an argument that could have been made in his original postconviction petition. Lang has no available state remedy for this claim in state court, therefore, and habeas review of this claim is not barred by the exhaustion doctrine. Moreover, even if this claim were unexhausted, *§ 2254(b)(2)* permits courts to deny unexhausted habeas claims on the merits where appropriate. *See Hanna, 694 F.3d at 610* (denying petitioner's claim on the merits "notwithstanding a failure to exhaust" the claim).

As the State argues, this claim also is procedurally defaulted because Lang **[*169]** has no remaining avenues of relief in state court (Doc. 23 at 79). *See O'Sullivan, 526 U.S. at 848* (if a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has procedurally defaulted those claims); *Jacobs v. Mohr, 265 F.3d 407, 417 (6th Cir. 2001)* (Ohio's doctrine of *res judicata*, barring courts from considering any issue that could have been, but was not, raised on direct appeal, is an "independent and adequate state ground" upon which to find habeas claim procedurally defaulted).

Lang argues this Court should excuse procedural default of this claim because of ineffective assistance of his postconviction counsel, who failed "to fully and exhaustively develop the factual predicate, including

rebuttal of facts that were only to be created by the court of appeals" (Doc. 33 at 97—98). As with his procedurally defaulted jury-composition claim, he relies on *Martinez*. As explained above, *Martinez* is inapt. Lang identifies no other grounds for excusing default of his *Brady* claims.

Merits Analysis

Lang's *Brady* claim also lacks merit. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt **[*170]** or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, 373 U.S. at 87*. To establish a *Brady* violation "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene, 527 U.S. 263, 281—82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*.

Lang argues here that the police *possibly* failed to preserve key evidence that *may* have shown Walker was the principal offender. He provides no evidence to support these allegations. Lang's claim is speculative. *See, e.g., United States v. Aleman, 548 F.3d 1158, 1164 (8th Cir. 2008)* ("[The defendant] only speculates that interviews of [the undisclosed] individuals would have provided evidence favorable to his defense, however, and mere speculation is not sufficient to sustain a *Brady* claim." (internal ellipses and quotation marks omitted)); *Cunningham v. City of Wenatchee, 345 F.3d 802, 812 (9th Cir. 2003)* (bad faith is not established when the exculpatory value of unpreserved evidence is entirely speculative).

Eleventh and Thirteenth Grounds for Relief

Prosecutorial Misconduct

Lang alleges prosecutorial misconduct rendered his trial fundamentally unfair because the prosecutor:

1. Asked prospective jurors if they would promise to return a death sentence;

2. Presented **[*171]** evidence regarding gangs;
3. Presented evidence regarding Lang vomiting;
4. Argued that DNA evidence proved Lang was the principal offender;
5. Speculated during closing argument;
6. Vouched for witnesses;
7. Engaged in such egregious prosecutorial misconduct during the guilt phase of the trial that prejudice from that misconduct carried over into the trial's penalty phase;
8. Mischaracterized mitigating evidence;
9. Alluded to gang activity; and
10. Asked the jury to render justice.

(Doc. 16 at 88—95, 98—102).

Procedural Posture

The State argues that "insofar as the Supreme Court of Ohio invoked Ohio's contemporaneous objection rule," Lang's prosecutorial-misconduct claims are procedurally defaulted because Lang's counsel did not object to the alleged misconduct at trial (Doc. 23 at 81—82, 95). Lang responds that the State has waived a procedural default claim -- the State does not identify the prosecutorial-misconduct sub-claims it claims are defaulted (Doc. 33 at 104—05). Lang cites to *Slagle v. Bagley, 457 F.3d 501, 514 (6th Cir. 2006)*, in which the Sixth Circuit noted that because the warden had "not identified with specificity which [prosecutor] statement[claims] are allegedly defaulted," the warden waived her procedural default defense. **[*172]** *Id. at 514*. In addition to the warden's "vague assertion" of the procedural default defense, the court in *Slagle* could not determine if the relevant state court decision reached the merits of the prosecutor statement claims, or instead denied the claims by relying on a procedural bar. *Id. at 515*. But in Lang's case, the Ohio Supreme Court identified the prosecutorial-misconduct sub-claims -- specifically, all sub-claims except sub-claims 1, 6, and 7 (as numbered above) -- Lang had waived due to the contemporaneous objection rule.

Lang further agues that if this Court finds that he defaulted any of his prosecutorial-misconduct sub-claims, the default should be excused based on ineffective assistance of trial counsel (Doc. 33 at 105). Because Lang's allegations of prosecutorial misconduct lack merit, he cannot show prejudice under *Strickland*.

Merits Analysis

"Although the State is obliged to 'prosecute with earnestness and vigor,' it 'is as much [its] duty to refrain from improper methods calculated to produce a

wrongful conviction as it is to use every legitimate means to bring about a just one.'" Cone v. Bell, 556 U.S. 449, 469, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). A prosecutor's "improper suggestions, insinuations, and, especially, assertions of personal **[*173]** knowledge are apt to carry much weight against the accused when they should properly carry none." Berger, 295 U.S. at 88.

Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986), controls this Court's analysis of Lang's prosecutorial misconduct claims. There, the Court held that to prevail on such claims, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned. . . . The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 181 (internal quotation marks omitted). *See also* United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) ("Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."). "[T]he appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" Darden, 477 U.S. at 181 (quoting Donnelly, 416 U.S. at 642). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The *Darden* standard "is a very general **[*174]** one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations.'" Parker v. Matthews, 132 S. Ct. 2148, 2155, 183 L. Ed. 2d 32 (2012) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)).

Commitment From Jurors to Impose Death Penalty. Lang argues the prosecutor improperly asked prospective jurors for a commitment to impose the death penalty, a request that, Lang claims, influenced the jurors' ultimate decisions regarding his conviction and sentence (Doc. 16 at 89—90).

The Ohio Supreme Court rejected this claim on the merits:

> First, Lang argues that the prosecutor committed misconduct by improperly seeking a commitment from the prospective jurors that they would sign a death verdict. During voir dire, the prosecutor asked the prospective jurors whether they could sign a death verdict if all 12 of them agreed that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.
>
> The prosecutor then asked individual jurors whether they could do so. The prosecutor's questioning was proper because the relevant inquiry during voir dire in a capital case is whether the juror's beliefs would prevent or substantially impair his or her performance of duties as a juror in accordance with the instructions and the oath. State v. Davis, 116 Ohio St. 3d 404, 2008—Ohio—2, ¶ 76, 880 N.E.2d 31, citing Wainwright v. Witt (1985), 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841. "Clearly, a juror who **[*175]** is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties." Accordingly, Lang's argument in this regard is not well taken.

Lang, 129 Ohio St. 3d at 535 (paragraph numbers and internal citation omitted).

The Ohio Supreme Court's analysis is correct. "[A] criminal defendant [in a capital case] has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." Witherspoon v. Illinois, 391 U.S. 510, 521, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). At the same time, the State has a "legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." Wainwright v. Witt, 469 U.S. 412, 423, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). Therefore, during voir dire, a prosecutor may probe into prospective jurors' views of the death penalty, and may challenge for cause a potential juror who appears unwilling to return a capital sentence. Id. at 423—24. The prosecution's conduct here, therefore, was proper, and this claim is meritless.

Evidence Regarding Gangs. Lang argues the prosecutor improperly elicited evidence from witnesses suggesting that Lang was a gang member (Doc. 16 at 90—91). The Ohio **[*176]** Supreme Court found that with this claim Lang was "recast[ing] several of his objections [to trial court rulings] into claims of prosecutorial misconduct." It repeated its conclusion that testimony that Lang frequently wore red constituted

harmless error, and that Dittmore's testimony that Dittmore was a member of the police department's gang unit and Walker's testimony that Lang's nickname was "Tech" did not rise to the level of plain error. *Lang, 129 Ohio St. 3d at 537—38* (paragraph numbers omitted). This Court likewise finds no prosecutorial misconduct in eliciting admissible evidence.

Evidence Regarding Lang Vomiting. Lang's next sub-claim faults the prosecution for introducing Walker's prejudicial testimony that Lang vomited after the murders and stated, "every time I do this, this same thing happens" (Doc. 16 at 91). The prosecutor did not commit misconduct in eliciting this testimony for the same reasons the trial court did not err in admitting the evidence.

DNA Evidence Proved Lang was the Principal Offender. Lang argues that during closing argument the prosecutor improperly stated DNA evidence proved Lang was the principal offender (Doc. 16 at 91—92). The Ohio Supreme Court reviewed this claim for plain error:

> Lang **[*177]** also argues that the prosecutor committed misconduct during closing arguments by telling the jury that DNA evidence found on the handgun "proves * * * beyond a reasonable doubt that Eddie Lang * * * is the actual killer." He contends that expert testimony offered in regard to the DNA evidence does not support the prosecutor's argument. Lang incorporates his argument from proposition II in claiming that the DNA evidence was unreliable and should not have been admitted, because Foster could not testify to "a reasonable degree of scientific certainty" that Lang was the source of DNA on the handgun. However, as discussed in proposition II, the DNA evidence was properly admitted. Thus, the prosecutor's argument about the DNA evidence was a reasonable theory and represented a fair inference based on the record. No plain error occurred.

Lang, 129 Ohio St. 3d at 536 (paragraph number omitted). Because, as explained above, this Court agrees that the DNA evidence was properly admitted, the prosecutor's arguments about the DNA evidence were proper.

Closing Argument Speculation. Lang contends the prosecution committed misconduct by making speculative comments during closing argument (Doc. 16 at 93). The Ohio Supreme Court **[*178]** rejected this claim in its plain-error review:

> Fourth, Lang asserts the existence of prosecutorial misconduct in speculative comments made during closing argument, claiming that the prosecutor argued, over defense objection, that Lang "took the gun * * * and turned it toward Marnell who saw it coming because she put her hand up." Lang asserts that the prosecutor's assertion that Cheek raised her hand to ward off the fatal gunshot was not supported by the evidence.
>
> Dr. Murthy, the coroner, testified that Cheek was shot at close range, and the bullet had entered the left side of her head above the ear. He also testified that there was a "prominent area of stippling" found on the back of Cheek's left hand, which indicated that her hand was only a "few inches" from the muzzle of the gun. The evidence also showed that Cheek had been sitting in the front passenger seat and she had been shot from behind. Thus, the prosecutor's argument represented a fair inference that could be made from the record.
>
> Lang also claims that the prosecutor's argument that Cheek "saw it (the bullet) coming because she put her hand up" was a comment that improperly focused on what the victim experienced in the final **[*179]** moments of her life. But the prosecutor's comments were not such remarks. Even if the comments were improper, any errors were corrected by the trial court's instructions that the arguments of counsel were not evidence and that the jury was the sole judge of the facts.
>
> Additionally, Lang contends that the prosecutor improperly speculated during his final argument that Lang's DNA was on the handgun "[f]rom firing the gun." Michael Short, a forensic expert, testified: "The discharging of a firearm would greatly increase the probability of finding * * * what they call touch DNA on the surfaces of a firearm." Lang's argument fails, because the prosecutor's argument represented a fair characterization of Short's testimony. No plain error occurred.

Lang, 129 Ohio St. 3d at 536—37 (paragraph numbers and internal citations omitted).

This Court agrees. "The prosecution necessarily has 'wide latitude' during closing argument to respond to the defense's strategies, evidence and arguments." *Wogenstahl v. Mitchell, 668 F.3d 307, 329 (6th Cir. 2012)* (quoting *Bedford v. Collins, 567 F.3d 225, 233 (6th Cir. 2009)*). The scope of permissible prosecution comments depends on the circumstances of the case

and "what the defense has said or done (or likely will say or do)." *Id.* "To avoid impropriety . . .[the prosecutor's] comments must reflect reasonable **[*180]** inferences from the evidence adduced at trial." *Id. at 331* (internal quotation marks and citations omitted). Here, the prosecutor's comments were not speculative; they constituted reasonable inferences from evidence in the record. *See id.*

Vouching for Witnesses. Lang further argues that the prosecutor improperly vouched for several prosecution witnesses (Doc. 16 at 93—95). The Ohio Supreme Court addressed this claim on the merits:

> Fifth, Lang argues that the prosecutor improperly vouched for several of the state's witnesses. An attorney may not express a personal belief or opinion as to the credibility of a witness. "Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue."
>
> Lang claims that the prosecutor improperly vouched for Walker's testimony and bolstered Walker's claim that he did not shoot Cheek and Burditte. The prosecutor argued: "We know Antonio didn't enter the truck because he tells us that." These comments simply argue the evidence. The comments do not vouch for Walker's veracity or imply knowledge of facts outside the record.
>
> Lang also claims that the prosecutor vouched for the testimony of Short and his **[*181]** identification of the handgun. The prosecutor stated: "We know that this is the murder weapon beyond a reasonable doubt. Mike Short told you that." This is not vouching. The prosecutor merely summarized the evidence supporting his argument by referring to the witness who provided the testimony. Lang's argument is unpersuasive and rejected.
>
> Lang further claims that the prosecutor vouched for Seery's testimony. Here, the prosecutor argued: "But I submit to you, and you judge his credibility and you look at what he knew, he is telling the truth." The trial court sustained a defense objection to these comments and instructed the jury to "disregard the Prosecutor's indication that he believes that he was telling the truth." Thus, the trial court's instructions cured the effect of any improper vouching.

Lang, 129 Ohio St. 3d at 537 (paragraph numbers and internal citations omitted).

Lang argues that the Ohio Supreme Court's decision violates *§ 2254(d)(1)* and *(d)(2)* (Doc. 16 at 89). This Court disagrees.

"Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the [government] behind the witness." *Wogenstahl, 668 F.3d at 328* (internal quotation marks **[*182]** omitted).

> [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). But "[a] state's attorney is free to argue that the jury should arrive at a particular conclusion based upon the record evidence." *Wogenstahl, 668 F.3d at 329* (internal quotation marks and citations omitted). "Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *Young, 470 U.S. at 11*.

Even assuming the prosecutor's closing argument statements were improper, the statements were not so flagrant as to render Lang's trial fundamentally unfair. The prosecution's comments were made in closing argument in the context of an extensive trial record. References to Walker, Seery, and Short were supported by evidence that had been presented in court and demonstrated no special knowledge **[*183]** of the prosecution. Finally, the prosecutor's comments were isolated and unlikely to mislead the jury or prejudice Lang. The Ohio Supreme Court's decision rejecting this claim did not unreasonably apply clearly established federal law or rest on an unreasonable determination of fact.

Penalty Phase Carryover. Lang claims this Court owes no AEDPA deference to the Ohio Supreme Court's decision rejecting his claim that "[t]he extensive prosecutorial misconduct in this case may have a prejudicial 'carry over' effect on the trier of fact's penalty-phase deliberations (Doc. 16 at 95). The Ohio Supreme Court rejected Lang's carry-over argument because it found no prosecutorial misconduct during the guilt phase of trial. *See Lang, 129 Ohio St. 3d at 538*.

Lang cites only DePew v. Anderson, 311 F.3d 742 (6th Cir. 2002), in support of this claim (Doc. 33 at 107). There, the Sixth Circuit observed, "When a prosecutor's actions are so egregious that they effectively 'foreclose the jury's consideration of . . . mitigating evidence,' the jury is unable to make a fair, individualized determination as required by the *Eighth Amendment*." DePew, 311 F.3d at 748 (quoting Buchanan v. Angelone, 522 U.S. 269, 277, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998)). This claim fails because none of the prosecutor's actions during the guilt phase were "egregious" or otherwise constituted misconduct.

Mitigating Evidence [*184] Mischaracterized. Lang contends the prosecutor misrepresented certain mitigating evidence during closing argument during the penalty phase of his trial (Doc. 16 at 99—100). The Ohio Supreme Court considered this claim for plain error:

> First, Lang argues that the prosecutor misrepresented the evidence during final argument by stating, "We know now that Eddie was born in Baltimore, Maryland, that *until the age of 10 life seemed to be pretty good*." (Emphasis added.) Lang argues that this argument mischaracterized the evidence because Yahnena Robinson, Lang's half-sister, testified, "A lot of times my mother didn't let him [Lang's father] come" to see Lang. Lang argues that Robinson's testimony shows that he did not have a good or normal childhood.
>
> Other testimony supported the prosecutor's argument. Robinson also testified, "We had a typical brother sister relationship. We would watch movies and play school, other things that an older sister do [*sic*] with a younger brother we shared and did" before Lang was ten. Thus, the prosecutor's argument represented fair comment. No plain error occurred.
>
> Second, Lang argues that the prosecutor misstated the evidence in arguing that the trauma he suffered **[*185]** while living with his father for two years was not supported by the evidence. Robinson and Tracy Carter [*sic*], Lang's mother, testified about the trauma Lang suffered during the two years that he lived with his father and the counseling and psychiatric treatment that Lang received for this trauma after returning home.
>
> During rebuttal argument, the prosecutor stated that the jury could discount testimony from Lang's mother and sister about Lang's trauma. The prosecutor argued, "[I]t is all speculation as to what happened in that two-year period of time. Nobody knows. But they want you to speculate that bad things happened when there is *absolutely no evidence* of that."
> The prosecutor's argument mischaracterized the evidence because Robinson's and Carter's testimony constituted evidence of what happened to Lang when he lived with his father. Nevertheless, when viewed in its entirety, the prosecutor's misstatement did not contribute unfairly to the death verdict and did not create outcome-determinative plain error.
>
> Third, Lang argues that the prosecutor improperly faulted him for not taking his medications as a child. Lang complains that the prosecutor argued, "And we know that his mother on **[*186]** numerous occasions sought help for Eddie, but Eddie didn't take his medication."
> During final argument, the prosecutor mentioned Lang's failure to take his medications while summarizing the mitigating testimony. The prosecutor's argument followed Carter's testimony that Lang took medication for depression and other psychiatric or behavioral problems before and after he lived with his father. But she also stated that Eddie "did not take it all the time."
>
> Lang contends that the prosecutor's argument improperly criticized his struggle with mental health and turned a mitigating factor into an aggravating circumstance. Review of the state's argument in its entirety shows that the prosecutor's argument about Lang's medications was an isolated remark that did not convey the improper meaning that Lang suggests. Indeed, isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. Donnelly v. DeChristoforo (1974), 416 U.S. 637, 646—647, 94 S.Ct. 1868, 40 L.Ed.2d 431. Moreover, the court's instructions clearly described the aggravating circumstances that the jury was to consider during deliberations. No plain error occurred.

Lang, 129 Ohio St. 3d at 548—49 (paragraph numbers and internal citations omitted).

Lang argues that because the Ohio Supreme Court applied **[*187]** the wrong legal standard to this claim (*i.e.*, by failing to consider the cumulative effect of the challenged statements), AEDPA deference does not apply (Doc. 33 at 115). AEDPA deference does not

apply to this claim for a different reason: the Ohio Supreme Court reviewed the claim for plain error.

Lang first challenges the prosecutor's statements that "until the age of 10 life seemed to be pretty good" and that "there [was] absolutely no evidence" supporting Lang's half-sister and mother's testimony about Lang's time living with his father (Doc. 16 at 99 (quotation marks omited)). Lang points to *Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000)*, in which the court stated that "[m]isrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have a significant impact on the jury's deliberations.'" *Id. at 700* (quoting *Donnelly v. DeChristoforo, 416 U.S. 637, 646, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*). "This is particularly true when a prosecutor misrepresents evidence," the court explained, "because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Id.* (citing *Berger, 295 U.S. at 88*). The Supreme Court in *Donnelly* distinguished the "'consistent and repeated misrepresentation' of a dramatic exhibit in evidence," like **[*188]** calling an exhibit "blood-stained" when the prosecutor knew the exhibit was stained with paint, from "[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence." *416 U.S. at 646*.

This Court agrees with the Ohio Supreme Court that the prosecutor's statement concerning Lang's childhood was supported by evidence in the record and therefore rested on a "reasonable inference[] from the evidence adduced at trial." *Wogenstahl, 668 F.3d at 331*. This Court also agrees with the Ohio Supreme Court's finding that the prosecutors' remarks regarding the speculative nature of Lang's evidence concerning his time with his father are troubling. Lang's step-sister and mother's testimony did, in fact, constitute evidence of this period of Lang's life, even if the State questions the weight this evidence should be given.

Nevertheless, these comments were isolated, spanning only seven sentences of the prosecution's 15-transcript-page-long closing argument (*see* Doc. 22-3, Mit. T., at 92, 102). Viewed in context, the prosecutors' comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden, 477 U.S. at 181* (internal quotation marks omitted).

Lang also asserts that the prosecutor improperly **[*189]** "faulted Lang" for not taking his medications when he was a child (*see* Doc. 16 at 99 (quoting Doc. 22-3, Mit. T., at 92)). Lang argues this statement misrepresented facts in the record, turned mitigating circumstances into aggravating circumstances, and urged the jury to consider non-statutory aggravating factors. In doing so, the prosecutor misled the jury and prejudiced Lang (Doc. 16 at 100).

This Court disagrees. The prosecutor did not misrepresent the evidence. Lang's mother testified that her son "did not [take his medication] all the time" (Doc. 22-3, Mit. T., at 74). Nor was Lang denied due process by the prosecutor's argument. The prosecution may offer, and the jury is free to consider, "a myriad of factors to determine whether or not death is the appropriate punishment" once statutory aggravating factors are met. *Barclay v. Florida, 463 U.S. 939, 950, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)*. And the "consideration of a non-statutory aggravating circumstance, even if contrary to state law, does not violate the Constitution." *Smith v. Mitchell, 348 F.3d 177, 210 (6th Cir. 2003)* (citing *Barclay, 463 U.S. at 939*).

Alluding to Gang Activity. Lang argues the prosecutor repeatedly referred to Lang by the nickname "Tek" during his opening statement in the penalty phase of trial in an effort to associate Lang with gangs and violence (Doc. 16 at 100—01). The Ohio **[*190]** Supreme Court reviewed this claim for plain error, concluding:

> Fourth, Lang argues that the prosecutor committed misconduct by referring to him by the nickname "Tek" during the penalty-phase opening statements. During the state's opening statement, the prosecutor advised the jurors of the aggravating circumstances: "The first is that Eddie Lang, also known as Tek, committed the offense of * * *." The prosecutor repeated the reference to Lang's nickname in advising the jury about the second aggravating circumstance. The prosecutor also completed his opening statement by stating, "Based upon that I submit that * * * two sentences of death shall by [sic] pronounced against Eddie Lang, also known as Tek * * *."
>
> Lang argues that the prosecutor's reference to his nickname was an improper attempt to associate him with gangs and violence. As discussed in proposition VIII, no testimony was introduced explaining the meaning of Lang's nickname. Thus, Lang's claim that the prosecutor was trying to paint him as a gang member is speculative.

> Nevertheless, the prosecutor's use of Lang's nickname was unnecessary and may have been an attempt to impugn his character. But the prosecutor did not repeat **[*191]** Lang's nickname during the remainder of the penalty-phase proceedings. Although error, the prosecutor's brief remarks do not rise to the level of outcome-determinative plain error.

Lang, 129 Ohio St. 3d at 549 (paragraph numbers omitted).

This Court again agrees with the Ohio Supreme Court. Because there was no evidence offered at either phase of trial regarding the meaning Lang now ascribes to his nickname -- a nickname mentioned only three times in the prosecutor's brief opening statement, (Doc. 22-3, Mit. T., at 28—30) --it is speculative to assume the jury understood the nickname in the same manner.

Asking the Jury to Render Justice. Lang's final claim of prosecutorial misconduct is based on the prosecutor's request to the jury during his closing argument to "render justice" (Doc. 16 at 101(quoting Doc. 22-3, Mit. T., at 103)). The Ohio Supreme Court rejected this claim on plain-error review, stating:

> Finally, Lang argues that the prosecutor committed misconduct during closing argument by arguing that the jurors should "render justice" and impose a sentence of death.
>
> "There is nothing inherently erroneous in calling for justice * * *." The prosecutor's argument was within the creative latitude afforded both parties in closing arguments. No plain **[*192]** error occurred.

Lang, 129 Ohio St. 3d at 550 (paragraph numbers and internal citations omitted).

In *Young*, the Supreme Court found error in a prosecutor's request that the jury "do its job." *Young, 105 S. Ct. at 1047—48*. However, the Court found this comment did not "influence[the jury] to stray from its responsibility to be fair and unbiased." *Id. at 1048*. This Court finds the prosecutor's remark did not undermine the jury's ability to fairly judge the evidence.

Cumulative Effect. Lang argues that this Court must consider the cumulative effect of the purported prosecutorial misconduct discussed above (Doc. 33 at 115). The prosecutor's conduct during trial should be viewed in the context of the entire trial. *Darden, 477 U.S. at 182*. *See also Young, 470 U.S. at 12*. In judging whether prosecutorial misconduct denied a defendant a fair trial, a court may consider the "cumulative effect" of several instances of misconduct. *See Berger, 295 U.S. at 89*.

Viewing all of Lang's allegations of prosecutorial misconduct cumulatively and in the context of the entire trial, this Court concludes Lang's claims do not entitle him to habeas relief. This Court finds only a few instances of possibly improper conduct among these claims. Even if those acts were improper, and this Court considered the misconduct as a whole, Lang has failed **[*193]** to demonstrate that the misconduct was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *See Wogenstahl, 668 F.3d at 335*.

Twelfth Ground for Relief

Arbitrary Sentencing

Lang complains the trial court erred by accepting the jury's recommended sentence of death for Cheek's murder but only life without the possibility of parole for Burditte's murder. He argues that because he was convicted of the same charges for both crimes, with the same aggravating factors, the jury and trial court "improperly weighed who the victim was as an aggravating circumstance" in violation of the *Eighth* and *Fourteenth Amendments* and Ohio law (Doc. 16 at 95—98).

Lang raised this identical claim on direct appeal (*see* Doc. 18-1 at 1519—20). In his Petition, he implicitly concedes that the Ohio Supreme Court adjudicated the claim on the merits for purposes of AEDPA by arguing that the Ohio Supreme Court's decision violates *§ 2254(d)(1)* and *(d)(2)* (Doc. 16 at 98). However, in his Traverse, Lang argues the Ohio Supreme Court did *not* adjudicate this claim on the merits because it "misrepresented Lang's claim" as an inconsistent-verdict claim (Doc. 33 at 111). As *Harrington* makes clear, the substance of a state court's analysis is irrelevant in determining whether **[*194]** the claim was "adjudicated on the merits" under AEDPA. *Harrington, 131 S. Ct. at 784—85*. Lang raised this claim in state court and the Ohio Supreme Court ruled on the claim. Therefore, AEDPA applies.

In rejecting Lang's claim, the Ohio Supreme Court reasoned:

> In proposition of law XI, Lang argues that his death

sentence for Cheek's murder should be vacated because the jury's sentencing recommendations—life for Burditte's murder (Count One) and death for Cheek's murder (Count Two)—are arbitrary. Lang contends that the disparity in sentencing occurred because Burditte was a drug dealer and Cheek was not. Consequently, Lang argues, the jury improperly considered the victim's status as an aggravating circumstance in reaching its death verdict.

We reject Lang's argument. The jury verdicts are not inconsistent. The jury was required to "consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense." Here, the nature and circumstances of the offense showed that Burditte was involved in selling illegal drugs to Lang at the time of his murder. There was no evidence showing that Cheek was involved. In weighing the nature and circumstances of the **[*195]** offense, the jurors might have determined that Burditte's murder was mitigated because of Burditte's involvement in the events leading up to his murder. On the other hand, the jury might have decided that Lang's murder of Cheek was not mitigated at all.

Moreover, it is not for an appellate court to speculate about why a jury decided as it did. "'Courts have always resisted inquiring into a jury's thought processes * * *; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.' "*Id.*, quoting *United States v. Powell (1984), 469 U.S. 57, 66—67, 105 S.Ct. 471, 83 L.Ed.2d 461*.

Additionally, we reject Lang's claim that the jurors improperly considered Burditte's status as a drug dealer as an aggravating circumstance. The trial court properly instructed the jury on the aggravating circumstances that they could consider during their deliberations. The trial court's instructions included the admonition, "The aggravated murder itself is not an aggravating circumstance. You may only consider the aggravating circumstances that were just described to you and which accompanied the aggravated murder." It is presumed that the jury followed the trial court's instructions. Based on the **[*196]** foregoing, we overrule proposition XI.

Lang, 129 Ohio St. 3d at 553 (paragraph numbers and internal citations omitted).

Neither Lang nor the State identify clearly established federal law governing Lang's argument comparing his sentences for the murders of Burditte and Cheek, respectively. *See White v. Woodall, 134 S. Ct. 1697, 1706—07, 188 L. Ed. 2d 698 (2014)* ("The critical point is that relief is available under *§ 2254(d)(1)*'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question."). *Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932)*, on which the State relies (Doc. 23 at 87), governs a jury verdict with inconsistent findings of guilt on separate counts that involve the same evidence. *See Dunn, 284 U.S. at 393—94*. *Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)*, and *Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)*, on which Lang relies (Doc. 33 at 108—09), govern challenges to state sentencing procedures which a defendant argues result in the arbitrary imposition of a capital sentence. *See, e.g., Godfrey v. Georgia, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)*.[9] Neither controls in this case, where Lang alleges "inconsistent" sentences on separate counts.

Lang also argues that his death sentence is arbitrary and capricious because the jury and trial court must have improperly considered the non-statutory aggravating circumstance that Cheek was not a drug dealer, which Lang claims is the only factor distinguishing her from Burditte (Doc. 33 at 111—12). But the Ohio Supreme Court, addressing this very argument, found the sentences complied with state law, and "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction[,] binds a federal court sitting in habeas corpus." *Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2006)*. And as a matter of federal law, in *Barclay v. Florida, 463 U.S. 939, 950, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)*, the Court held that "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons

[9] Lang states in his Traverse that his sentence was "arbitrary and disproportionate as compared to his co-conspirators [*sic*] and compared to others similarly situated" (Doc. 33 at 112). This Court does not address **[*197]** Lang's perfunctory comparison of his sentence with Walker's sentence, a claim not included in Lang's Petition and not adequately developed in the briefs. *See United States v. Hall, 549 F.3d 1033, 1042 (6th Cir. 2008)* ("[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (internal quotation marks omitted).

eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment." **[*198]** The Court continued:

> [w]e have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see *Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)*, and as long as the decision is not so wholly arbitrary as to offend the Constitution, the *Eighth Amendment* cannot and should not demand more.

Id. at 951. Thus, even if the jury and trial court were influenced by Burditte's drug dealing in considering Lang's sentence, the "consideration of a non-statutory aggravating circumstance, even if contrary to state law, does not violate the Constitution." *Smith v. Mitchell, 348 F.3d 177, 210 (6th Cir. 2003)* (citing *Barclay, 463 U.S. at 939*).

Seventeenth Ground for Relief

Cumulative Error

Lang asserts the cumulative effect of all the constitutional errors he alleges deprived him of a fair trial and penalty-phase hearing (Doc. **[*199]** 33 at 137—38). Because Lang raised his cumulative-error claim in state postconviction proceedings, he preserved the claim for federal habeas review. But "cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue." *Williams v. Anderson, 460 F.3d 789, 816 (6th Cir. 2006)*.

CERTIFICATE OF APPEALABILITY ANALYSIS

This Court must determine whether to grant a Certificate of Appealability ("COA") for any of Lang's grounds for relief. The blanket grant or denial of a COA "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell, 258 F.3d 484, 487 (6th Cir. 2001)*. Lang may not appeal this Court's denial of any portion of his Petition "[u]nless a circuit justice or judge issues a certificate of appealability," which "may issue . . . only if the applicant has make a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)*. Lang must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel, 529 U.S. 473, 483—84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)* (internal **[*200]** quotation marks omitted). With respect Lang's procedurally defaulted claims, Lang must show "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Applying these standards, this Court denies a COA for grounds for relief 3, 4, 6, 8, 10 (only sub-claims regarding Lang's red clothing and recorded statement), 11 (sub-claims A, F, and G), 12, 14, 15, and 17. Similarly, this Court denies a COA for Lang's plainly defaulted grounds for relief, specifically grounds 5, 7, 9, 10 (except sub-claims relating to Lang's red clothing and recorded statement), 11 (sub-claims B, C, D, and E), 13, and 16. This Court grants a COA for Lang's ineffective assistance of trial counsel claim regarding mitigating evidence (ground 1) and his juror bias claim (ground 2).

CONCLUSION

For the foregoing reasons, this Court denies Lang's Petition for Writ of Habeas Corpus. This Court further certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could be taken in good faith as to Lang's first and second grounds for relief, and **[*201]** this Court issues a certificate of appealability pursuant to *28 U.S.C. § 2253(c)* and *Federal Appellate Rule 22(b)* as to those claims only. As to all remaining claims, this Court certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability, *28 U.S.C. § 2253(c)*.

IT IS SO ORDERED.

/s/ Jack Zouhary

JACK ZOUHARY

U. S. DISTRICT JUDGE

March 27, 2015

JUDGMENT ENTRY

This Court denies Lang's Petition for Writ of Habeas Corpus (Doc. 16). This Court further certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could be taken in good faith as to Lang's first and second grounds for relief, and this Court issues a certificate of appealability pursuant to *28 U.S.C. § 2253(c)* and *Federal Appellate Rule 22(b)* as to those claims only. As to all remaining claims, this Court certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability, *28 U.S.C. § 2253(c)*.

IT IS SO ORDERED.

/s/ Jack Zouhary

JACK ZOUHARY

U. S. DISTRICT JUDGE

End of Document

APPENDIX D

State v. Lang

Court of Appeals of Ohio, Fifth Appellate District, Stark County

August 23, 2010, Date of Judgment Entry

Case No. 2009 CA 00187

Reporter
2010-Ohio-3975 *; 2010 Ohio App. LEXIS 3375 **; 2010 WL 3314494

STATE OF OHIO, Plaintiff-Appellee -vs- ***EDWARD*** LEE ***LANG***, III, Defendant-Appellant

Subsequent History: Motion granted by *State v. Lang, 126 Ohio St. 3d 1610, 2010 Ohio 5075, 935 N.E.2d 425, 2010 Ohio LEXIS 2669 (2010)*

Decision reached on appeal by, Remanded by *State v. Lang, 129 Ohio St. 3d 512, 2011 Ohio 4215, 954 N.E.2d 596, 2011 Ohio LEXIS 2162 (2011)*

Discretionary appeal not allowed by, Motion denied by, Motion to strike denied by, As moot *State v. Lang, 131 Ohio St. 3d 1484, 2012 Ohio 1143, 963 N.E.2d 824, 2012 Ohio LEXIS 751 (2012)*

Habeas corpus proceeding at, Motion denied by, Without prejudice, Motion denied by, Motion granted by *Lang v. Bobby, 2014 U.S. Dist. LEXIS 150916 (N.D. Ohio, Oct. 23, 2014)*

Prior History: **[**1]** CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2006 CR 01824(A).

Disposition: Affirmed.

Core Terms

mitigation, trial court, post-conviction, aggravated, records, ineffective, murder, trial counsel, sentence, funds, evidentiary hearing, neuropsychological, proceeded, post conviction relief, entry of judgment, death sentence, childhood, discovery, disorder, cumulative error, sub judice, recommendation, half-sister, witnesses, killing, rights

Case Summary

Procedural Posture

Following a jury trial, the Stark County Court of Common Pleas (Ohio) convicted appellant inmate of two counts of aggravated murder, and one count of aggravated robbery, all with firearm specifications. He was sentenced to death on one count, plus life without eligibility for parole, 10 years, and three years for one firearm specification. His petition for postconviction relief under *R.C. 2953.21* was dismissed. The inmate appealed.

Overview

The inmate argued that the trial court violated his due process rights by preventing him from developing facts for his claim during the postconviction process. The appellate court held that the trial court did not abuse its discretion in denying the inmate's petition for postconviction relief. There was no error in denying his request for expert assistance and examination funding because *R.C. 2953.21* did not specifically provide for a right to funding or the appointment of an expert witness. Further, there was no error in declining to allow a postconviction evidentiary hearing because the trial court fully reviewed and analyzed the dehors facts and determined that their presentation would have made no difference in the outcome of the trial. Finally, there was no error in denying the relief petition because the inmate did not demonstrate that he received ineffective assistance of counsel. Trial counsel developed a mitigation strategy which allowed the jury to adequately weigh the mitigation evidence against the evidence of dual murder produced at the guilt phase of the trial. Even if more evidence would have been presented at mitigation, the outcome would not have been different.

Outcome
The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN1[] Criminal Law & Procedure, Postconviction Proceedings

A petitioner in a postconviction proceeding only possesses the rights given him by statute. R.C. 2953.21 itself does not specifically provide for a right to funding or the appointment of an expert witness in postconviction petition proceedings. Thus, it is not error for a trial court to deny a defendant's request for funds for expert witnesses in support of his petition for postconviction relief. However, a narrow exception to this funding rule has been recognized where a capital defendant claims mental retardation.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery by Defendant > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN2[] Criminal Law & Procedure, Postconviction Proceedings

A petition for postconviction relief is a civil proceeding. However, the procedure to be followed in ruling on such a petition is established by R.C. 2953.21, and the power to conduct and compel discovery under the Ohio Civil Rules is not included within the trial court's statutorily defined authority in this realm. Thus, petitioners do not have a right to discovery in postconviction relief proceedings, even in death penalty cases.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN3[] Criminal Law & Procedure, Postconviction Proceedings

In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing. Under R.C. 2953.21(E), when a person files an R.C. 2953.21 petition, the trial court must grant a hearing unless it determines that the petitioner is not entitled to relief. To make that determination, the court must consider the petition, supporting affidavits, and files and records, including, but not limited to, the indictment, journal entries, clerk's records, and transcript of the proceedings. R.C. 2953.21(C). Furthermore, when the trial court record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN4[] Criminal Law & Procedure, Postconviction Proceedings

A petition for postconviction relief does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. A defendant is entitled to postconviction relief only upon a showing of a violation of constitutional dimension that occurred at the time that the defendant was tried and convicted. An appellate court reviewing a trial court's decision in regard to the "gatekeeping" function in this context must apply an abuse-of-discretion standard. In order to find an abuse of discretion, the appellate court must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN5[] Criminal Law & Procedure, Postconviction Proceedings

A trial court has the discretion to review the credibility and weight of any evidentiary materials supporting a petition for postconviction relief. In reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn

to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN6[] Criminal Law & Procedure, Postconviction Proceedings

A petition for postconviction relief brought pursuant to R.C. 2953.21 will be granted only where the denial or infringement of constitutional rights is so substantial as to render the judgment void or voidable. In reviewing a trial court's denial of an appellant's petition for postconviction relief, absent a showing of abuse of discretion, an appellate court will not overrule the trial court's finding if it is supported by competent and credible evidence. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary, or unconscionable.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN7[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The standard of review for ineffective assistance claims is set forth in Strickland. A two-pronged analysis is required in reviewing a claim for ineffective assistance of counsel. First, an appellate court must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If an appellate court find ineffective assistance of counsel, an appellate court must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN8[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

A defendant is entitled to a fair trial but not a perfect one. Likewise, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN9[] Effective Assistance of Counsel, Trials

The effect of hindsight has been recognized and courts have been warned against second-guessing as to counsel's assistance after a conviction.

Criminal Law & Procedure > Juries & Jurors > Assembling the Jury Pool

HN10[] Juries & Jurors, Assembling the Jury Pool

Use of voter registration rolls to select the petit jury pool is not unconstitutional.

Criminal Law & Procedure > Appeals > Reversible Error > Cumulative Errors

HN11[] Reversible Error, Cumulative Errors

The doctrine of cumulative error provides that a conviction will be reversed where the cumulative effect of evidentiary errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not singularly constitute cause for reversal.

Counsel: For Plaintiff-Appellee: JOHN D. FERRERO, PROSECUTING ATTORNEY, RONALD MARK CALDWELL, KATHLEEN O. TATARSKY, Canton, Ohio.

For Defendant-Appellant: RACHEL TROUTMAN, TYSON FLEMING, ASSISTANT PUBLIC DEFENDERS,

Columbus, Ohio.

Judges: Hon. W. Scott Gwin, P. J., Hon. John W. Wise, J., Hon. Patricia A. Delaney, J. Gwin, P. J., and Delaney, J., concur.

Opinion by: John W. Wise

Opinion

Wise, J.

[*P1] Appellant ***Edward*** L. ***Lang*** III appeals from the decision of the Court of Common Pleas, Stark County, which denied his petition for post-conviction relief pertaining to his conviction and life sentence for the aggravated murder of Jaron Burditte and conviction and death sentence for the aggravated murder of Marnell Cheek. The relevant facts leading to this appeal are as follows.

[*P2] In 2006, appellant, age eighteen at the time, moved to Canton from Baltimore, Maryland, where he had lived almost all of his life. Once in Canton, he became acquainted with Antonio Walker. In October of that year, appellant and Walker discussed the possibility of robbing Jaron "C.J." Burditte, a participant in the local drug trade. Appellant and Walker decided **[**2]** to pull off the robbery by calling in a fake offer to buy crack cocaine from Burditte, and then coercing money from Burditte when he arrived in his vehicle.

[*P3] On October 22, 2006, appellant proceeded to make a cell phone call to Burditte, agreeing to pay $ 225 for a small quantity of crack cocaine. The two men arranged to meet on Sahara Avenue NE in Canton. Burditte, along with a female passenger, Marnell Cheek, then drove a Dodge Durango to that location, where appellant and Walker were waiting. Walker stayed outside Burditte's Durango, but appellant got into the back seat. Shortly thereafter, Walker heard two gunshots emanating from inside the vehicle.

[*P4] Appellant and Walker ran from the scene. The Durango proceeded through some yard areas, finally striking a parked Dodge Intrepid. An area resident heard some of the noise and went outside to check out what had happened. The resident saw two individuals slumped inside the Durango with apparent gunshot wounds to the head. He quickly called 911.

[*P5] **[**3]** After an initial police investigation, the Stark County Coroner conducted autopsies and determined that the cause of death for both Burditte and Cheek was a single gunshot to each of their heads.

[*P6] After further investigation, the Canton Police arrested appellant. At the station, appellant waived his Miranda rights and admitted to participating in the robbery of Burditte. However, he denied being the shooter and instead stated that Walker used his gun to kill Burditte and Cheek, while he waited in a nearby car.

[*P7] On December 11, 2006, the Stark County Grand Jury indicted appellant on two counts of aggravated murder, with firearm and death penalty specifications, and one count of aggravated robbery with a firearm specification. Appellant was charged alternatively as the principal offender and as the accomplice. Appellant pled not guilty to all charges and specifications. The matter proceeded to a jury trial commencing July 11, 2007.

[*P8] The jury thereafter found Lang guilty as charged, and, as part of its verdict, found that appellant was the principal offender in the two deaths.

[*P9] A separate sentencing/mitigation hearing was held subsequently. Among other things, the jury heard evidence, chiefly **[**4]** from appellant's mother and half-sister, about appellant's difficult and dysfunctional childhood. At the conclusion of the sentencing hearing, the jury recommended a life sentence of imprisonment without the possibility of parole for the one aggravated murder conviction (the Jaron Burditte killing), but a sentence of death for the other aggravated murder conviction (the Marnell Cheek killing).

[*P10] The trial court then independently reviewed the evidence of the aggravating circumstances and the mitigating factors and found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. Accordingly, the court imposed a sentence of death upon appellant for the aggravated murder of Marnell Cheek. The court also imposed the mandatory three-year term of actual incarceration for the three firearm specifications, but merged them into one for purposes of sentencing, and imposed it consecutively with the death sentence. The court also sentenced appellant to a term of life imprisonment without eligibility for parole for the aggravated murder of Jaron Burditte, as well as the maximum ten-year prison term for the aggravated robbery conviction, imposing these also consecutively **[**5]** with each other and with appellant's death sentence.

[*P11] Appellant thereafter filed a direct appeal of his

convictions and death sentence to the Ohio Supreme Court. That appeal is pending as of the date of this opinion. See *State v. Lang*, Supreme App. No. 2007-1741.

[*P12] In the meantime, on May 15, 2008, appellant filed a post-conviction petition in the trial court, pursuant to R.C. 2953.21. The majority of his claims challenged the effectiveness of trial counsel in the mitigation phase and the constitutionality of the PCR statute, particularly as it relates to discovery. The State filed a response, a motion to dismiss, and a motion for summary judgment. On June 15, 2009, the trial court issued a detailed 31-page judgment entry, sustaining the State's motion to dismiss and granting summary judgment in favor of the State of Ohio. The court also denied appellant's request for funds for a neuropsychological evaluation.

[*P13] Appellant filed a notice of appeal on July 15, 2009, and herein raises the following two Assignments of Error:

[*P14] "I. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT DENIED HIM ESSENTIAL MECHANISMS FOR OFFRECORD FACT DEVELOPMENT DESPITE SUFFICIENT OPERATIVE FACTS **[**6]** PRESENTED BY APPELLANT TO JUSTIFY HIS REQUESTS TO FURTHER DEVELOP THE FACTUAL BASIS FOR HIS CLAIMS.

[*P15] "II. THE TRIAL COURT ERRED IN DISMISSING LANG'S POSTCONVICTION PETITION WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT A MINIMUM, AN EVIDENTIARY HEARING."

I.

[*P16] In his First Assignment of Error, appellant contends the trial court violated his due process rights by preventing him from developing facts for his claim during the post-conviction process. We disagree.

Appellant's Post-Conviction Request for a Neuropsychological Examination

[*P17] In the case sub judice, appellant filed a motion for appropriation of funds, referencing therein a recommendation from Dr. Bob Stinson, who had conducted an evaluation, that appellant receive a neuropsychological examination. Dr. Stinson's review indicated that appellant has a history of emotional dysregulation, poor impulse control, low frustration tolerance, limited problem solving abilities, poor judgment, violence and aggression, and "strong indications of deficits in executive functioning generally." Motion for Appropriation of Funds at 5. Furthermore, Dr. Stinson noted that "there is strong evidence of neuropsychological deficits in **[**7]** Edward's case. *** It would be important to have Edward evaluated by specialists in the field of neurology, neurophysiology, and neuropsychology to determine the existence of brain dysfunction and/or neuropsychological deficits that would be consistent with a learning disorder, a cognitive disorder, an impulse control disorder, a neurological or neuropsychological disorder, and/or another mental illness or mental defect." Id. at 3-4. In addition, Dr. Thomas Boyd, an expert neuropsychologist, concurred with Dr. Stinson's recommendation.

[*P18] HN1[↑] "A petitioner in a postconviction proceeding only possesses the rights given him by statute." *State v. Bryan, Cuyahoga App.No. 93038, 2010 Ohio 2088, P 48*, (citations omitted). We note *R.C. 2953.21* itself does not specifically provide for a right to funding or the appointment of an expert witness in post-conviction petition proceedings. "Thus, it is not error for a trial court to deny a defendant's request for funds for expert witnesses in support of his petition for postconviction relief." *State v. Madison, Franklin App.No. 08AP-246, 2008 Ohio 5223, P 16*, citing *State v. Conway, Franklin App. No. 05AP-550, 2006 Ohio 6219, P 15*. We recognize the United **[**8]** States Supreme Court has potentially recognized a narrow exception to this funding rule where a capital defendant claims mental retardation. See *Atkins v. Virginia (2002), 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335*. However, appellant herein has not specifically raised such a claim.

[*P19] Upon review, we hold the trial court did not err in denying appellant's request for expert assistance and examination funding.

Appellant's Post-Conviction Request for Discovery

[*P20] As noted by this Court in *State v. Sherman (Oct. 30, 2000), Licking App. No. 00CA39, 2000 Ohio App. LEXIS 5034, 2000 WL 1634067*, HN2[↑] a petition for post-conviction relief is a civil proceeding. See, also, *State v. Milanovich (1975), 42 Ohio St.2d 46, 49, 325 N.E.2d 540*. However, the procedure to be followed in ruling on such a petition is established by *R.C. 2953.21*, and the power to conduct and compel discovery under

the Civil Rules is not included within the trial court's statutorily defined authority in this realm. See State v. Lundgren (Dec. 18, 1998), Lake App. No. 97-L-110, 1998 Ohio App. LEXIS 6164, quoting State v. Lott (Nov. 3, 1994), Cuyahoga App.Nos. 66388, 66389, 66390, 1994 Ohio App. LEXIS 4965; State v. Muff, Perry App. No. 06-CA-13, 2006 Ohio 6215, P 21.

[*P21] Thus, petitioners do not have a right to discovery in PCR proceedings, even **[**9]** in death penalty cases, and we find no merit in appellant's claim that he was erroneously denied post-conviction discovery in the case sub judice.

Appellant's Post-Conviction Request for an Evidentiary Hearing

[*P22] Appellant next challenges the trial court's decision to rule on his postconviction petition without holding an evidentiary hearing.

[*P23] The Ohio Supreme Court has recognized: HN3[] "In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing." *State v. Gondor, 112 Ohio St.3d 377, 388, 860 N.E.2d 77, 2006 Ohio 6679, P 51.* Under R.C. 2953.21(E), when a person files an R.C. 2953.21 petition, the trial court must grant a hearing unless it determines that the petitioner is not entitled to relief. To make that determination, the court must consider the petition, supporting affidavits, and files and records, including, but not limited to, the indictment, journal entries, clerk's records, and transcript of the proceedings. See R.C. 2953.21(C). Furthermore, " '*** when the trial court record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation. ***' **[**10]** " State v. Radel, Stark App.No. 2009-CA-00021, 2009 Ohio 3543, P 17, quoting State v. Cooperrider (1983), 4 Ohio St.3d 226, 228, 4 Ohio B. 580, 448 N.E.2d 452 (citation omitted).

[*P24] Nonetheless, HN4[] a petition for postconviction relief does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. State v. Wilhelm, Knox App.No. 05-CA-31, 2006 Ohio 2450, P 10, citing State v. Jackson (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819. A defendant is entitled to post-conviction relief only upon a showing of a violation of constitutional dimension that occurred at the time that the defendant was tried and convicted. State v. Powell (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13, 16. As an appellate court reviewing a trial court's decision in regard to the "gatekeeping" function in this context, we apply an abuse-of-discretion standard. See *Gondor, supra, at P 52*, citing State v. Calhoun (1999), 86 Ohio St.3d 279, 1999 Ohio 102, 714 N.E.2d 905. Accord State v. Scott, Stark App.No. 2006CA00090, 2006 Ohio 4694, P 34. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary **[**11]** or unconscionable and not merely an error of law or judgment. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 5 Ohio B. 481, 450 N.E.2d 1140.

[*P25] Appellant's PCR petition included, inter alia, the following documentation: (1) the trial court's order for release of records from the Baltimore Department of Social Services, dated June 13, 2007 (about one month before trial); (2) affidavit of Tracie Carter (appellant's mother); (3) affidavit of Dorian Hall, LSW, a mitigation specialist for the Ohio Public Defender (4) affidavit of Abigail Duncan, LCPC, one of appellant's former counselors; (5) affidavit and curriculum vitae of Dr. Bob Stinson, a psychologist; (6) a 2002 letter from Ms. Duncan; (7) memoranda and reports from the Maryland Child Welfare Services; (8) Baltimore school records; (9) hospital records; (10) a 2003 psychological diagnosis letter from Deborah H. Drummer, Ph.D.; (11) additional evaluation notes from Maryland; (12) various SSI records; (13) the 1999 Report of the Ohio Commission on Racial Fairness; and (14) additional notes and scientific articles.

[*P26] Appellant maintains he presented sufficient operative facts dehors the record entitling him to an evidentiary hearing. However, as we will **[**12]** more thoroughly discuss in addressing appellant's Second Assignment of Error, infra, the judgment entry sub judice reveals the trial court fully reviewed and analyzed the dehors facts suggested by appellant and determined they were cumulative, alternative to evidence presented at trial, lacking in objectivity, or speculative, and that their presentation would have made no difference in the outcome of the trial. As the Ohio Supreme Court noted in Calhoun, supra, HN5[] the trial court has the discretion to review the credibility and weight of any supporting evidentiary materials: "In reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." Id.,

paragraph one of the syllabus.

[*P27] Upon review, we are unpersuaded that the trial court abused its discretion in declining to allow a postconviction evidentiary hearing in this matter.

[*P28] Appellant's First Assignment of Error is therefore overruled.

II.

[*P29] In his Second **[**13]** Assignment of Error, appellant argues the trial court erred in denying his PCR petition. We disagree.

Standard of Review

[*P30] It is well settled that HN6[↑] a petition for postconviction relief brought pursuant to R.C. 2953.21 will be granted only where the denial or infringement of constitutional rights is so substantial as to render the judgment void or voidable. State v. Jackson, Delaware App.Nos. 04CA-A-11-078, 04CA-A-11-079, 2005 Ohio 5173, P 13, citing State v. Walden (1984), 19 Ohio App.3d 141, 146, 19 Ohio B. 230, 483 N.E.2d 859. In reviewing a trial court's denial of appellant's petition for postconviction relief, absent a showing of abuse of discretion, we will not overrule the trial court's finding if it is supported by competent and credible evidence. State v. Delgado (May 14, 1998), Cuyahoga App. No. 72288, 1998 Ohio App. LEXIS 2180, citing State v. Mitchell (1988), 53 Ohio App.3d 117, 559 N.E.2d 1370. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary or unconscionable. Blakemore, supra.

[*P31] HN7[↑] Our standard of review for ineffective assistance claims is set forth in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted **[**14]** this standard in the case of State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

[*P32] As an initial matter, we note that shortly after appellant was indicted in December 2006, death penalty-qualified counsel was retained and/or appointed to represent him. That same month, counsel filed a request for discovery and a motion for funds to hire a defense investigator, a psychological expert and a mitigation expert. According to the court's docket, before the month of January 2007 was **[**15]** over, defense counsel had filed thirty seven motions on appellant's behalf. In all, counsel filed over eighty-two motions, including a motion to permit defense to admit all relevant mitigating evidence.

Mitigation Evidence Issues

[*P33] The focus of appellant's present argument pertains to his representation at his mitigation hearing. At that time, appellant's counsel called two witnesses, appellant's mother and half-sister, to relate the harsh circumstances of appellant's childhood. Appellant's mother, Tracie Carter, first described how she met ***Edward*** "Coffee" ***Lang***, Sr., appellant's father, who was her landlord when she was a 19-yearold single mother of a two-year-old. Unable to afford the rent, she exchanged sex with Lang, Sr. (hereinafter "Coffee") for being able to stay in her apartment. According to Carter, she maintained a relationship with Coffee, even though he was physically abusive to her and abused heroin, cocaine, and alcohol. Carter, as well as his half-sister Yahnena, proceeded at the mitigation hearing to portray appellant's abuse-filled childhood. See Mitig. Tr. at 46-78.

[*P34] As part of his PCR petition, appellant provided additional documentation of his troubled life. Evidence **[**16]** was supplied that Coffee was around appellant for part of his toddler years, before Coffee went to prison. But during this period of time, according to a 1991 report, Coffee sexually abused appellant. PC Exh. 14, at 8-10. During that same time period, appellant and his siblings also "witnessed Coffee tying their mother up [for] 3-4 days, ordering her to perform fellatio, stabbing her in [the] chest with a pair of scissors, shooting her in the back of her leg, shooting windows out, cursing at her, beating her up, and attempting to set the house on fire with them in it." PC Exh. 18, at 18.1. In addition, the children reportedly had "witnessed Coffee raping [their mother] on several occasions." PC Exh. 14, at 5.

[*P35] Furthermore, appellant's older brother began acting out towards his siblings and mother. When the brother was 6 years old, he reportedly attempted to smother his mother to death (PC Exh. 18) and "brutally beat his siblings" (PC Exh. 14), including pushing his half-sister Yahnena Robinson down the stairs and hitting appellant (then 3 years old) in the head with a baseball bat. PC Exh. 18. He also reportedly acted out sexually towards appellant and Yahnena, ordering them to perform **[**17]** oral sex on him. Id., at 18-19; PC Exh. 14. The brother was eventually admitted to a psychiatric hospital. Id.

[*P36] This phase of appellant's childhood ended when he was about ten years old. Because of court-ordered parenting time, Coffee took appellant from Maryland at that time on what was supposed to be a two-week visitation in Delaware. However, Coffee did not return appellant to his mother, Tracie Carter, for nearly two years. During the time appellant lived with his father, he endured physical, sexual, and emotional abuse. PC Exh. 6, 38. Appellant was forced to stay in his bedroom for days at a time, and he was repeatedly beaten with "anything in reach." PC Exh. 6, at 17. In addition to enduring the physical abuse, appellant was falsely told by Coffee that his mother was dead. PC Exh. 6, at 21. Appellant, at this young age, began using drugs. Id. at 38.

[*P37] When he was reunited with his mother, appellant was wearing the same clothes that he had been wearing when he left two years before. Mitig. Tr. at 62. Tracie Carter described him at that time as "fragile" and undernourished. Id. He was covered in bruises, had a cigarette burn on his back, and he had a gash on his hand. Id. at 63. Emotionally, **[**18]** he was withdrawn, moody, and defiant. PC Exh. 6, at 21.

[*P38] The years that followed appellant's stay with his father included numerous psychiatric hospitalizations and more than one suicide attempt. Id. at p. 22, 25. During those years, appellant described to his counselors the abuse he suffered at the hands of his father, and he acknowledged anger and hatred toward him. Id. See also PC Exh. 38. Appellant's counselors observed his ongoing fear that his mother would abandon him, and they observed his inability to restrain himself from "'acting first' as a defense." PC Exh. 6, p.23. See also PC Exh. 38.

[*P39] Apparently, appellant did experience frequent periods of abandonment by his mother. Appellant's psychiatric therapist, Abigail Duncan, who worked with appellant when he was approximately fourteen years old, recalled in her affidavit a time when Tracie Carter moved out of the family home with her boyfriend and appellant's youngest brother. PC Exh. 5. She left appellant alone with his older brother and his sister Yahnena, "and would return just to check on them." Id. See also PC Exh. 10, 1/14/03 rpt. According to Duncan, appellant's life lacked structure and consistent treatment. PC Exh. 5.

[*P40] **[**19]** Despite this, appellant later performed "well in school... when he was living in a group home receiving proper medication for his mood disorder." See PC Exh. 10. When he received needed psychotropic medication, "[h]e attended all his classes and performed above average academically." Id., 1/14/03 report. But as soon as "[h]e ceased taking his medication, his emotional and behavioral status quickly deteriorated." Id.

[*P41] In September 2004, appellant completed a residential treatment program at Woodbourne Residential Treatment Center in Maryland. He was returned to his mother's care with instructions that he needed to deal with the trauma from his early childhood, but he never really did. Furthermore, appellant never finished high school, but he got a job with the census department. Mitig. Tr. at. 76. He moved in with his baby daughter and the child's mother. Id. at 75-76. But that potential for stability didn't last long, as appellant left the area he'd known his whole life and moved to Ohio.

[*P42] Appellant's chief challenge under the *Strickland* standard for allegations of ineffective assistance is that his defense counsel allegedly waited until the last minute to gather mitigating evidence; thus, **[**20]** "compelling evidence was not available at the time of his mitigation hearing." Appellant's Brief at 11. Appellant points to an order from the trial court, filed June 13, 2007, ordering release of records from Baltimore Social Services as proof of counsel's delay in seeking mitigation evidence. Appellant also faults the allegedly brief time trial counsel spent with his mother, Tracie Carter, as another example of failing to fully investigate his background. As evidence dehors the record to document these assertions, appellant submitted the affidavit of Dorian Hall, LSW, a mitigation specialist employed by the Ohio Public Defender. In support, appellant directs us to *Rompilla v. Beard (2005), 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L. Ed. 2d 360*, wherein the United States Supreme Court, quoting the 1982 version of the ABA Standards for Criminal Justice, recognized: "It is the duty of the lawyer

to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

[*P43] Nonetheless, our review of the additional documentation at issue leads us to conclude that the impact thereof is largely speculative. Appellant's **[**21]** trial counsel had already presented mitigation evidence about appellant's youth and the horrors of his life growing up. The record further does little to persuasively show a lack of investigation by trial counsel of appellant's background. Regarding the release of records order, few conclusions can be reached therefrom as to what records were provided in 2007 based on appellant's authorization and what value, if any, the records provided to appellant's mitigation team. Finally, in regard to the Ohio Public Defender affidavit, the evidence therein was given minimal weight because of the interest of the employee in the outcome of the litigation and because she had no direct knowledge of the conversations between Tracie Carter and the mitigation attorneys. See Judgment Entry at 13-14.

[*P44] Furthermore, as the State correctly notes, appellant's mother and half-sister presented a detailed picture of his youth and development. They testified to his various excursions into the mental health system and his treatment at the hands of his biological father. Appellant does not deny that his trial counsel interviewed various members of his family. Although Tracie Carter was able to recall that appellant **[**22]** had been in a psychiatric facility more than twenty-eight times, appellant points out that his mother was unable to articulate the identity of his mental health disorders, other than in lay terms, and he calls into question trial counsel's decision not to utilize a psychologist or mental health counselor at mitigation.

[*P45] However, we remain mindful that *HN8*[↑] "[a] defendant is entitled to a fair trial but not a perfect one." *State v. Bleigh, Delaware App.No. 09-CAA-03-0031, 2010 Ohio 1182, P133*, quoting *Bruton v. United States (1968), 391 U.S. 123, 135-136, 88 S.Ct. 1620, 20 L.Ed.2d 476*. Likewise, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie (1998), 81 Ohio St.3d 673, 675, 1998 Ohio 343, 693 N.E.2d 267*. In the case sub judice, the trial court determined that the strategy of trial counsel was to treat appellant's mother as a sympathetic character and not to portray her in a negative light, a strategy that easily could have been derailed with excessive information about her role in appellant's unfortunate upbringing. It is also not unreasonable to surmise that additional records may have also damaged appellant **[**23]** himself. As the trial court aptly noted, trial counsel's approach at mitigation was to "humanize" appellant's difficulties, rather than present them in detailed scientific terms. Judgment Entry at 24, 29.. Trial counsel thus developed a mitigation strategy which allowed the jury to adequately weigh the mitigation evidence against the evidence of dual murder produced at the guilt phase of the trial. We reiterate that the Ohio Supreme Court has recognized *HN9*[↑] the effect of hindsight and has warned against second-guessing as to counsel's assistance after a conviction. See *State v. Branco (June 8, 1992), Stark App.No. CA-8618, 1992 Ohio App. LEXIS 2940, 1992 WL 147437*, citing *Strickland, supra, at 689*.

[*P46] Furthermore, considering the second prong of Strickland, we note that after reviewing the evidence presented by appellant in his PCR appendix, the trial court consistently reached the conclusion throughout its written decision that even if more evidence would have been presented at mitigation, the outcome would not have been different. We are unable to conclude the trial court's conclusions in this regard were unreasonable, arbitrary, or unconscionable. The record clearly indicates that appellant's mental illness and **[**24]** childhood were presented to the jury through the mitigation witnesses, which the jury most likely credited given its recommendation of a life sentence for the Burditte killing. We are unpersuaded that additional and more detailed evidence about appellant's upbringing and mental health issues would have created a reasonable probability that the jury would have recommended a life sentence, rather than the death penalty, for the Marnell Cheek killing.

Jury Pool Issue

[*P47] Appellant secondly directs his claim of ineffective assistance to the entire capital trial and alleges ineffectiveness for failing to object to use of voter registration to select the jury pool. As the trial court found, however, this claim is barred by the doctrine of res judicata. Appellant counters that the trial court erred in its finding of res judicata because he presented evidence dehors the record, namely, the Report of the Ohio Commission on Racial Fairness commissioned by the Supreme Court of Ohio. See PCR Exh. 32. We note this 1999 report was prepared well before appellant's aggravated murder trial, and appellant points to no part

of the report that would have made a difference in his case. Moreover, the Ohio Supreme **[**25]** Court has held that HN10[] use of voter registration rolls to select the petit jury pool is not unconstitutional. See, e.g. State v. Yarbrough, 95 Ohio St.3d 227, 2002 Ohio 2126, P 103-106, 767 N.E.2d 216.

Cumulative Error Claim

[*P48] Appellant lastly maintains that cumulative errors during the trial resulted in reversible error. Appellant's Brief at 20. HN11[] The doctrine of cumulative error provides that a conviction will be reversed where the cumulative effect of evidentiary errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not singularly constitute cause for reversal. State v. DeMarco (1987), 31 Ohio St.3d 191, 31 Ohio B. 390, 509 N.E.2d 1256, paragraph two of the syllabus. Appellant does not clearly tie the doctrine to his ineffective assistance claims in this instance; however, notwithstanding this Court's past reluctance to embrace cumulative error as grounds for reversal (see *State v. Mascarella* (July 6, 1995), Tuscarawas App.No. 93AP100075), we find reversible error has not been demonstrated regarding appellant's mitigation hearing. See, also, *State v. Garner, 74 Ohio St.3d 49, 64, 1995 Ohio 168, 656 N.E.2d 623* (holding that the doctrine of cumulative **[**26]** error by which a conviction will be reversed does not apply absent multiple instances of harmless error).

Conclusion

[*P49] Upon review of the record and judgment entry in the case sub judice, we hold the trial court did not abuse its discretion in denying appellant's petition for postconviction relief.

[*P50] Appellant's Second Assignment of Error is therefore overruled.

[*P51] For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

JUDGMENT ENTRY

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

Costs assessed to appellant.

End of Document

APPENDIX E

State v. Lang

Supreme Court of Ohio

June 7, 2011, Submitted; August 31, 2011, Decided

No. 2007-1741

Reporter
129 Ohio St. 3d 512 *; 2011-Ohio-4215 **; 954 N.E.2d 596 ***; 2011 Ohio LEXIS 2162 ****

THE STATE OF OHIO, APPELLEE, v. LANG, APPELLANT.

Subsequent History: Motion granted by *State v. Lang, 129 Ohio St. 3d 1493, 2011 Ohio 5139, 954 N.E.2d 664, 2011 Ohio LEXIS 2395 (2011)*

Reconsideration denied by, Motion denied by *State v. Lang, 130 Ohio St. 3d 1419, 2011 Ohio 5605, 956 N.E.2d 310, 2011 Ohio LEXIS 2770 (2011)*

Prior History: [**1]** APPEAL from the Court of Common Pleas of Stark County, No. 2006-CR-1824A.

State v. Lang, 2010 Ohio 3975, 2010 Ohio App. LEXIS 3375 (Ohio Ct. App., Stark County, Aug. 23, 2010)

Disposition: Judgment accordingly.

Core Terms

argues, juror, trial court, murder, handgun, plain error, sentencing, instructions, proposition of law, death penalty, aggravating circumstances, specifications, gun, aggravated, questioning, mitigating factors, indictment, aggravated robbery, defense counsel, photographs, principal offender, mentally retarded, ineffective, witnesses, cross-examination, circumstances, speculative, clothing, testing, waived

Case Summary

Procedural Posture
Defendant appealed a judgment of the Court of Common Pleas of Stark County, Ohio, that convicted him of aggravated murder and aggravated robbery, arguing that the trial court erred in admitting prejudicial evidence and that the evidence was insufficient to support his murder convictions.

Overview

On review, the court held that testimony that defendant wore red all the time was irrelevant under *Evid. R. 401* and was erroneously entered under *Evid. R. 403* because the implication was that defendant was a member of the "Bloods" gang but no evidence was admitted at trial linking the murders to gang activity. However, given the substantial evidence of defendant's guilt, such testimony constituted harmless error. Further, the introduction of a gruesome photograph showing the bodies of the murder victims was admissible because it was probative of defendant's intent and the manner and circumstances of the victims' deaths. Although gruesome, the photographs supported the coroner's testimony and provided a perspective of the victims' wounds. In addition, sufficient evidence supported defendant's murder convictions because witnesses testified that defendant was the principal offender, the murder weapon belonged to defendant, and the police found the murder weapon in the back of the car that defendant was driving.

Outcome
Defendant's convictions and capital sentence were affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > Appellate Review

Criminal Law & Procedure > ... > Indictments > Contents > Sufficiency of Contents

Criminal Law & Procedure > ... > Standards of

Review > Plain Error > Indictments

HN1[] Indictments, Appellate Review

When a defendant fails to preserve objections to a defective indictment during the course of a trial, the issues are generally forfeited and must be reviewed under a plain error analysis except in rare cases of structural error.

Criminal Law & Procedure > ... > Indictments > Contents > Sufficiency of Contents

HN2[] Contents, Sufficiency of Contents

An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Defendants

HN3[] Particularized Need Standard, Defendants

An accused is not entitled to review the transcript of grand jury proceedings unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists that outweighs the need for secrecy. A particularized need is established when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial. Determining whether a particularized need exists is a matter within the trial court's discretion.

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Defendants

HN4[] Particularized Need Standard, Defendants

A defendant's speculative claim that the grand jury testimony might have contained material evidence or might have aided his cross-examination does not establish a particularized need.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Juror Misconduct

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN5[] Jury Deliberations, Juror Misconduct

Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Due process means a jury capable and willing to decide the case solely on the evidence before it and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Moreover, a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Juror Misconduct

HN6[] Jury Deliberations, Juror Misconduct

When presented with an issue of juror misconduct, a trial court should not decide and take final action ex parte but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial in a hearing with all interested parties permitted to participate.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Judicial Discretion

HN7[] Voir Dire, Judicial Discretion

The scope of voir dire is generally within the trial court's discretion, including voir dire conducted during trial to investigate jurors' reaction to outside influences.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN8[] Expert Witnesses, Daubert Standard

Evid. R. 702(C) requires that an expert's testimony be

based on reliable scientific, technical, or other specialized information. Under Evid. R. 702(C), if the expert's testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) the theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles; (2) the design of the procedure, test, or experiment reliably implements the theory; and (3) the particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of Evidence

Evidence > ... > Testimony > Expert Witnesses > Criminal Proceedings

HN9 **Province of Court & Jury, Weight of Evidence**

Expert witnesses in criminal cases can testify in terms of possibility rather than in terms of a reasonable scientific certainty or probability. The treatment of such testimony involves an issue of sufficiency, not admissibility. Questions about the certainty of the scientific results are matters of weight for the jury. Expert testimony regarding DNA evidence is similarly treated.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of Evidence

Evidence > ... > Scientific Evidence > Bodily Evidence > DNA

HN10 **Province of Court & Jury, Weight of Evidence**

Questions regarding the reliability of DNA evidence in a given case go to the weight of the evidence rather than its admissibility. No pretrial evidentiary hearing is necessary to determine the reliability of the DNA evidence. The trier of fact, the judge, or jury can determine whether DNA evidence is reliable based on the expert testimony and other evidence presented.

Evidence > Admissibility > Expert Witnesses

HN11 **Admissibility, Expert Witnesses**

Ohio has a split application of Evid. R. 702. Criminal cases adhere to the D'Ambrosio standard in allowing expert opinion in terms of possibilities to be admitted under Evid. R. 702. In contrast, Ohio courts require expert opinions in civil cases to rise to the level of probabilities before being admitted under Evid. R. 702.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN12 **Equal Protection, Nature & Scope of Protection**

The *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution*, Section 1, U.S. Const. amend. XIV, § 1, commands that no state shall deny to any person within its jurisdiction the equal protection of the laws. The Equal Protection Clause does not prevent all classification, however. It simply forbids laws that treat persons differently when they are otherwise alike in all relevant respects.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN13 **Criminal Process, Right to Confrontation**

The *Confrontation Clause of the Sixth Amendment to the United States Constitution*, *U.S. Const. amend. VI*, gives the accused the right to be confronted with the witnesses against him. However, the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Evidence > Relevance > Relevant Evidence

HN14[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

Evid. R. 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. In addition to relevancy, Evid. R. 403 requires a court to weigh the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury and to exclude evidence more prejudicial than probative. When considering evidence under Evid. R. 403, the trial court is vested with broad discretion.

Evidence > Relevance > Exclusion of Relevant
Evidence > Confusion, Prejudice & Waste of Time

HN15[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather, it refers to evidence that tends to suggest decision on an improper basis.

Evidence > ... > Exemptions > Prior Statements > Consistent Statements

HN16[] Prior Statements, Consistent Statements

Evid. R. 801(D)(1)(b) authorizes the admission of prior consistent statements that are offered to rebut charges that the testimony is influenced by an improper reward.

Evidence > ... > Exemptions > Prior Statements > Consistent Statements

HN17[] Prior Statements, Consistent Statements

See Evid. R. 801(D)(1)(b).

Evidence > ... > Exemptions > Prior Statements > Consistent Statements

HN18[] Prior Statements, Consistent Statements

Prior consistent statements that an offering party seeks to introduce to rehabilitate its witness must have been made before the alleged influence or motive to fabricate arose to be admissible under Evid. R. 801(D)(1)(b).

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

HN19[] Plain Error, Definition of Plain Error

Where defense counsel fails to object to the admission evidence at trial, all but plain error is waived. An alleged error is plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been otherwise. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN20[] Criminal Process, Right to Confrontation

The Confrontation Clause under *U.S. Const. amend. VI* bars testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant was afforded a prior opportunity for cross-examination.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN21[] Criminal Process, Right to Confrontation

When a declarant appears for cross-examination at trial, the Confrontation Clause under *U.S. Const. amend. VI* places no constraints at all on the use of his prior testimonial statements. The Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN22[] Conduct Evidence, Prior Acts, Crimes & Wrongs

Under *Evid. R. 404(B)*, evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's character in order to show criminal propensity. It may, however, be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

HN23[] Abuse of Discretion, Evidence

In capital cases, nonrepetitive photographs, even if gruesome, are admissible as long as the probative value of each photograph substantially outweighs the danger of material prejudice to the accused. Decisions on the admissibility of photographs are left to the sound discretion of the trial court.

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

HN24[] Demonstrative Evidence, Photographs

The term "gruesome" in the context of photographic evidence should, in most cases, be limited to depictions of actual bodies or body parts. Thus, photograph of bloodstains is not so gruesome to preclude its admission into evidence.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

HN25[] Standards of Review, Harmless & Invited Error

Where the defense invites error, defendant may not, on appeal, take advantage of an error that he himself invited or induced.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Penalties

HN26[] Capital Punishment, Aggravating Circumstances

Pursuant *R.C. 2929.04(A)(7)*, a defendant found guilty of aggravated murder may also be found guilty of the death penalty specification if defendant committed one of the enumerated felony murders and was either the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Tests for Prosecutorial Misconduct

HN27[] Prosecutorial Misconduct, Tests for Prosecutorial Misconduct

The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. The touchstone of the analysis is the fairness of the trial, not the culpability of the prosecutor.

Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

HN28[] Capital Punishment, Death-Qualified Jurors

The relevant inquiry during voir dire in a capital case is whether the juror's beliefs would prevent or substantially impair his or her performance of duties as a juror in

accordance with the instructions and the oath. Clearly, a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties.

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN29[] Admissibility, Expert Witnesses

Pursuant to Evid. R. 702(B), an expert may be qualified by reason of his or her specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony to give an opinion that will assist the jury in understanding the evidence and determining a fact at issue. Dittmore testified that he had experience setting up drug transactions in his present job and while serving on the police department's vice unit. Dittmore's specialized knowledge of drug-related transactions was knowledge of a matter not possessed by the average layman. Accordingly, Dittmore was qualified to testify as an expert on these matters under Evid.R. 702. Given his qualifications, the prosecutor's failure to tender Dittmore as an expert was of no consequence and did not result in plain error.

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN30[] Trials, Closing Arguments

An attorney may not express a personal belief or opinion as to the credibility of a witness. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN31[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

Reversal of a conviction based on ineffective assistance requires that the defendant show first that counsel's performance was deficient, and second that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial.

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN32[] Trials, Closing Arguments

Counsel for both sides are afforded wide latitude during closing arguments. Debatable trial tactics generally do not constitute a deprivation of effective counsel.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN33[] Brady Materials, Brady Claims

A trial court is not required to seal the prosecutor's file based on speculation that the prosecutor might have withheld exculpatory evidence.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Weight & Sufficiency

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Verdicts

HN34[] Substantial Evidence, Sufficiency of Evidence

A claim raising the sufficiency of the evidence invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law. In reviewing such a challenge, the 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. A claim that a jury verdict is against the manifest weight of the evidence involves a different test. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

HN35 **Imposition of Sentence, Victim Statements**

Victim impact testimony does not violate constitutional guarantees.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN36 **Capital Punishment, Aggravating Circumstances**

R.C. 2929.03(D)(1) provides that the prosecutor at the penalty stage of a capital proceeding may introduce any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN37 **Capital Punishment, Mitigating Circumstances**

The law requires that the mitigating factors be considered collectively, not individually.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

HN38 **Trials, Jury Instructions**

A judge's shorthand references to legal concepts during voir dire cannot be equated to final instructions given shortly before the jury's penalty deliberations.

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

HN39 **Capital Punishment, Bifurcated Trials**

It is the trial court's responsibility to determine what guilt-phase evidence is relevant in the penalty phase.

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

HN40 **Trials, Closing Arguments**

Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning.

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

HN41 **Trials, Closing Arguments**

Merely mentioning the personal situation of the victim's family, without more, does not constitute misconduct.

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

HN42 **Trials, Closing Arguments**

There is nothing inherently erroneous in calling for justice.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN43 **Capital Punishment, Mitigating Circumstances**

Inducing or facilitating the offense is a statutory mitigating factor. R.C. 2929.04(B)(1).

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN44[] Capital Punishment, Mitigating Circumstances

The presentation of mitigating evidence is a matter of trial strategy. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN45[] Capital Punishment, Aggravating Circumstances

In a capital case, the jury is required to consider and weigh the nature and circumstances of the offense against the aggravating circumstances proved beyond a reasonable doubt. R.C. 2929.04(B)

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > General Overview

HN46[] Standards of Review, Deferential Review

It is not for an appellate court to speculate about why a jury decided as it did. Courts have always resisted inquiring into a jury's thought processes through this deference, as the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN47[] Capital Punishment, Mitigating Circumstances

The assessment and weight to be given mitigating evidence are matters for the trial court's determination.

Criminal Law & Procedure > Sentencing > Costs

HN48[] Sentencing, Costs

Costs may be assessed against and collected from indigent defendants.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN49[] Capital Punishment, Mitigating Circumstances

While participation in criminal activity certainly carries with it an element of serious risk, the unlawful taking of a human life cannot be deemed less serious simply because the victim was involved in unlawful activity.

Headnotes/Syllabus

Headnotes

Criminal law—Aggravated murder—Death penalty upheld.

Counsel: John D. Ferrero Jr., Stark County Prosecuting Attorney, and Ronald Mark Caldwell and Kathleen O. Tatarsky, Assistant Prosecuting Attorneys, for appellee.

Timothy Young, Ohio Public Defender, Joseph E. Wilhelm, Chief Counsel, Death Penalty Division, and Benjamin D. Zober, Jennifer A. Prillo, and Rachel Troutman, Assistant Public Defenders, for appellant.

Judges: O'DONNELL, J. O'CONNOR, C.J., and LANZINGER and CUPP, JJ., concur. PFEIFER, LUNDBERG STRATTON, and MCGEE BROWN, JJ., concur separately. PFEIFER and MCGEE BROWN, JJ., concur in the foregoing opinion.

Opinion by: O'DONNELL

Opinion

[*607] [*512] O'DONNELL, J.**

[P1]** This is an appeal as of right by defendant-appellant, ***Edward Lang***. A jury convicted him of the aggravated murder of Marnell Cheek and Jaron Burditte and of aggravated robbery, with each count carrying gun specifications, and it recommended the sentence of death for the aggravated murder of Cheek and life with no possibility of parole for the murder of Burditte. The trial court accepted those recommendations and sentenced Lang accordingly. The court also imposed a ten-year term of imprisonment for the aggravated-robbery conviction and a three-year **[****2]** term for the gun specifications, which it had merged for sentencing.

[P2]** **[*513]** We affirm Lang's convictions and sentences of death and life without parole, but we remand for the proper imposition of postrelease control pursuant to R.C. 2929.191 on his sentence for aggravated robbery.

State's Case

[P3]** The state's case revealed that at 9:36 p.m. on October 22, 2006, Canton police officer Jesse Butterworth was dispatched to a traffic accident with injuries on Sahara Avenue in Canton. At the scene, Butterworth observed that a Dodge Durango had crashed into the back of a parked car. He discovered that the two people inside the Durango had been shot in the back of the head. They were later identified as Jaron Burditte, the driver, and Marnell Cheek, the front-seat passenger.

[P4]** Police investigators found a bag of cocaine in Burditte's hand. Investigators examining the inside of the Durango recovered two shell casings in the backseat area and a spent bullet in the driver's side door pocket. Additionally, two cell phones were found in the car, and a third cell phone was found in Burditte's pocket.

[P5]** One of the cell phones recovered from the Durango showed that calls had been received at 9:13 p.m. and 9:33 p.m., **[****3]** which was close to the time of the murders. Police learned that these calls had been made from a prepaid cell phone that was not registered in anyone's name. Phone records for the cell phone showed that two calls had been made to the phone number of Teddy Seery on the afternoon and evening of the murders.

[P6]** On October 24, 2006, Sergeants John Gabbart and Mark Kandel interviewed Seery. Following that interview, **[***608]** the police identified Lang as a suspect in the murders.

[P7]** At trial, Seery testified that he and Lang were together almost every day during the summer of 2006. Lang called Seery on the evening of October 22, but Seery did not recall what they discussed. On the morning of October 23, Seery was informed by another friend that someone had been murdered on Sahara Avenue. Lang came to Seery's house later that day.

[P8]** During the visit, Seery asked Lang "what happened at Sahara," because Lang stayed in that area. Lang told Seery that "he killed two people up there" that "[t]hey were going to rob." Lang then described what had occurred: "[H]e had called the guy up and the guy came and he saw there was a girl in the car. The guy passed him up. He called him back. The guy came back around, and **[****4]** he got in the car." Lang then said that he had gotten into the car and had "shot them * * * [t]wice." However, Lang did not tell Seery whom he was with or explain why he had shot the two people.

[P9]** **[*514]** The police obtained a warrant for Lang's arrest. On the evening of October 24, 2006, the police stopped Lang as he was parking his girlfriend's car at a local apartment. Lang gave police a false name when asked his identity, but police established his identity and arrested him. Police officers seized a 9 mm handgun and ammunition that had been wrapped inside a towel and were resting on the rear passenger floorboard of the car.

[P10]** On October 25, 2006, Sergeants Gabbart and Kandel interviewed Lang. After waiving his *Miranda* rights, Lang told police that on October 22, Antonio Walker had come to his house and had told him "he had somebody that [they] could rob." Lang agreed to join him. After Walker gave him Burditte's phone number, Lang called Burditte and made arrangements to purchase a quarter-ounce of crack cocaine for $ 225. Burditte and Lang agreed to meet later that night "off of 30th Street and Sahara," and Burditte said he would call Lang when he got close to that location.

[P11]** Lang stated that **[****5]** he gave his gun to Walker before they left the house because Walker had told him, "[A]ll [Lang] had to do was just be in the car with him basically." As they walked to the meeting location, Walker told Lang how the robbery was going to take place: Walker said they were going to get in the car and hold Burditte up, and he told Lang which direction to run afterwards.

[P12]** After reaching the meeting location, Burditte called Lang and told him that he was "right around the corner." After Burditte drove past them, Lang said that Walker had called Burditte on Lang's cell phone and told him where they were. The car then pulled up in front of Lang and Walker. Lang then described what happened: "I walked like on the other side of the car [and] I get in the back seat behind the passenger and he got in the back seat behind the driver. * * * We jumped in the car and he put the gun up dude head [sic] and told dude that he wanted everything and like in a moment of seconds he fired two shots. And I jumped out the car."

[P13]** Lang stated that they went to Walker's apartment after the shootings. Lang asked Walker why he shot the two people, and Walker said that "he felt as though dude was reachin' for somethin'. * **[****6]** * * And he wasn't * * * sure." Lang stated that he vomited in a bag. Lang also called "[his] home boy E" to get the gun melted down and disposed of. In the meantime, Walker wiped down the gun. Walker also told Lang that they needed to get rid of the cell phone, and Lang gave it **[***609]** to him. Walker then dismantled the phone and went outside to throw it in the dumpster.

[P14]** During the interview, Lang told police that he was surprised that Walker had shot the victims because the "plan was just to rob him." Lang also said, "I did not wanna do it. * * * He wanted to do it. * * * I just went with him for, that was my gun I needed some money."

[P15]** **[*515]** On October 26, 2006, Walker turned himself into the police after learning that the police were looking for him. Walker then talked to the police about the murders.

[P16]** At trial, Walker testified that on the evening of October 22, 2006, he, Lang, and Tamia Horton, a girlfriend of Lang, were at Horton's apartment. Lang had a gun out and said that he "needed to hit a lick" (commit a robbery) because he "needed some money." Lang mentioned that they could rob "Clyde," who was Jaron Burditte. Walker knew Burditte because they had been in the same halfway house together **[****7]** in 2004.

[P17]** Walker agreed to help Lang rob Burditte because he was also "short on money." Their plan was to arrange to buy drugs from Burditte and then rob him when he showed up for the sale. Lang then called Burditte and arranged to buy a quarter ounce of crack cocaine from him later that night.

[P18]** Shortly thereafter, Lang and Walker walked to their meeting location on Sahara Avenue. Lang loaded his 9 mm handgun while they waited for Burditte to arrive. When Burditte's Durango drove past them, Lang called Burditte and told him where they were. Burditte then arrived at their location and stopped in front of Lang and Walker.

[P19]** According to Walker, Lang got into the backseat on the driver's side of the Durango. Walker did not get into the Durango, explaining, "It didn't feel right to me." Walker then heard two gunshots and saw Lang get out of the vehicle and start running. Walker saw the Durango "crash[ ] up into the yard."

[P20]** Lang and Walker separately ran to Horton's apartment. Lang vomited in the bathroom. Walker asked whether Lang was all right, and Lang said, "[E]very time I do this, this same thing happens." Walker testified that he never saw Lang's handgun after they reached his apartment. **[****8]** He also denied throwing away Lang's cell phone.

[P21]** Michael Short, a criminalist with the Canton—Stark County crime lab, testified that none of the fingerprints collected matched Lang or Walker. Short also examined the handgun seized from Lang's vehicle and the spent bullet recovered from the Durango. He testified that testing showed that the handgun had fired the spent bullet. Testing also showed that the two cartridge cases found in the Durango's backseat had been ejected by this handgun.

[P22]** Michele Foster, a criminalist with the Canton-Stark County crime lab, examined Lang's clothing. Blood was found on Lang's red T-shirt and pants, but DNA testing showed that it was Lang's blood. No blood was found on Lang's coat, knit hat, white T-shirt, or the athletic shoes that were taken from the car. Soiling was also noticed on Lang's athletic shoes, jacket, and pants.

[*516] C **[**P23]** Foster also examined Walker's clothing. She found no blood on the hooded sweatshirt or the athletic shoes that Walker said he was wearing on October 22. But tan-colored soiling with fragments of dried plant material was noticed on the exterior of both his shoes.

[P24]** **[***610]** Foster conducted DNA testing of a swab taken from the trigger grips, slide, **[****9]** and magazine release on the 9 mm handgun. Foster detected low levels of DNA from at least two individuals on the swab. Foster testified, "Walker is not the major source of DNA that we detected from the swabbing of the pistol." She also testified, "[W]e can say that ***Edward Lang*** cannot be excluded as a possible minor

source to the DNA that we found on the weapon."[1] Because of the low level of DNA, Foster testified, "[W]e can't say to a reasonable degree of scientific certainty that this person is the source. In this particular case, the chance of finding the major DNA profile that we found on that pistol is 1 in 3,461," which is to say that "1 of 3,461 people could possibly be included as a potential source of the DNA."

[P25]** Dr. P.S.S. Murthy, the Stark County coroner, conducted the autopsies on Cheek and Burditte. Murthy testified that Cheek was shot at close **[****10]** range above the left ear. The gunshot traveled "left to right, downwards, and slightly backwards" and exited behind Cheek's right ear. Cheek's toxicology report was negative for the presence of any drugs or alcohol.

[P26]** Dr. Murthy testified that Burditte was shot in the back of the head. The trajectory of the shot was downwards, and the bullet exited through the left side of the victim's mouth. Dr. Murthy determined that the gunshot was a "near contact entrance wound" to the head. Burditte's toxicology report was positive for benzoylecognine, which is the metabolite for cocaine, and THCA, which is marijuana. Dr. Murthy concluded that a gunshot wound to the head was the cause of death for both victims.

[P27]** The defense presented no evidence during the guilt phase.

Case History

[P28]** Lang was indicted on two counts of aggravated murder pursuant to R.C. 2903.01(B). Count One charged Lang with the aggravated murder of Burditte while committing or attempting to commit aggravated robbery and/or aiding another in so doing. Count Two charged Lang with the aggravated murder of Cheek while committing or attempting to commit aggravated robbery and/or aiding another in so doing.

[P29]** **[*517]** Counts One and Two included death-penalty **[****11]** specifications for a course of conduct, R.C. 2929.04(A)(5), and for committing or attempting to commit aggravated robbery as the principal offender in the commission of the aggravated murder or, if not the principal offender, committing the aggravated murder with prior calculation and design, R.C. 2929.04(A)(7). Both counts also included gun specifications.

[P30]** Count Three charged Lang with aggravated robbery. This charge also included a gun specification.

[P31]** Lang pleaded not guilty to all charges. However, the jury found him guilty of the aggravated murders of Cheek and Burditte and of aggravated robbery, along with the associated gun specifications. The jury's verdict included findings that Lang was guilty as the principal offender (the actual shooter) of the two victims. Lang was sentenced to death for the murder of Cheek, to life without parole for the murder of Burditte, and to ten years in prison on the aggravated-robbery count. The court merged the gun specifications, for which it imposed an additional **[***611]** three-year term of imprisonment. Lang seeks reversal of his convictions and sentence in 22 propositions of law.

Pretrial and Trial Issues

[P32]** *Sufficiency of the indictment.* **[****12]** In proposition of law III, Lang argues that his indictment for aggravated robbery in Count Three is constitutionally defective because it fails to specify the mens rea element of the offense. Lang argues that the defective charge also affects Counts One and Two because aggravated robbery was the predicate felony for both aggravated-murder charges. He also argues that the death-penalty specifications for felony murder under R.C. 2929.04(A)(7) are defective because the predicate felony was aggravated robbery.

[P33]** We have considered similar arguments in prior cases. Lang's proposition of law is not well taken.

[P34]** Count Three of the indictment, the aggravated-robbery charge, followed the wording of R.C. 2911.01(A)(1). The indictment alleged that Lang "did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, have a deadly weapon on or about his person or under his control, to-wit: a Firearm, and did either display the weapon, brandish it, indicate that he possessed it, or used said weapon, and/or did aid or abet another in so doing, in violation of Section 2911.01(A)(1) of the Ohio Revised Code." **[****13]** Lang did not object to the indictment at trial.

---

[1] Foster may have misspoken in stating that Lang cannot be excluded as a "possible minor source" of the DNA. It appears from Foster's other testimony that she meant to say that Lang could not be excluded as a possible "major" rather than "minor" source of DNA found on the handgun. This matter is addressed more fully in proposition V.

[P35]** Lang invokes State v. Colon, 118 Ohio St.3d 26, 2008 Ohio 1624, 885 N.E.2d 917 ("Colon I"), in arguing that the indictment's failure to allege the **[*518]** mens rea for the offense of aggravated robbery constitutes structural error. In *Colon I*, this court held that the omission of a mens rea allegation in the indictment was a structural defect that rendered the conviction improper. Id. at ¶ 19. Further, we held that the issue could be raised for the first time on appeal. Id. However, in State v. Colon, 119 Ohio St.3d 204, 2008 Ohio 3749, 893 N.E.2d 169 ("Colon II"), this court clarified that HN1[↑] when a defendant fails to preserve objections to a defective indictment during the course of a trial, the issues are generally forfeited and must be reviewed under a plain-error analysis except in rare cases of structural error. Id. at ¶ 7.

[P36]** In State v. Horner, 126 Ohio St.3d 466, 2010 Ohio 3830, 935 N.E.2d 26, this court overruled *Colon I* and *Colon II* to the extent that they held that such indictments are defective. Id. at ¶ 45. *Horner* holds, HN2[↑] "An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure **[****14]** to identify a culpable mental state when the statute itself fails to specify a mental state." Id. at paragraph one of the syllabus. *Horner* also holds that a defendant's failure to make a timely objection to a defect in an indictment constitutes waiver of all but plain error. Id. at paragraph three of the syllabus.

[P37]** Based on *Horner*, the failure to include a mens rea element in Lang's indictment for aggravated robbery did not constitute plain error, because the indictment tracked the language of R.C. 2911.01(A)(1). For the same reasons, we reject Lang's argument that the aggravated felony-murder charges and the R.C. 2929.04(A)(7) specifications must be dismissed.

[P38]** Based on the foregoing, we overrule proposition III.

[P39]** *Disclosure of grand jury testimony.* In proposition of law VI, Lang argues that the trial court erred by denying his request for grand jury testimony.

[P40]** **[***612]** Lang made various pretrial motions requesting the names of the witnesses who testified before the grand jury and the transcripts of the grand jury testimony. The trial court ruled that the defense had failed to provide "any particularized need" for the transcripts and denied the request. The trial court also denied the defense motion to **[****15]** disclose the names of the grand jury witnesses. In a subsequent judgment entry, the trial court stated that it had reviewed the grand jury transcripts, which included the testimony of four witnesses, and determined that "the defendant has not provided a particularized need for the transcripts" and has "not met the burden to establish the disclosure" of them. The trial court also found that "no exculpatory or other information which must be disclosed to the defendant exists within said transcripts." The transcripts were sealed and made part of the appellate record.

[P41]** We have recognized a limited exception to the general rule of grand jury secrecy: HN3[↑] an accused is not entitled to review the transcript of grand jury **[*519]** proceedings "unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." State v. Greer (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus. A particularized need is established "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial." State v. Sellards (1985), 17 Ohio St.3d 169, 173, 17 OBR 410, 478 N.E.2d 781. **[****16]** Determining whether a particularized need exists is a matter within the trial court's discretion. Greer, paragraph one of the syllabus.

[P42]** Lang argues that the trial court erred by failing to disclose the grand jury testimony of his codefendant, Walker. But review of the grand jury testimony shows that Walker never testified before the grand jury. Thus, this claim lacks merit.

[P43]** Lang also makes a generalized argument that he needed the grand jury testimony to prepare for cross-examination of the witnesses and to adequately prepare for his defense. Lang also argues that he was unable to establish a particularized need without knowing who testified at the grand jury or the content of their testimony.

[P44]** HN4[↑] Lang's speculative claim that the grand jury testimony might have contained material evidence or might have aided his cross-examination does not establish a particularized need. See State v. Fry, 125 Ohio St.3d 163, 2010 Ohio 1017, 926 N.E.2d 1239, ¶ 68-69 (rejecting claim that the grand jury "must have" considered favorable or exculpatory evidence in returning the indictment); State v. Hancock, 108 Ohio St.3d 57, 2006 Ohio 160, 840 N.E.2d 1032, ¶ 71 (rejecting claim that "it seems apparent" **[****17]** that

grand jury witnesses made statements that "may" have been inconsistent with other statements or "may" have contained other unspecified "exculpatory or impeachment information"); *State v. Webb (1994), 70 Ohio St.3d 325, 337, 1994 Ohio 425, 638 N.E.2d 1023* (rejecting claim that grand jury testimony might have aided cross-examination by revealing contradictions).

[P45]** Lang's assertion that he did not know who testified during the grand jury or what they said provides no excuse for failing to establish a particularized need. Lang was required to show that nondisclosure of the grand jury transcripts would *probably* deprive him of a fair trial. *Greer, 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982*, paragraph three of the syllabus. Lang has failed to make such a **[***613]** showing, and nothing in the record (including the testimony under seal) supports it here. We find that the trial court did not abuse its discretion in ruling that Lang failed to establish a particularized need for the grand jury testimony.

[P46]** Based on the foregoing, we reject proposition VI.

[P47]** **[*520]** *Juror misconduct.* In **[****18]** proposition of law I, Lang argues that he was denied a fair trial because one of the jurors was related to Marnell Cheek, one of the victims.

[P48]** Before she was seated as a juror, juror No. 386 failed to disclose that her stepfather was Cheek's brother. Juror No. 386 failed to mention this relationship on either her juror questionnaire or her pretrial-publicity questionnaire. When asked to disclose her "personal knowledge" about the shooting deaths, juror No. 386 wrote, "Well the newspaper stated that both of them were shot execution style in the back of the heads over drugs." When asked to disclose what she had "heard, read, discussed or seen" concerning the shootings "from any source including * * * friends, neighbors, relatives, co-workers or family," juror No. 386 wrote, "None."

[P49]** Juror No. 386 also failed to disclose her relationship to Cheek during voir dire. Juror No. 386 indicated that she learned about the shootings from reading the newspaper but provided no further information about her relationship to Cheek during the questioning.

[P50]** Following the testimony of the state's first two witnesses, the prosecutor notified the court that Cheek's father had informed him that "Juror No. **[****19]** 386's mother is married to Marnell's brother." The trial court stated that he would address the matter during the "very next break."

[P51]** After the testimony of two more witnesses, the trial court, the prosecutor, and the defense counsel questioned juror No. 386 about her relationship to Cheek. Juror No. 386 acknowledged, "My mom is married to [Cheek's] brother" and that she had failed to previously disclose that information. Juror No. 386 also stated that she knew two of the spectators in the courtroom who were related to her mother through marriage. Juror No. 386 stated that she had met Cheek and had attended her funeral. However, juror No. 386 said that she had not talked to her mother, other relatives, or anybody else about the case. Despite her relationship to Cheek, juror No. 386 stated that she could remain fair. Finally, juror No. 386 stated that she had not talked to any of the other jurors about her relationship to Cheek.

[P52]** Following questioning, the prosecution moved to excuse juror No. 386, and the defense agreed. The trial court excused juror No. 386 and instructed her not to talk with any of the jurors about the case or why she was excused from the jury. Before leaving **[****20]** the courtroom, juror No. 386 reiterated that she had not previously talked to other jurors about this matter.

[P53]** Before the trial continued, the trial court informed the jurors that juror No. 386 had been excused because "she may have had a relative relationship with either a witness or a party or somebody that was involved in the case." The trial court then asked the jurors as a group whether any of them had had any **[*521]** discussions with juror No. 386 about this matter, and they indicated that they had not. The trial then resumed.

[P54]** First, Lang argues that the presence of juror No. 386 on the jury, even for a short period of time, deprived him of an unbiased jury. Yet *HN5*[↑] "due process does not require a new trial every **[***614]** time a juror has been placed in a potentially compromising situation. * * * Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer [v. United States (1954), 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654, 1954-1 C.B. 146]* * * *." *Smith v. Phillips (1982), 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78*; see also *Remmer*

[**21]** (when integrity of jury proceedings is in question, court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate"). Moreover, "a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown." *State v. Keith (1997), 79 Ohio St.3d 514, 526, 1997 Ohio 367, 684 N.E.2d 47*.

[P55]** Nothing in the record supports Lang's claim that the jury was tainted by the presence of juror No. 386. Before being excused, juror No. 386 assured the court that she had not talked to any of the other jurors about her relationship to Cheek. The other jurors also indicated during group questioning that they had had no conversations with juror No. 386 about this matter. Thus, Lang's bias claim is speculative and unsupported by the evidence.

[P56]** Second, Lang argues that the trial court erred by failing to excuse juror No. 386 from the jury immediately after being informed of the juror's relationship to the victim. Lang contends that the continued presence of juror No. 386 during the testimony of two more witnesses tainted the jury.

[P57]** Defense counsel requested that the **[****22]** trial court talk to juror No. 386 before other witnesses testified, to eliminate any risk that the juror's presence might taint the jury. The trial court replied, "There is no risk at this point. * * * We will do it at the very next break. We will do it before this juror has any opportunity to go down and talk to the jury. We won't let the juror leave the courtroom before she has a chance to go down and talk to them." The trial court then questioned juror No. 386 at the next break, and the juror was excused before she had had an opportunity to talk with the other jurors. Thus, this claim lacks merit.

[P58]** Finally, Lang argues that the trial court failed to conduct a hearing into the juror's misconduct and its possible effect on the other jurors as required by *Remmer, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654, 1954-1 C.B. 146*, and *State v. Phillips (1995), 74 Ohio St.3d 72, 88-89, [*522] 1995 Ohio 171, 656 N.E.2d 643*. *Remmer* set forth the procedures that a trial court should follow for inquiring into possible jury misconduct: *HN6*[↑] "The trial court should not decide and take final action ex parte * * * but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with **[****23]** all interested parties permitted to participate." *Remmer at 229-230*.

[P59]** The trial court conducted a *Remmer* hearing in the presence of the prosecutor, defense counsel, and the accused. The trial court and both counsel questioned juror No. 386. During questioning, juror No. 386 discussed her relationship to Cheek, admitted that she had failed to disclose this information to the court, and assured the court that she had not discussed this matter with any of the other jurors. Thereafter, the trial court questioned the other jurors as a group and obtained their assurance that they had not **[***615]** discussed this matter with juror No. 386. Neither the state nor the defense counsel objected to the questioning or requested an additional inquiry. Under these circumstances, we hold that no further inquiry was required.

[P60]** Nevertheless, Lang argues that the trial court was obligated to individually question each of the jurors to ensure that juror No. 386 had not spoken to them about Cheek. The trial court asked the jurors as a group: "Is there any member of the jury — I will take your silence if none did — but is there any member of the jury that she did discuss this with at all?" The trial court then stated, **[****24]** "I take it by your silence that she did not."

[P61]** No case authority support's Lang's position. *HN7*[↑] "The scope of voir dire is generally within the trial court's discretion, including voir dire conducted during trial to investigate jurors' reaction to outside influences." *State v. Sanders (2001), 92 Ohio St.3d 245, 252, 2001 Ohio 189, 750 N.E.2d 90*. The trial court's questioning and the jurors' negative response obviated the need for individual questioning. Moreover, neither the state nor the defense requested that the trial counsel individually question the jurors following this response. Thus, the trial court did not abuse its discretion by stopping there. See *State v. McKnight, 107 Ohio St.3d 101, 2005 Ohio 6046, 837 N.E.2d 315, ¶ 192*; *State v. Henness (1997), 79 Ohio St.3d 53, 65, 1997 Ohio 405, 679 N.E.2d 686* (upholding trial court's failure to question each juror individually).

[P62]** However, Lang contends that the trial court should have individually questioned juror No. 387, because the judge noted that juror No. 386 and juror No. 387 were seated next to each other and had been friendly. But Juror No. 386 assured the court that she had not talked to juror No. 387 about Cheek. Juror No. 387's silence during group questioning **[****25]** indicated that she had not talked to juror No.

386 about her relationship to any parties involved in the case. The trial court was permitted to rely on juror No. 387's silence in determining **[*523]** that juror's impartiality. See *McKnight at ¶ 191*. Trial counsel's failure to ask juror No. 387 any questions about possible conversations with juror No. 386 also indicated that the defense was satisfied with juror No. 387's response. Thus, the trial court did not abuse its discretion by failing to interrogate juror No. 387 individually.

[P63]** Based on the foregoing, we overrule proposition I.

[P64]** *DNA evidence*. In proposition of law II, Lang argues that expert testimony about DNA evidence linking him to the murder weapon was unreliable and should not have been admitted. He asks us to reconsider our holding in *State v. D'Ambrosio (1993), 67 Ohio St.3d 185, 1993 Ohio 170, 616 N.E.2d 909*.

[P65]** Michele Foster provided expert testimony about the DNA found on the handgun used in the killings. She stated that DNA was detected from "at least two individuals" at three different locations on the handgun. The prosecutor then questioned Foster about the comparison of Lang's and **[****26]** Walker's DNA with the DNA found on the handgun:

[P66]** "Q: Do you have an opinion as to a reasonable degree of scientific certainty as to whose DNA appears on that handgun?

[P67]** "A: In this particular case, we can say that Antonio Walker is not the major source of DNA that we detected from the swabbing of the pistol.

[P68]** "In this case we, based on our comparison, we can say that ***Edward Lang*** cannot be excluded as a possible minor **[***616]** source to the DNA that we found on the weapon.

[P69]** "Q: When you say not excluded, what do you mean by that?

[P70]** "A: Well, in this particular case, because we had such low level DNA, we can't say to a reasonable degree of scientific certainty that this person is the source.

[P71]** "In this particular case, the chance of finding the major DNA profile that we found on that pistol is 1 in 3,461," meaning that "1 of 3,461 people could possibly be included as a potential source of the DNA."

[P72]** Lang argues that Foster's DNA testimony suggested that Lang was the source of the DNA even though she could not testify that he was the source "to a reasonable degree of scientific certainty." Therefore, he maintains, the testimony should not have been allowed. Lang failed to object to such evidence at trial, **[****27]** however, and thus waived all but plain error. *State v. Childs (1968), 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545*, paragraph three of the syllabus.

[P73]** ***HN8***[⬆] *Evid.R. 702(C)* requires that an expert's testimony be based on "reliable scientific, technical, or other specialized information." Under *Evid.R. 702(C)*, if the expert's "testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

[P74]** **[*524]** "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles;

[P75]** "(2) The design of the procedure, test, or experiment reliably implements the theory;

[P76]** "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

[P77]** In *D'Ambrosio, 67 Ohio St.3d at 191, 616 N.E.2d 909*, the court held that ***HN9***[⬆] expert witnesses in criminal cases can testify in terms of possibility rather than in terms of a reasonable scientific certainty or probability. The treatment of such testimony involves "an issue of sufficiency, not admissibility." Id.; see also *State v. Jones (2000), 90 Ohio St.3d 403, 416, 2000 Ohio 187, 739 N.E.2d 300*. **[****28]** "'Questions about the certainty of the scientific results are matters of weight for the jury.'" *State v. Allen, 5th Dist. No. 2009-CA-13, 2010 Ohio 4644, ¶ 157*, quoting *United States v. Brady (C.A.6, 1979), 595 F.2d 359, 363*.

[P78]** Expert testimony regarding DNA evidence is similarly treated. In *State v. Pierce (1992), 64 Ohio St.3d 490, 1992 Ohio 53, 597 N.E.2d 107*, the court concluded that the trial court had properly admitted calculations as to the frequency probabilities of DNA evidence. *Pierce* held, ***HN10***[⬆] "[Questions regarding the reliability of DNA evidence in a given case go to the weight of the evidence rather than its admissibility. No pretrial evidentiary hearing is necessary to determine the reliability of the DNA evidence. The trier of fact, the judge or jury, can determine whether DNA evidence is reliable based on the expert testimony and other

evidence presented." *Id. at 501*.

[P79]** Foster's DNA testimony was admissible and did not result in plain error. Lang offered no evidence challenging the DNA evidence or the manner in which the samples were tested or collected, preferring to rely upon cross-examination of the expert. During cross-examination, Foster acknowledged that the DNA profile could not **[****29]** be entered into the Combined DNA Index System ("CODIS"), because **[***617]** there was such a small amount of DNA. Foster stated that the "statistic has to be more than 1 in 280 billion" to "say to a reasonable degree of scientific certainty [that] this person is a source." These answers weakened the certainty of the DNA evidence. But the jury remained free to assign this evidence whatever weight it deemed proper in arriving at the verdict.

[P80]** Nevertheless, Lang attacks the admissibility of the DNA evidence on several grounds. First, Lang argues that this court should overrule *D'Ambrosio, 67 Ohio St.3d 185, 1993 Ohio 170, 616 N.E.2d 909*, because its application to criminal but not civil cases denies him equal protection of the laws.

[P81]** **[*525]** *HN11*[↑] Ohio has a split application of *Evid.R. 702*. Criminal cases adhere to the *D'Ambrosio* standard in allowing expert opinion in terms of possibilities to be admitted under *Evid.R. 702*. In contrast, Ohio courts require expert opinions in civil cases to rise to the level of probabilities before being admitted under *Evid.R. 702*. See *Stinson v. England (1994), 69 Ohio St.3d 451, 1994 Ohio 35, 633 N.E.2d 532*, paragraph one of the syllabus; see also Jurs, Daubert, Probabilities and Possibilities, and the Ohio **[****30]** Solution: A Sensible Approach to Relevance Under *Rule 702* in Civil and Criminal Applications (2008), *41 Akron L.Rev. 609, 630*.

[P82]** *HN12*[↑] The *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section 1*, commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The *Equal Protection Clause* does not prevent all classification, however. It simply forbids laws that treat persons differently when they are otherwise alike in all relevant respects. *Nordlinger v. Hahn (1992), 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1*. Lang's equal protection argument can be rejected because criminal defendants and civil litigants have vastly different stakes and concerns and are not similarly situated. *See Mason v. Home Depot U.S.A., Inc. (2008), 283 Ga. 271, 274-275, 658 S.E.2d 603* (rejecting equal protection claim challenging more stringent requirements for admission of expert testimony in tort actions than in criminal cases).

[P83]** Second, Lang argues that the admission of Foster's expert testimony denied him his *Sixth Amendment* right to confrontation, because of his inability to confront a scientifically unreliable possibility. *HN13*[↑] The **[****31]** *Confrontation Clause of the Sixth Amendment to the United States Constitution* gives the accused the right to be confronted with the witnesses against him. However, the *Confrontation Clause* guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis sic.) *Delaware v. Fensterer (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15*.

[P84]** The trial court placed no limitations on the scope of cross-examination of Foster. Moreover, the record shows that Foster's cross-examination undermined the reliability of the DNA evidence by bringing out that such a small amount of DNA was found on the handgun that the DNA profile could not be entered into the CODIS database. Thus, we also reject this argument.

[P85]** Third, Lang argues that the admission of the DNA evidence failed to meet the *Evid.R. 401*, *402*, and *403* requirements, which address "relevancy and its limits."

[P86]** *HN14*[↑] *Evid.R. 401* defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination **[***618]** of the action more probable or less probable than it would be without the **[****32]** evidence." **[*526]** The "admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343*, paragraph two of the syllabus. Foster's DNA testimony was relevant because it tended to link Lang to the handgun used to kill the two victims.

[P87]** In addition to relevancy, *Evid.R. 403* requires a court to weigh the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury and to exclude evidence more prejudicial than probative. When considering evidence under *Evid.R. 403*, the trial court is vested with broad discretion. See *State v. Yarbrough, 95 Ohio St.3d*

227, 2002 Ohio 2126, 767 N.E.2d 216, ¶ 40.

[P88]** Lang argues that the DNA testimony should have been excluded because Foster's conclusions could not be made to a reasonable degree of scientific certainty, and it thereby misled the jury. Yet DNA evidence was highly probative in showing that Lang could not be excluded as a contributor of the DNA found on the handgun. DNA evidence also helped corroborate other evidence showing that Lang was the principal offender. Questions about the certainty of the **[****33]** DNA results went to the weight to be assigned to the evidence and not to its admissibility. See State v. Allen, 5th Dist. No. 2009-CA-13, 2010 Ohio 4644, ¶ 157.

[P89]** Lang also argues that the DNA evidence should have been excluded because the prosecutor improperly used it during his final argument to assert that the DNA proved that Lang was the actual killer. But the trial court was not required to exclude Foster's testimony because the prosecutor might later use such evidence with damaging effect during his final argument. HN15[] "Unfair prejudice '"does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."'" United States v. Bonds (C.A.6, 1993), 12 F.3d 540, 567, quoting United States v. Schrock (C.A.6, 1988), 855 F.2d 327, 335, quoting United States v. Mendez-Ortiz (C.A.6, 1986), 810 F.2d 76, 79. Moreover, the record shows that the prosecutor's comments, which were not objected to, represented "fair inference." See State v. Diar, 120 Ohio St.3d 460, 2008 Ohio 6266, 900 N.E.2d 565, ¶ 213-214. No plain error occurred.

[P90]** As a final matter, Lang argues that the **[****34]** improperly admitted DNA evidence requires reversal of his convictions because the state cannot prove beyond a reasonable doubt that this evidence did not affect the jury's decision. However, we reject this claim because the DNA evidence was properly admitted.

[P91]** Based on the foregoing, we overrule proposition II.

[P92]** *Prior consistent statements.* In proposition of law VII, Lang argues that Walker's prior consistent statements were improperly admitted under **[*527]** Evid.R. 801(D)(1)(b), a hearsay rule, and violated his *Sixth Amendment* right to confrontation.

[P93]** During the state's direct examination, Walker testified about his plea deal. He said that he had pleaded guilty to two counts of complicity to murder with firearm specifications and one count of complicity to commit aggravated robbery with a firearm specification. Walker also testified that he had received concurrent sentences for these offenses of "18 to life." The prosecutor then elicited the following testimony:

[P94]** **[***619]** "Q: And what were you asked to do because you were given that sentence?

[P95]** "A: Testify.

[P96]** "Q: Testify, how?

[P97]** "A: To give truthful testimony of the events of October 22.

[P98]** "Q: And that's the same story that you gave Detective Kandel when you **[****35]** were arrested on October 27?

[P99]** "A: Yes.

[P100]** "Q: Before you had any deal?

[P101]** "A: Yes."

[P102]** HN16[] Evid.R. 801(D)(1)(b) authorizes the admission of prior consistent statements that are offered to rebut charges that the testimony is influenced by an improper reward. It provides:

[P103]** HN17[] "(D) **Statements which are not hearsay** A statement is not hearsay if:

[P104]** "(1) *Prior statement by witness.* The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is

[P105]** "* * *

[P106]** "(b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive * * *." (Boldface and italics sic.)

[P107]** HN18[] Prior consistent statements that an offering party seeks to introduce to rehabilitate its witness must have been made *before* the alleged influence or motive to fabricate arose to be admissible under this rule. See Tome v. United States (1995), 513 U.S. 150, 157-158, 115 S.Ct. 696, 130 L.Ed.2d 574;

State v. Nichols (1993), 85 Ohio App.3d 65, 71, 619 N.E.2d 80; State v. Patel, 9th Dist. No. 24030, 2008 Ohio 4693, ¶ 9.

[P108]** **[*528]** Lang argues that Walker's police statement should not have been admitted as a prior consistent statement, because **[****36]** it was made after his motive for fabrication arose. However, ***HN19***[] defense counsel failed to object to the admission of the statement at trial and waived all but plain error. See Childs, 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus. An alleged error is plain error only if the error is "obvious," State v. Barnes (2002), 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240, and "but for the error, the outcome of the trial clearly would have been otherwise." State v. Long (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

[P109]** During his opening statement, defense counsel told the jury that Walker had entered into a plea agreement that allowed him to plead guilty to lesser charges. Defense counsel also informed the jury that in exchange for this deal, Walker signed an agreement to "testify truthfully at any proceeding, including trials, involving the case of [his] Co-Defendant, ***Edward Lang***." Defense counsel recited Walker's agreement: "I further understand **[****37]** that if I fail to cooperate and testify truthfully as agreed, this agreement and sentence can be voided by the State of Ohio, and I can be prosecuted to the fullest extent as allowed by law including have a consecutive sentence imposed." Defense counsel then concluded his opening statement by stating: "[A]fter you have heard all of the evidence you will come to the conclusion that the only evidence against Eddie Lang are the *statements of a person or persons with **[***620]** an interest in the case*" (Emphasis added.)

[P110]** Defense counsel's opening statement implied that Walker had had a motive to lie because of the favorable terms of his pretrial agreement. This was an allegation of recent fabrication or improper influence that allowed the state to introduce Walker's prior consistent statements to rehabilitate his testimony. See State v. Wolff, 7th Dist. No. 07 MA 166, 2009 Ohio 2897, ¶ 78 (allegations of recent fabrication during opening statement provided grounds for admitting prior consistent statement).

[P111]** Furthermore, Walker had made the statements at issue *before* he entered into his pretrial agreement. See State v. Howe (Sept. 30, 1994), 2d Dist. App. No. 13969, 1994 Ohio App. LEXIS 4352, 1994 WL 527612, *9 (prior consistent **[****38]** statement made before an offer of leniency admissible following a defense allegation that the offer established a motive to falsify); State v. Mullins (1986), 34 Ohio App.3d 192, 197, 517 N.E.2d 945. Thus, no error, plain or otherwise, occurred when the trial court admitted Walker's prior consistent statements.

[P112]** **[*529]** Lang invokes Crawford v. Washington (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, in arguing that Walker's testimony about his prior consistent statements violated his right to confrontation because those first statements had not been subject to cross-examination. In *Crawford*, the Supreme Court held that ***HN20***[] the *Confrontation Clause* bars "testimonial statements 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." Id. at 53-54.

[P113]** Lang argues that Walker's prior statement violated *Crawford*, because he did not have an earlier opportunity to cross-examine Walker about his police statement. But Walker testified at trial and was subject to cross-examination. ***HN21***[] "[W]hen the declarant appears for cross-examination at trial, the *Confrontation Clause* places no constraints at all on the use of **[****39]** his prior testimonial statements. * * * The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id. at 59, fn. 9. Accordingly, we reject Lang's *Crawford* claim.

[P114]** Based on the foregoing, we overrule proposition VII.

[P115]** *Inflammatory evidence and gruesome photographs.* In proposition of law VIII, Lang argues that the prosecutor elicited irrelevant and inflammatory evidence.[2] He also argues that the trial court erred in admitting gruesome crime-scene and autopsy photographs. He claims that the Rules of Evidence prohibit the introduction of this information.

---

[2] Lang's claims in this proposition are made against the prosecutor but are not alleged in terms of prosecutorial misconduct. In proposition of law IX, Lang recasts some of these allegations as prosecutorial misconduct.

[P116]** HN22[↑] Under Evid.R. 404(B), "Evidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character in order to show criminal propensity. "It may, however, be admissible * * * [to show] proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"

[P117]** 1. Inflammatory evidence. First, Lang argues that **[****40]** Walker improperly testified, over defense objection, that Lang wore red all the time. However, the trial court sustained the defense objection when the prosecutor asked Walker whether **[***621]** he was "familiar with the significance of red."

[P118]** Lang argues that Walker's testimony about the color red should not have been admitted because the implication was that Lang was a member of the "Bloods" gang. The state counters that the testimony that Lang wore red was relevant in showing his familiarity with firearms and the drug culture, and it contends that the very nature of these crimes pointed to gang-related homicides. **[*530]** However, no evidence was presented at trial linking the two murders to gang activity. Accordingly, testimony that Lang frequently wore red was irrelevant and should not have been admitted. But the testimony was brief, and no explanation was presented linking the color red to gang activity. Given the substantial evidence of Lang's guilt, such testimony constituted harmless error.

[P119]** Second, Lang argues that Sergeant John Dittmore, a Canton police officer, improperly testified that he supervises the police department's "Gang Unit." But trial counsel's failure to object to this testimony **[****41]** waived all but plain error. Childs, 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus.

[P120]** Lang argues that testimony about Dittmore's duties with the gang unit implied that he was involved in the investigation because of Lang's gang activity. In response, the state argues that Dittmore's testimony about his duties was relevant because of the possible gang-related nature of these crimes. This testimony was irrelevant and should not have been admitted, because there was no evidence linking the murders with gang activity. However, this testimony did not result in plain error in this case. Dittmore's testimony made no reference to Lang's gang involvement or affiliation, if any. Dittmore also testified that he worked closely with narcotics investigators, which would have explained why he was involved in this murder investigation.

[P121]** Third, Lang argues that Walker and Seery improperly testified that Lang's nickname was "Tech," or "Tek." Lang claims that this nickname suggested that he was familiar with guns and was violent, because "Tech" is shorthand for a type of 9 mm handgun. However, Lang failed to object to this testimony and thus waived all but plain **[****42]** error.

[P122]** There was no testimony explaining the meaning of Lang's nickname or its association with a 9 mm handgun. It is speculative to conclude that the jurors made such a connection. Thus, no plain error occurred. See State v. Gillard (1988), 40 Ohio St.3d 226, 230, 533 N.E.2d 272, 535 N.E.2d 315 (testimony that defendant's nickname was "Dirty John" was not plain error).

[P123]** Fourth, Lang argues that Sergeant Dittmore's testimony improperly suggested that Lang had previously purchased illegal drugs. Dittmore testified, over defense objection, that drug dealers do not sell drugs and deal with people they do not know. During redirect examination, Dittmore clarified that "small amounts of crack cocaine that are bought on the street, the street level dealers will sell to anybody. But larger amounts as in a quarter ounce of powder or crack or whatever is a larger amount of drugs * * *. That's going to be done more surreptitiously behind the scenes, and those people generally know each other." But Lang did not object to this testimony and waived all but plain error.

[P124]** **[*531]** Dittmore's redirect testimony showed the likelihood that Lang knew Burditte when he called him and set up the drug deal for a quarter ounce of **[***622]** crack **[****43]** cocaine. Such testimony was relevant because Lang told police he did not know Burditte prior to calling him. It also suggested that Lang's motive to kill Burditte was to avoid identification. Thus, Dittmore's redirect testimony was relevant and did not constitute plain error.

[P125]** Fifth, Lang argues that Walker improperly testified that after the murders, Lang vomited and said, "[E]very time I do this, this same thing happens." Lang claims that the prosecution used this testimony to imply that Lang had previously killed someone. However, defense counsel's failure to object to this testimony waived all but plain error.

[P126]** Lang's conduct and comments after the murders were relevant in reflecting his consciousness of guilt. See State v. Richey (1992), 64 Ohio St.3d 353,

357, 1992 Ohio 44, 595 N.E.2d 915. Moreover, the prosecution made no attempt to use Lang's comments as showing that he had previously murdered other people. No plain error occurred.

[P127]** Sixth, Lang argues that his statement admitting that he might be guilty of conspiracy to commit murder was improperly admitted. During the state's case-in-chief, the prosecution played the tape-recorded statement that Lang made to the police. The trial court, over **[****44]** defense objection, allowed the prosecutor to play a segment of the tape that included Lang's admission to conspiracy to commit murder:

[P128]** "(Officer) Kandel: * * * When everything went bad and you felt so bad about it, why didn't you call the police?

[P129]** "Lang: Basically that he used my gun and then that I was in the car when that shit happenin'. And then as though, you know what I'm sayin', that's *conspiracy to murder*.

[P130]** "* * *

[P131]** "Kandell: That's what you believe?

[P132]** "Lang: Yeah. If you right there at the scene of a crime and you witness somethin' or you bein' a part of somethin' no matter how much you played a part in it, if you involved in it, * * * that's *conspiracy to murder*" (Emphasis added.)

[P133]** After the tape was played, the trial court provided the jury with the following limiting instructions: "You may have heard in the statement some references by both sides to a concept known as conspiracy to murder. I would indicate to you that there are no charges in this case that alleged conspiracy to murder. You may take the Defendant's statement or the statements of the **[*532]** officers if they deal with the facts of this case, but not as they may discuss any legal conclusions because they may be correct or **[****45]** incorrect legally."

[P134]** Lang's opinion that he might be guilty of conspiracy to commit murder was irrelevant. No prejudicial error, however, resulted from playing this segment of Lang's statement, because the trial court's limiting instructions ensured that the jury did not improperly consider it. See State v. Noling, 98 Ohio St.3d 44, 2002 Ohio 7044, 781 N.E.2d 88, ¶ 49; State v. Heinish (1990), 50 Ohio St.3d 231, 241, 553 N.E.2d 1026.

[P135]** Seventh, Lang argues that Walker falsely testified that he did not know the make and model of the murder weapon. Walker testified that he saw Lang with a handgun before the murders. He testified, "[I]t was a grey and black gun. I didn't know what kind of gun it was at the time, but I found out it was a .9 [sic] millimeter." Walker later testified that while waiting for Burditte to arrive at the meeting point, Lang had trouble placing a round in the handgun. Walker also **[***623]** testified that he knew how to chamber a round on a 9 mm handgun.

[P136]** Lang claims that Walker's familiarity with how to load a 9 mm handgun shows that Walker lied when he said that he did not know the make and model of Lang's handgun. However, Walker's statement that he knew how to load a 9 mm handgun **[****46]** does not establish that Walker lied when he stated, "I didn't know what kind of gun it was at the time." Walker's credibility was a matter for the jury to decide after they heard his testimony. Moreover, the defense failed to object to such testimony and waived all but plain error. No plain error occurred.

[P137]** Finally, Lang argues that unreliable DNA evidence was improperly admitted. But as discussed in proposition II, this argument lacks merit.

[P138]** 2. Gruesome photographs. Lang argues that the trial court erred in admitting two gruesome crime-scene photographs and three gruesome autopsy photographs. However, trial counsel failed to object to this evidence at trial and waived all but plain error with respect to those exhibits. State v. Trimble, 122 Ohio St.3d 297, 2009 Ohio 2961, 911 N.E.2d 242, ¶ 132.

[P139]** HN23[↑] In capital cases, nonrepetitive photographs, even if gruesome, are admissible as long as the probative value of each photograph substantially outweighs the danger of material prejudice to the accused. State v. Morales (1987), 32 Ohio St.3d 252, 257, 513 N.E.2d 267; State v. Maurer (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, paragraph seven of the syllabus. Decisions on the admissibility **[****47]** of photographs are "left to the sound discretion of the trial court." State v. Slagle (1992), 65 Ohio St.3d 597, 601, 605 N.E.2d 916.

[P140]** State's exhibit No. 33-P is a decidedly gruesome photograph showing the bodies of Cheek and Burditte inside the Durango after the shooting. This **[*533]** photograph was probative of Lang's intent and the manner and circumstances of the victims' deaths.

See State v. Craig, 110 Ohio St.3d 306, 2006 Ohio 4571, 853 N.E.2d 621, ¶ 92. No plain error resulted from admitting this photograph.

[P141]** State's exhibit No. 33-R shows where a shell casing was found on the bloodstained area behind the passenger seat. However, the "photos of blood stains * * * do not have a shock value equivalent to a photograph of a corpse. HN24[↑] The term 'gruesome' in the context of photographic evidence should, in most cases, be limited to depictions of actual bodies or body parts." State v. DePew (1988), 38 Ohio St.3d 275, 281, 528 N.E.2d 542. Thus, the photograph of the bloodstains was not precluded from admission into evidence.

[P142]** State's exhibits Nos. 31A and B are autopsy photographs depicting the entry and exit gunshot wounds on Cheek's head. State's exhibit No. 32B depicts the exit wound **[****48]** of the gunshot through Burditte's mouth. Although these photographs are gruesome, each of them supported the coroner's testimony and provided a perspective of the victims' wounds. No plain error occurred in admitting these photographs. See State v. Trimble, 122 Ohio St.3d 297, 2009 Ohio 2961, 911 N.E.2d 242, ¶ 148.

[P143]** Based on the foregoing, proposition VIII is overruled.

[P144]** *Instructions*. In proposition of law IV, Lang argues that the trial court's instructions on the R.C. 2929.04(A)(7) specification failed to provide the jury with the option of finding that he was guilty under either the principal-offender element **[***624]** or the prior-calculation-and-design element of that specification.

[P145]** Lang failed to object to these instructions and waived all but plain error. State v. Underwood (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus. Moreover, defense counsel's proposed instructions included the language that Lang now contends was erroneous. Thus, HN25[↑] the defense invited any error and may not "'take advantage of an error which he himself invited or induced.'" State v. Bey (1999), 85 Ohio St.3d 487, 493, 1999 Ohio 283, 709 N.E.2d 484, quoting Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co. (1986), 28 Ohio St.3d 20, 28 OBR 83, 502 N.E.2d 590, **[****49]** paragraph one of the syllabus.

[P146]** During final instructions, the trial court advised the jury that it could find Lang guilty of aggravated murder in Counts One and Two if the jurors found that he "purposely caused the death" of the victims "while committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of aggravated robbery and/or did aid or abet another in so doing."

[P147]** The trial court also advised the jury that it could find Lang guilty of Specification Three, the felony-murder death-penalty specification that accompanied Counts One and Two, if it found that the "State proved beyond a reasonable doubt that the aggravated murder as set forth in [Counts One and Two] was **[*534]** committed while the Defendant was committing * * * the offense of aggravated robbery and the Defendant was the principal offender in the commission of the aggravated murder." The trial court advised the jury that the term "principal offender" meant the "actual killer."

[P148]** Lang argues that the trial court's instructions on the R.C. 2929.04(A)(7) specifications were incomplete because they did not advise the jury of the option of finding him guilty of the "prior calculation **[****50]** and design" alternative as set forth in the statute. Lang also argues that the jury may have found him guilty because the jurors were presented with an all-or-nothing choice between finding him guilty as the shooter or acquitting him. Compare Beck v. Alabama (1980), 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392.

[P149]** HN26[↑] Pursuant R.C. 2929.04(A)(7), a defendant found guilty of aggravated murder may also be found guilty of this death-penalty specification if the defendant committed one of the enumerated felony murders and was either "the principal offender in the commission of the aggravated murder *or*, if not the principal offender, committed the aggravated murder with prior calculation and design." (Emphasis added.)

[P150]** In *Beck*, the United States Supreme Court struck down an Alabama statute that prohibited lesser-included-offense instructions in capital cases. In so holding, the court stated, "[O]n the one hand, the unavailability of * * * convicting on a lesser included offense may encourage the jury to convict for an impermissible reason-its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty **[****51]** may encourage it to acquit for an equally impermissible reason-that, whatever his crime, the defendant does not deserve death. * * * [T]hese two extraneous factors * * * introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Id. at 642-643, 100 S.Ct. 2382, 65 L.Ed.2d 392See also Schad v. Arizona (1991), 501 U.S. 624, 646-647, 111 S.Ct. 2491,

115 L.Ed.2d 555.

[P151]** **[***625]** Here, the trial court's instructions on aggravated-murder counts presented the jury with the option of finding Lang guilty as the principal offender or as an aider or abettor. Unlike in *Beck*, the jury was presented with two options of finding Lang guilty of the aggravated-murder counts. The jury was instructed to consider the death-penalty specifications after making findings on the aggravated-murder counts. Under these circumstances, it is illogical to conclude that the jury would find the defendant guilty of Counts One and Two as an aider or abettor, but find him guilty of Specification Three as the principal offender. Accordingly, the court's instructions were not constitutionally defective.

[P152]** **[*535]** Moreover, Lang would have still been eligible for the death penalty **[****52]** if the jury had found that he had committed the aggravated murder with prior calculation and design. Thus, even if there was a *Beck* violation, such error was harmless.

[P153]** We reject Lang's claims on the basis of plain error and invited error and overrule proposition IV.

[P154]** *Prosecutorial misconduct*. In proposition of law IX, Lang argues that the prosecutor committed misconduct during the guilt-phase proceedings. However, except where noted, defense counsel failed to object and waived all but plain error. *Childs, 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545*, paragraph three of the syllabus.

[P155]** *HN27*[↑] The test for prosecutorial misconduct is whether the remarks were improper, and if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883*. The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Phillips, 455 U.S. at 219, 102 S.Ct. 940, 71 L.Ed.2d 78*.

[P156]** First, Lang argues that the prosecutor committed misconduct by improperly seeking a commitment from the prospective jurors that they would sign a death verdict. During voir dire, the prosecutor asked the prospective jurors **[****53]** whether they could sign a death verdict if all 12 of them agreed that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The prosecutor then asked individual jurors whether they could do so.

[P157]** The prosecutor's questioning was proper because *HN28*[↑] the relevant inquiry during voir dire in a capital case is whether the juror's beliefs would prevent or substantially impair his or her performance of duties as a juror in accordance with the instructions and the oath. *State v. Davis, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31, ¶ 76*, citing *Wainwright v. Witt (1985), 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841*. "Clearly, a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties." *State v. Franklin, 97 Ohio St.3d 1, 2002 Ohio 5304, 776 N.E.2d 26, ¶ 34*. Accordingly, Lang's argument in this regard is not well taken.

[P158]** Second, Lang argues that the prosecutor committed misconduct by failing to lay a foundation to establish Sergeant Dittmore's expertise before presenting his testimony about drug dealers and drug transactions. As discussed in proposition VIII, Dittmore testified that drug dealers **[****54]** sell "larger amounts of drugs * * * surreptitiously behind the scenes, and those people generally know each other."

[P159]** *HN29*[↑] Pursuant to *Evid.R. 702(B)*, an expert may be qualified by reason of his or her "specialized knowledge, skill, experience, **[***626]** training, or education regarding **[*536]** the subject matter of the testimony" to give an opinion that will assist the jury in understanding the evidence and determining a fact at issue. Dittmore testified that he had experience setting up drug transactions in his present job and while serving on the police department's vice unit. Dittmore's specialized knowledge of drug-related transactions was knowledge of a matter not possessed by the average layman. Accordingly, Dittmore was qualified to testify as an expert on these matters under *Evid.R. 702*. Given Dittmore's qualifications, the prosecutor's failure to tender Dittmore as an expert was of no consequence and did not result in plain error. See *State v. Skatzes, 104 Ohio St.3d 195, 2004 Ohio 6391, 819 N.E.2d 215, ¶ 97*.

[P160]** Lang also argues that the prosecutor committed misconduct during closing arguments by telling the jury that DNA evidence found on the handgun "proves * * * beyond a reasonable doubt that Eddie Lang **[****55]** * * * is the actual killer." He contends that expert testimony offered in regard to the DNA evidence does not support the prosecutor's argument. Lang incorporates his argument from proposition II in claiming that the DNA evidence was unreliable and should not have been admitted, because Foster could not testify to "a reasonable degree of scientific certainty" that Lang

was the source of DNA on the handgun. However, as discussed in proposition II, the DNA evidence was properly admitted. Thus, the prosecutor's argument about the DNA evidence was a reasonable theory and represented a fair inference based on the record. No plain error occurred.

[P161]** Fourth, Lang asserts the existence of prosecutorial misconduct in speculative comments made during closing argument, claiming that the prosecutor argued, over defense objection, that Lang "took the gun * * * and turned it toward Marnell who saw it coming because she put her hand up." Lang asserts that the prosecutor's assertion that Cheek raised her hand to ward off the fatal gunshot was not supported by the evidence.

[P162]** Dr. Murthy, the coroner, testified that Cheek was shot at close range, and the bullet had entered the left side of her head above **[****56]** the ear. He also testified that there was a "prominent area of stippling" found on the back of Cheek's left hand, which indicated that her hand was only a "few inches" from the muzzle of the gun. The evidence also showed that Cheek had been sitting in the front passenger seat and she had been shot from behind. Thus, the prosecutor's argument represented a fair inference that could be made from the record. See State v. Diar, 120 Ohio St.3d 460, 2008 Ohio 6266, 900 N.E.2d 565, ¶ 214-215.

[P163]** Lang also claims that the prosecutor's argument that Cheek "saw it (the bullet) coming because she put her hand up" was a comment that improperly focused on what the victim experienced in the final moments of her life. But the prosecutor's comments were not such remarks. Compare State v. Wogenstahl **[*537]** (1996), 75 Ohio St.3d 344, 357, 1996 Ohio 219, 662 N.E.2d 311. Even if the comments were improper, any errors were corrected by the trial court's instructions that the arguments of counsel were not evidence and that the jury was the sole judge of the facts. See State v. Waddy (1992), 63 Ohio St.3d 424, 436, 588 N.E.2d 819.

[P164]** Additionally, Lang contends that the prosecutor improperly speculated during his final argument that **[****57]** Lang's DNA was on the handgun "[f]rom firing the gun." Michael Short, a forensic expert, testified: "The discharging of a firearm would greatly increase the probability **[***627]** of finding * * * what they call touch DNA on the surfaces of a firearm." Lang's argument fails, because the prosecutor's argument represented a fair characterization of Short's testimony. No plain error occurred.

[P165]** Fifth, Lang argues that the prosecutor improperly vouched for several of the state's witnesses. HN30[↑] An attorney may not express a personal belief or opinion as to the credibility of a witness. State v. Williams (1997), 79 Ohio St.3d 1, 12, 1997 Ohio 407, 679 N.E.2d 646. "Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." State v. Davis, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31, ¶ 232.

[P166]** Lang claims that the prosecutor improperly vouched for Walker's testimony and bolstered Walker's claim that he did not shoot Cheek and Burditte. The prosecutor argued: "We know Antonio didn't enter the truck because he tells us that." These comments simply argue the evidence. The comments do not vouch for Walker's veracity or imply knowledge of facts outside **[****58]** the record.

[P167]** Lang also claims that the prosecutor vouched for the testimony of Short and his identification of the handgun. The prosecutor stated: "We know that this is the murder weapon beyond a reasonable doubt. Mike Short told you that." This is not vouching. The prosecutor merely summarized the evidence supporting his argument by referring to the witness who provided the testimony. Lang's argument is unpersuasive and rejected.

[P168]** Lang further claims that the prosecutor vouched for Seery's testimony. Here, the prosecutor argued: "But I submit to you, and you judge his credibility and you look at what he knew, he is telling the truth." The trial court sustained a defense objection to these comments and instructed the jury to "disregard the Prosecutor's indication that he believes that he was telling the truth." Thus, the trial court's instructions cured the effect of any improper vouching. See *State v. Garner (1995), 74 Ohio St.3d 49, 59, 1995 Ohio 168, 656 N.E.2d 623* (jury is presumed to follow the trial court's curative instructions).

[P169]** In addition, Lang recasts several of his objections in proposition VIII into claims of prosecutorial misconduct. Lang claims prosecutorial misconduct in introducing **[****59]** (1) testimony that Lang frequently wore red, to suggest to the jurors that he was a gang member, (2) Dittmore's testimony that he was a member of **[*538]** the police department's gang unit, (3) testimony that Lang's nickname was "Tech," in an effort to associate him with guns, (4) Walker's testimony that Lang vomited after the murders and said, "[E]very time I

do this, this same thing happens," (5) Lang's statement that he may be guilty of conspiracy to commit murder, and (6) Walker's testimony about the make and model of the murder weapon. But as discussed in proposition VIII, testimony that Lang frequently wore red constituted harmless error, and Lang's opinion about his guilt of conspiracy was not prejudicial. None of the other claims rise to the level of plain error.

[P170]** Finally, Lang argues that the extensive prosecutorial misconduct during the guilt phase carried over into the jury's penalty-phase deliberations. We reject this argument because prejudicial misconduct did not occur.

[P171]** Based on the foregoing, proposition IX is overruled.

[P172]** *Ineffective assistance of counsel.* In proposition of law X, Lang **[***628]** asserts that his counsel were ineffective during the guilt-phase proceeding. HN31[↑] Reversal of a conviction based **[****60]** on ineffective assistance requires that the defendant show first that counsel's performance was deficient, and second that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial. *Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674*. Accord *State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373*, paragraph two of the syllabus.

[P173]** First, Lang argues that his counsel were ineffective by failing to forcefully challenge the state's DNA evidence. However, the record belies this claim. During cross-examination, defense counsel elicited from Michele Foster, the state's DNA expert, that there was such a small amount of DNA obtained from the handgun that the DNA profile could not be entered into the CODIS database. Counsel also elicited from Foster, "[W]hen we say to a reasonable degree of scientific certainty this person is a source, that statistic has to be more than 1 in 280 billion."

[P174]** Lang also argues that defense counsel should have moved to suppress the DNA evidence under *Evid.R. 401 through 403* (relevant evidence). As discussed in proposition II, the state's DNA evidence was relevant because it tended to connect **[****61]** Lang to the handgun used to kill the victims. In addition, the trial court could have determined that the admission of the DNA evidence outweighed any danger of unfair prejudice, confusion of the issues, or misleading the jury. Thus, this ineffectiveness claim also lacks merit.

[P175]** Next, Lang argues that his counsel were ineffective by conceding that the DNA found on the handgun matched his DNA. During closing argument, his counsel stated:

[P176]** **[*539]** "The gun. I was interested in noting how Mr. Barr misstated the facts. He said Eddie Lang's DNA is on the gun.

[P177]** "That's not what I heard. I think the Crime Lab people said that he can't be excluded. I think that's what they said. I don't think they said it is conclusive.

[P178]** "Plus, there was some minor DNA that they couldn't identify whose DNA it was. *But maybe I am wrong. Maybe they did say that. It is conclusively Eddie Lang's DNA. Maybe that's true*" (Emphasis added.)

[P179]** Counsel's argument was a poor attempt to rectify his previous misstatements about the DNA evidence. But Lang contends that defense counsel's concession was unduly prejudicial because there was no conclusive proof that his DNA was found on the handgun. Even assuming that counsel's approach **[****62]** was deficient, Lang fails to establish prejudice under the *Strickland test* Evidence that Lang's DNA might be on the handgun was not surprising, because the handgun was his. Moreover, such evidence was not crucial to the outcome of the defense case. Lang's defense was that he gave Walker his handgun, and Walker shot the victims. Thus, testimony that Walker's DNA was not found on the handgun was the key evidence, and testimony about Lang's DNA was not. This ineffectiveness claim is rejected.

[P180]** Second, Lang argues that counsel were ineffective during final argument by comparing the jury to a lynch mob. During final argument, trial counsel stated:

[P181]** "A lynch mob is made up of the same people that make up a jury. They are citizens of the community, employers, **[***629]** employees, taxpayers, voters, they are the same people.

[P182]** "So what separates them? One thing separates a lynch mob from a jury and one thing only. That's your oath of office.

[P183]** "* * *

[P184]** "They (a lynch mob) are not interested in evidence. They are not interested in the fact that there is no forensic evidence linking Eddie Lang to either one of those murders. They are not interested in that.

[P185]** "A jury is. A jury is interested, and they want **[****63]** to know of four people in that vehicle on October 22, why do you run tests on three of them and not the guy that got the deal?

[P186]** "Why run tests on Jaron Burditte's clothes? Why run tests on Marnell Cheek's clothes? Why run tests on Eddie Lang's clothes, and stop, come to a halt with Antonio Walker's clothes? Why?

[P187]** "A jury, not a lynch mob, would be interested in that. They are made up of the same people.

[P188]** **[*540]** "Now, just because a jury takes an oath of office does not mean that they have to act like a jury. They can go in the jury room, close the jury door, hey, let's flip a coin. So guilty, let's go. Okay. Jury has spoken.

[P189]** "But the problem is violence was done to not only the Defendant but beyond that. Violence was done to the system. If I am indicted, if the Court is indicted, Prosecutor is indicted, if Mr. Koukoutas is indicted, even if one of those Deputies are indicted, the only safeguard we have is the oath of office.

[P190]** "Life will go on for everybody in this courtroom. If you act like a jury or if you act like a lynch mob."

[P191]** Lang argues that trial counsel lost credibility and alienated the jury when he made his lynch-mob argument. Lang contends that the jury may have perceived counsel's **[****64]** lynch-mob comparison as an attempt to play the race card, particularly because an African-American counsel made the argument on behalf of an African-American defendant.

[P192]** *HN32*[↑] Counsel for both sides are afforded wide latitude during closing arguments. *State v. Brown (1988), 38 Ohio St.3d 305, 317, 528 N.E.2d 523*. Debatable trial tactics generally do not constitute a deprivation of effective counsel. *State v. Phillips, 74 Ohio St.3d at 85, 656 N.E.2d 643*. Trial counsel's lynch-mob argument focused the jury's attention on their oath and obligation as jurors. Counsel's argument also highlighted the lack of forensic testing conducted on Walker's clothing. Lang's claim that counsel's argument alienated the jury by presenting the imagery of racist brutality is speculative. Thus, counsel's decision to make this argument was a "tactical" decision and did not rise to the level of ineffective assistance. *See Bradley, 42 Ohio St.3d at 144, 538 N.E.2d 373*.

[P193]** Third, Lang argues that his counsel were ineffective by failing to hire a forensic expert to conduct independent testing of Walker's clothing to obtain evidence to support his claim that Walker was the principal offender.

[P194]** The police seized Walker's **[****65]** shoes and the hooded sweatshirt he was wearing on the night of the murders, but not his pants. Foster examined Walker's shoes and hooded sweatshirt and found no blood or trace evidence. Gunshot-residue tests were not conducted on these clothes, because the state never requested it.

[P195]** Lang argues that defense counsel were ineffective by failing to secure a forensic expert to test the pants that **[***630]** Walker was wearing on the night of the murders for bloodstains and gunshot residue. However, counsel could not make such a request, because the police never seized his pants. Thus, this ineffectiveness claim lacks merit.

[P196]** As for the other clothing, counsel's failure to pursue independent testing of them appears to have been a tactical decision. See *State v. Hartman **[*541]** (2001), 93 Ohio St.3d 274, 299, 2001 Ohio 1580, 754 N.E.2d 1150*. Moreover, defense counsel used the state's failure to conduct testing of Walker's clothing during closing arguments as a reason for finding him not guilty. Finally, resolving this issue in Lang's favor would be speculative. "Nothing in the record indicates what kind of testimony an * * * expert could have provided. Establishing that would require proof outside the record, such as affidavits **[****66]** demonstrating the probable testimony. Such a claim is not appropriately considered on a direct appeal." *State v. Madrigal (2000), 87 Ohio St.3d 378, 390-391, 2000 Ohio 448, 721 N.E.2d 52*.

[P197]** Fourth, Lang argues that his counsel were unprepared to effectively cross-examine Dr. Murthy, the coroner. During cross-examination of Dr. Murthy, defense counsel asked about finding a firearm:

[P198]** "Q: Okay. When you examined the body of Jaron Burditte, you took a firearm off of that body, didn't you?

[P199]** "Mr. Scott (prosecutor): Objection.

[P200]** "Mr. Beane (trial counsel): It is in his report, Your Honor.

[P201]** "Mr. Barr (prosecutor): Where?

[P202]** "The Court: Let's find it in the report.

[P203]** "Mr. Beane: On the bottom, weapon, firearm.

[P204]** "Mr. Barr: No, no, that is the cause.

[P205]** "The Court: You can ask the question.

[P206]** "Q: The weapon down is firearm. That is the cause of death, not the fact that that is on him?

[P207]** "* * *

[P208]** "A: Yes, yes.

[P209]** "Q: Thank you.

[P210]** "The Court: So that the jury understands, in looking at the report, it was not on the person. It was just indicated that that was the cause of death."

[P211]** Lang contends that trial counsel's questioning showed that his counsel were unprepared and diminished their credibility with the jury. These claims are speculative. **[****67]** Moreover, counsel's mistake was quickly corrected to ensure that the jury was not misled. Thus, counsel's misstep made no difference in the outcome of the case.

[P212]** Fifth, Lang argues that his counsel were ineffective by failing to challenge the chain of custody of the handgun seized from the defendant's vehicle. Lang does not assert that there was an actual problem with the chain of custody. Rather, he contends that the state failed to establish the chain of custody for the gun between the time it was seized and when it was taken to the lab.

[P213]** **[*542]** Counsel's action appears to have been a tactical decision. Nothing in the record indicates that there was a problem with the chain of custody. Moreover, Sergeant Gabbard testified that the handgun was collected and forwarded to the Stark County Crime Lab. Given the "strong presumption" that counsel's performance constituted reasonable assistance, this **[***631]** claim is rejected. *State v. Bradley, 42 Ohio St.3d at 144, 538 N.E.2d 373*.

[P214]** Sixth, Lang argues that his counsel were ineffective by failing to request the court to seal the prosecutor's file for appellate purposes. Lang contends that sealing was necessary to ensure the complete disclosure of exculpatory **[****68]** evidence as required by *Brady v. Maryland (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215*. But ***HN33***[↑] the court was not required to seal the prosecutor's file based on speculation that the prosecutor might have withheld exculpatory evidence. *State v. Frazier, 115 Ohio St.3d 139, 2007 Ohio 5048, 873 N.E.2d 1263, ¶ 123*. Moreover, we denied a defense motion to seal the prosecutor's file that was filed with this court. *State v. Lang, 118 Ohio St.3d 1469, 2008 Ohio 3153, 889 N.E.2d 545*. Thus, this claim is also rejected.

[P215]** As a final matter, Lang raises other alleged acts of ineffective assistance of counsel, but even if we assume deficient performance by counsel, none prejudiced him. *Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674*. As discussed in other propositions of law, Lang was not prejudiced by his counsel's failure to object to the indictment (III), the instructions on the *R.C. 2929.04(A)(7)* specifications (IV), Walker's prior consistent statement (VII), gruesome photographs (VIII), prosecutorial misconduct (IX), or the failure to request the individual voir dire of jurors about their possible discussions with juror No. 386 (I).

[P216]** Furthermore, Lang was not **[****69]** prejudiced by his counsel's failure to object to testimony that his nickname was "Tech," or that Lang vomited and said, "every time I do this, this same thing happens," or Walker's testimony about the make and model of the handgun (VIII). Lang also suffered no prejudice from counsel's failure to object to Dittmore's testimony that he was employed by the police department's gang unit or his testimony about the selling practices of drug dealers (VIII).

[P217]** Based on the foregoing, we overrule proposition X.

[P218]** *Sufficiency and manifest weight of the evidence*. In proposition of law V, Lang challenges both the sufficiency and manifest weight of the evidence to convict him as the principal offender of the aggravated murders as charged in Specification Three of Counts One and Two.

[P219]** ***HN34***[↑] A claim raising the sufficiency of the evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the jury verdict as a matter of law. *State v. Thompkins (1997), 78 Ohio St.3d 380, 386, **[*543]** 1997 Ohio 52, 678 N.E.2d 541*. In reviewing such a challenge, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact **[****70]** 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.

[P220]** A claim that a jury verdict is against the manifest weight of the evidence involves a different test. "'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily **[***632]** against the conviction.'" Thompkins at 387, quoting State v. Martin (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 485 N.E.2d 717.

[P221]** Lang's sufficiency claims lack merit. Walker's and Seery's testimony, evidence that the murder weapon was found in Lang's possession, and DNA evidence sufficiently established Lang's guilt as the principal offender. **[****71]** The evidence showed that on the night of October 22, 2006, Lang and Walker agreed to rob a drug dealer. Lang suggested that they rob Burditte. Their plan was to meet Burditte, enter his car, and rob him. Lang then called Burditte and arranged a meeting to purchase crack cocaine from him that evening.

[P222]** Lang and Walker went to the meeting location later that night. Lang carried a 9 mm handgun and loaded it while they waited for Burditte to arrive. Shortly thereafter, Burditte and Cheek arrived. According to Walker, Lang got into the backseat of their vehicle and shot Burditte and Cheek.

[P223]** On the following day, Lang went to Seery's house and admitted to him that he had shot the victims. When the police later arrested Lang, they found a 9 mm handgun in the backseat of the car that he was driving. Forensic examination of the handgun identified it as the murder weapon. Additionally, Foster testified that Lang could not be excluded as a possible source of DNA that was found on the handgun.

[P224]** Nevertheless, Lang argues that the evidence is insufficient to convict him. Lang asserts that Walker's testimony was not credible, because he accepted a plea deal in exchange for **[****72]** his testimony against him. He also argues that Seery's testimony should be discounted because Seery had initially told police that he did not know anything about the killings. But these claims call for an evaluation of Walker's and Seery's credibility, which is not proper on review of **[*544]** evidentiary sufficiency. State v. Drummond, 111 Ohio St.3d 14, 2006 Ohio 5084, 854 N.E.2d 1038, ¶ 200.

[P225]** Lang also argues that none of his clothing was found with blood or gunshot residue, and Walker's clothing was untested. But Foster testified that she examined Walker's hooded sweatshirt and shoes and found no blood or other trace evidence linking Walker to the murders.

[P226]** Finally, Lang argues that none of the scientific evidence established that he was the principal offender. This argument overlooks evidence tending to show that Lang's DNA was found on the handgun and Walker's DNA was not. However, Lang continues to argue that the DNA evidence was unreliable because testing did not establish that his DNA was found on the handgun to a reasonable degree of scientific certainty. As discussed in proposition II, questions about the certainty of the DNA results went to the weight of the evidence and not its **[****73]** admissibility.

[P227]** Despite some discrepancies, the jury accepted the testimony of the state's witnesses. Furthermore, a review of the entire record shows that the testimony was neither inherently unreliable nor unbelievable. Therefore, witness testimony, circumstantial evidence, and forensic evidence provided sufficient evidence to prove beyond a reasonable doubt that Lang was guilty of the R.C. 2929.04(A)(7) specifications.

[P228]** Although Lang does not raise the point, we note that Foster provided conflicting testimony about the DNA evidence found on the handgun. Foster testified that Lang could not be excluded as a possible "minor" source of DNA. Foster then testified that the chance of finding the **[***633]** "major" DNA profile that was found on the pistol is 1 in 3,461. Foster also testified that there was a minor contributor to the DNA but "[t]here wasn't enough there of that second person * * * to compare to anyone * * * [and] we couldn't say anything about that minor person that was present." Thus, Foster's testimony that there was insufficient DNA to identify the minor contributor is inconsistent with her testimony that Lang could not be excluded as a possible "minor" source of the DNA that was **[****74]** found.

[P229]** It is apparent from the context of Foster's testimony that she misspoke about Lang's DNA. It

appears that Foster meant to say that Lang could not be excluded as a possible "major" source rather than a "minor" source of DNA found on the handgun.

[P230]** Even discounting Foster's testimony, sufficient evidence was presented to prove beyond a reasonable doubt that Lang is guilty of the aggravated murders as the principal offender. Walker's and Seery's testimony established that Lang was the principal offender. The murder weapon belonged to Lang, and the police found it in the back of the car that Lang was driving. Moreover, **[*545]** the presence of Lang's DNA on the handgun was not crucial to the state's case, because it was Lang's handgun, and his DNA could be expected to be found on it. Accordingly, the jury could have found Lang guilty of Specification Three of Counts One and Two without the DNA testimony.

[P231]** With respect to Lang's manifest-weight challenges, this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins, 78 Ohio St.3d at 387, 678 N.E.2d 541*, quoting *Martin, 20 Ohio App.3d at 175, 20 OBR 215, 485 N.E.2d 717*. Lang's challenge to the credibility **[****75]** of Walker's and Seery's testimony is unpersuasive. Thus, the jury neither lost its way nor created a manifest miscarriage of justice in convicting Lang of Specification Three of Counts One and Two.

[P232]** Based on the foregoing, we overrule proposition V.

Penalty-Phase Issues

[P233]** *Victim-impact testimony and readmission of guilt-phase evidence*. In proposition of law XV, Lang argues that the trial court erred by admitting victim-impact testimony from the victims' siblings in the mitigation phase of the trial. Lang also argues that the trial court erred in readmitting guilt-phase evidence during the penalty phase.

[P234]** 1. Victim-impact testimony. The trial court, over defense objection, allowed LaShonda Burditte, the sister of Jaron, and Rashu Jeffries, the brother of Cheek, to testify about the victims.

[P235]** LaShonda briefly discussed Jaron's early life, his schooling, his Navy enlistment, and his work record. LaShonda testified that Jaron married and had two daughters. She mentioned that Jaron was charged with possession of cocaine in 2005 and was sent to a halfway house, and he later lived with LaShonda. She also testified that Jaron and Cheek met in June 2006, and Jaron was 32 years old when he was killed.

[P236]** **[****76]** Rashu testified that Cheek was raised in Canton and was one of four children. He stated that Cheek graduated from Canton McKinley High School and was the mascot for the band. Rashu mentioned that Cheek married when she was 18 years old, and she had two children. Rashu also discussed Cheek's employment history and stated that she was 40 years old when she was killed.

[P237]** *HN35*[↑] Victim-impact testimony does not violate constitutional guarantees. **[***634]** *See Payne v. Tennessee (1991), 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720*. This court has permitted victim-impact testimony in limited situations in capital cases when the testimony is not overly emotional or directed to the penalty to be imposed. See *State v. Hartman, 93 Ohio St.3d at 292, 754 N.E.2d 1150*. In *Hartman*, the victim's mother briefly discussed the victim's early life, her schooling, her close-knit family, and the victim's contact with her family after she **[*546]** moved from North Carolina to Ohio. Id. The witness also testified, "[I]t has been an extremely bad time for us and will be from now on. She'll never leave our heart." Id.

[P238]** As in *Hartman*, LaShonda's and Rashu's testimony was not overly emotional. Both witnesses briefly summarized **[****77]** the victims' lives, their schooling, their marriages and children, and their work history. Neither witness mentioned the effect that the victim's death had on their families. Moreover, neither witness mentioned or recommended a possible sentence.

[P239]** Lang cites *State v. White (1999), 85 Ohio St.3d 433, 446, 1999 Ohio 281, 709 N.E.2d 140*, in arguing that the victim-impact testimony was improper. *White* held that victim-impact testimony about the impact on *victims of noncapital crimes* in a capital-murder case was improper. *Id. at 446-447*. Unlike in *White*, victim-impact testimony presented during Lang's trial addressed the impact on only the victims of capital crimes. Lang's reliance on *White* is rejected. Thus, the trial court did not abuse its discretion in admitting the limited victim-impact testimony.

[P240]** 2. Readmission of guilt-phase evidence. At the start of the penalty phase, the trial court, over defense objection, readmitted the handgun and the swab of the grip, trigger, and slide area of the handgun, Lang's police statement, two spent cartridges, one spent bullet, a photograph of the victims as they were found in

the Durango, and the coroner's photographs and autopsy reports.

[P241]** HN36[↑] R.C. 2929.03(D)(1) provides **[****78]** that the prosecutor at the penalty stage of a capital proceeding may introduce "any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing." See State v. DePew, 38 Ohio St.3d 275, 528 N.E.2d 542, paragraph one of the syllabus. The trial court did not abuse its discretion in readmitting this evidence because these items bore some relevance to the nature and circumstances surrounding the R.C. 2929.04(A)(5) and (A)(7) specifications.

[P242]** Based on the foregoing, proposition XV is overruled.

[P243]** *Instructions.* In proposition of law XIV, Lang argues that that the trial court's improper instructions rendered the jury's penalty-phase verdict unreliable.

[P244]** 1. Instructions on mitigating factors. During jury selection, the trial court advised the first group of prospective jurors, "If the State proved that the specific aggravating circumstance outweighed *any of the mitigating factors*, then you would have to, the law would require you to consider and to in fact order the death penalty." (Emphasis added.) The trial court provided similar instructions to subsequent groups of prospective jurors.

[P245]** **[*547]** Lang argues that the trial court's failure to advise **[****79]** the prospective jurors that they must weigh the mitigating factors collectively was improper and prejudicial. However, Lang's failure to object to these instructions waived all but plain error. Underwood, 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus.

[P246]** The trial court's voir dire instructions were incorrect. HN37[↑] "The law **[***635]** requires that the mitigating factors be considered collectively, not individually." State v. Fears (1999), 86 Ohio St.3d 329, 345, 1999 Ohio 111, 715 N.E.2d 136. However, the trial court's penalty-phase instructions properly advised the jurors of the correct standard for considering the mitigating factors. HN38[↑] "[T]he judge's shorthand references to legal concepts during voir dire cannot be equated to final instructions given shortly before the jury's penalty deliberations." State v. Stallings (2000), 89 Ohio St.3d 280, 285, 2000 Ohio 164, 731 N.E.2d 159. Thus, the trial court's penalty-phase instructions cured its earlier misstatements. See State v. Ahmed, 103 Ohio St.3d 27, 2004 Ohio 4190, 813 N.E.2d 637, ¶ 147. No plain error occurred.

[P247]** 2. Instructions on consideration of trial-phase evidence. During penalty-phase instructions, the trial court advised the jury:

[P248]** "Some of the evidence and testimony **[****80]** that you considered in the trial phase of this case may not be considered in this sentencing phase. We went through the exhibits. I've culled out only certain exhibits that will be with you in the jury room.

[P249]** "For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you. You will also consider all of the evidence admitted during the sentencing phase."

[P250]** Lang argues that the instructions improperly allowed the jury to determine which trial-phase evidence was relevant to the aggravating circumstances during the penalty phase. However, defense counsel failed to object to this instruction and waived all but plain error. Underwood, 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus. Neither plain error nor any other error occurred.

[P251]** HN39[↑] It is the trial court's responsibility to determine what guilt-phase evidence is relevant in the penalty phase. See State v. Getsy (1998), 84 Ohio St.3d 180, 201, 1998 Ohio 533, 702 N.E.2d 866. Here, the trial court's instructions on relevancy limited the jury's consideration of the guilt-phase evidence and testimony to the two aggravating circumstances **[****81]** and the mitigating factors. The trial court's instructions also made it clear that the jury would see only those guilt-phase exhibits that the trial judge admitted and deemed relevant. Viewing the penalty-phase instructions as a whole, we conclude that the trial court adequately guided the jury as to the evidence to consider in the penalty phase. Proposition XIV is overruled.

[P252]** **[*548]** *Prosecutorial misconduct.* In proposition of law XII, Lang argues that the prosecutor committed misconduct during the penalty-phase proceedings. However, defense counsel's failure to object waived all but plain error. Childs, 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus.

[P253]** First, Lang argues that the prosecutor

misrepresented the evidence during final argument by stating, "We know now that Eddie was born in Baltimore, Maryland, that *until the age of 10 life seemed to be pretty good*" (Emphasis added.) Lang argues that this argument mischaracterized the evidence because Yahnena Robinson, Lang's half-sister, testified, "A lot of times my mother didn't let him [Lang's father] come" to see Lang. Lang argues that Robinson's testimony shows that he did not have a good or normal **[****82]** childhood.

[P254]** Other testimony supported the prosecutor's argument. Robinson also testified, "We had a typical brother **[***636]** sister relationship. We would watch movies and play school, other things that an older sister do [sic] with a younger brother we shared and did" before Lang was ten. Thus, the prosecutor's argument represented fair comment. No plain error occurred.

[P255]** Second, Lang argues that the prosecutor misstated the evidence in arguing that the trauma he suffered while living with his father for two years was not supported by the evidence. Robinson and Tracy Carter, Lang's mother, testified about the trauma Lang suffered during the two years that he lived with his father and the counseling and psychiatric treatment that Lang received for this trauma after returning home.

[P256]** During rebuttal argument, the prosecutor stated that the jury could discount testimony from Lang's mother and sister about Lang's trauma. The prosecutor argued, "[I]t is all speculation as to what happened in that two-year period of time. Nobody knows. But they want you to speculate that bad things happened when there is *absolutely no evidence* of that." (Emphasis added.)

[P257]** The prosecutor's argument mischaracterized the **[****83]** evidence because Robinson's and Carter's testimony constituted evidence of what happened to Lang when he lived with his father. Nevertheless, when viewed in its entirety, the prosecutor's misstatement did not contribute unfairly to the death verdict and did not create outcome-determinative plain error. See *Bey, 85 Ohio St.3d at 497, 709 N.E.2d 484*.

[P258]** Third, Lang argues that the prosecutor improperly faulted him for not taking his medications as a child. Lang complains that the prosecutor argued, "And we know that his mother on numerous occasions sought help for Eddie, but Eddie didn't take his medication."

[P259]** During final argument, the prosecutor mentioned Lang's failure to take his medications while summarizing the mitigating testimony. The prosecutor's **[*549]** argument followed Carter's testimony that Lang took medication for depression and other psychiatric or behavioral problems before and after he lived with his father. But she also stated that Eddie "did not take it all the time."

[P260]** Lang contends that the prosecutor's argument improperly criticized his struggle with mental health and turned a mitigating factor into an aggravating circumstance. Review of the state's argument in its entirety **[****84]** shows that the prosecutor's argument about Lang's medications was an isolated remark that did not convey the improper meaning that Lang suggests. See *State v. Braden, 98 Ohio St.3d 354, 2003 Ohio 1325, 785 N.E.2d 439, ¶ 89*. Indeed, ***HN40***[↑] isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. *Donnelly v. DeChristoforo (1974), 416 U.S. 637, 646-647, 94 S.Ct. 1868, 40 L.Ed.2d 431*. Moreover, the court's instructions clearly described the aggravating circumstances that the jury was to consider during deliberations. No plain error occurred.

[P261]** Fourth, Lang argues that the prosecutor committed misconduct by referring to him by the nickname "Tek" during the penalty-phase opening statements. During the state's opening statement, the prosecutor advised the jurors of the aggravating circumstances: "The first is that Eddie Lang, also known as Tek, committed the offense of * * *." The prosecutor repeated the reference to Lang's nickname in advising the jury about the second aggravating circumstance. The prosecutor also completed his opening statement by stating, "Based upon that I submit that **[***637]** * * * two sentences of death shall by [sic] pronounced against **[****85]** Eddie Lang, also known as Tek * * *."

[P262]** Lang argues that the prosecutor's reference to his nickname was an improper attempt to associate him with gangs and violence. As discussed in proposition VIII, no testimony was introduced explaining the meaning of Lang's nickname. Thus, Lang's claim that the prosecutor was trying to paint him as a gang member is speculative. Nevertheless, the prosecutor's use of Lang's nickname was unnecessary and may have been an attempt to impugn his character. But the prosecutor did not repeat Lang's nickname during the remainder of the penalty-phase proceedings. Although error, the prosecutor's brief remarks do not rise to the level of outcome-determinative plain error.

[P263]** Fifth, Lang argues that the prosecutor committed misconduct by improperly making a victim-impact comment during the state's closing argument. Lang complains that the prosecutor argued, "We know that Eddie has a child just like Jaron and Marnell." Lang argues that the prosecutor's comments about the victims' children were made only to enhance the enormity of the crime. In the alternative, Lang argues that the prosecutor's statement about kids "just like Jaron and Marnell" presented the argument **[****86]** that the two victims had once been children too.

[P264]** **[*550]** The prosecutor's isolated remarks about the victims' children were made while summing up the mitigating evidence. HN41[] "Merely mentioning the personal situation of the victim's family, without more, does not constitute misconduct." State v. Goodwin (1999), 84 Ohio St.3d 331, 339, 1999 Ohio 356, 703 N.E.2d 1251. The prosecutor's brief remarks did not result in plain error. Moreover, Lang's alternative argument is speculative and lacks merit.

[P265]** Finally, Lang argues that the prosecutor committed misconduct during closing argument by arguing that the jurors should "*render justice*" and impose a sentence of death. (Emphasis added.)

[P266]** HN42[] "There is nothing inherently erroneous in calling for justice * * *." State v. Evans (1992), 63 Ohio St.3d 231, 240, 586 N.E.2d 1042. The prosecutor's argument was within the creative latitude afforded both parties in closing arguments. See State v. Davis, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31, ¶ 311. No plain error occurred.

[P267]** Based on the foregoing, proposition XII is rejected.

[P268]** *Ineffective assistance of counsel.* In proposition of law XIII, Lang argues that his counsel provided ineffective assistance on multiple occasions during **[****87]** the penalty phase.

[P269]** First, he argues that his counsel failed to offer evidence of Cheek's involvement in Burditte's criminal activities to show that Cheek "induced or facilitated" the offense.

[P270]** HN43[] Inducing or facilitating the offense is a statutory mitigating factor. See R.C. 2929.04(B)(1). Lang argues that his counsel should have established the existence of this factor by presenting evidence showing that Cheek was Burditte's girlfriend and knew that Burditte had planned to sell drugs on the night of the murders, because Burditte was found with a package of cocaine in his hand.

[P271]** No evidence was presented showing that Cheek was involved with the drug sale on the night of the murders. The fact that Cheek was sitting in the front seat with Burditte at the time of the drug sale is not sufficient to establish her involvement or show that she "induced or facilitated" the offense. R.C. 2929.04(B)(1); **[***638]** see State v. Williams, 79 Ohio St.3d at 18, 679 N.E.2d 646. Moreover, Lang's assertion that his counsel should have presented evidence of Cheek's involvement in Burditte's other criminal activities is not well founded, because nothing shows that such evidence existed. Thus, this is a speculative claim **[****88]** and it lacks merit.

[P272]** Even if such evidence did exist, the presentation of testimony suggesting that Cheek induced or facilitated her own murder might have backfired on the defense. The jury might have viewed trial counsel's attempt to present such evidence as unnecessarily attacking Cheek's character. Thus, counsel were not **[*551]** ineffective by failing to offer evidence suggesting that Cheek induced or facilitated the offense.

[P273]** Second, Lang argues that his counsel failed to fully investigate, prepare, and present mitigating evidence.

[P274]** HN44[] The presentation of mitigating evidence is a matter of "trial strategy." State v Keith, 79 Ohio St.3d at 530, 684 N.E.2d 47. "'Moreover, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."'" State v. Bryan, 101 Ohio St.3d 272, 2004 Ohio 971, 804 N.E.2d 433, ¶ 189, quoting Wiggins v. Smith (2003), 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471, quoting Strickland v. Washington, 466 U.S. at 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674.

[P275]** Lang claims that his counsel were deficient because they failed to collect and present his medical records, school records, police records, and social-**[****89]** service records to corroborate the mitigation testimony of Carter and Robinson.

[P276]** Defense counsel employed a mitigation expert, a psychologist, and a criminal investigator in preparing for trial. Each of these individuals began working on Lang's case several months before the penalty phase. The defense also requested records

about Lang from the Department of Social Services in Baltimore, Maryland, which was Lang's childhood home. Thus, the record shows that defense counsel thoroughly prepared for the penalty phase of the trial.

[P277]** The record does not show why this documentary evidence was not introduced into evidence. But Carter and Robinson provided lengthy testimony about Lang's background, his father's abuse, and the mental-health problems Lang suffered before and after living with his father for two years. Counsel's decision to rely solely on Carter's and Robinson's testimony constituted a tactical choice and not ineffective assistance of counsel. See *State v. Hand, 107 Ohio St.3d 378, 2006 Ohio 18, 840 N.E.2d 151, ¶ 241*.

[P278]** Additionally, Lang claims that his counsel failed to present a psychologist as a witness to explain the impact of his childhood abuse, his abduction by his father, and **[****90]** the failure to take medications. Dr. Jeffrey Smalldon, a clinical psychologist employed by the defense, interviewed and performed psychological testing on Lang and also interviewed Lang's mother and half-sister. Lang's claim that Dr. Smalldon would have provided important mitigating evidence on his behalf is speculative at best, and counsel's decision not to call Dr. Smalldon as a witness was a tactical choice as part of a trial strategy.

[P279]** Third, Lang argues that his counsel misrepresented the evidence during closing argument by telling the jury, "You learned that [Lang] had siblings, that * * * like the prosecutor said, *pretty normal childhood up until he [*552] was ten*" (Emphasis added.) Lang argues that counsel's argument misrepresented the evidence **[***639]** about his childhood and was prejudicial.

[P280]** Defense counsel's argument did not misrepresent the evidence. Carter testified that Lang did not meet his abusive father until he was ten years old. As discussed in proposition XII, Robinson also testified that before Lang was ten years old, they "had a typical brother sister relationship."

[P281]** Counsel's argument also maintained defense credibility and allowed the defense to focus the jury's attention on defense **[****91]** counsel's argument that addressed Lang's abuse after his father abducted him. Thus, counsel's characterization of Lang's early childhood did not result in ineffective assistance of counsel. See *State v. Jones (2001), 91 Ohio St.3d 335, 356-357, 2001 Ohio 57, 744 N.E.2d 1163*.

[P282]** Fourth, Lang argues that his counsel were ineffective by failing to present evidence to the jury that they promised to present during the opening statements.

[P283]** Lang claims that his counsel broke his promise to present evidence showing that he grew up in "one of the most dangerous" neighborhoods in Baltimore. However, counsel did not make a direct promise that he would present such evidence. Rather, trial counsel told the jury, "[Y]ou *will probably* hear the neighborhood is now known as one of the most dangerous ones in the State of Maryland." (Emphasis added.) Thus, Lang has failed to show that his counsel broke such a promise to the jury.

[P284]** Lang also argues that his counsel broke a promise to present testimony that he suffered from thoughts of suicide. During opening statements, defense counsel stated that Lang was a "different person" after he returned home following his abduction. Counsel also stated, "You'll hear about **[****92]** Eddie's thoughts of suicide."

[P285]** Defense counsel presented no evidence during the mitigation case that Lang had considered suicide. Thus, counsel were deficient in failing to keep this promise. But Lang has not established that this deficiency was prejudicial. See *Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674*. He merely speculates that such an omission caused the defense to lose credibility and weakened the overall defense case. Accordingly, this claim is rejected.

[P286]** Fifth, Lang argues that counsel were ineffective by failing to object to prosecutorial misconduct, instructions, and rulings of the trial court. But none of these claims has any merit. As discussed in other propositions, counsel were not ineffective by failing to object to prosecutorial misconduct (proposition XII) or to the court's instructions on reasonable doubt (proposition XX). Counsel were also not ineffective by failing to object to the trial court's instructions on the consideration **[*553]** of trial-phase evidence during the penalty phase (proposition XIV) or the imposition of court costs (proposition XIX).

[P287]** Finally, Lang argues that the cumulative effect of counsel's errors and omissions resulted in ineffective **[****93]** assistance of counsel. However, the record shows that Lang received a fair trial, and any

error was nonprejudicial.

[P288]** Based on the foregoing, proposition XIII is rejected.

[P289]** *Arbitrary sentencing.* In proposition of law XI, Lang argues that his death sentence for Cheek's murder should be vacated because the jury's sentencing recommendations — life for Burditte's murder (Count One) and death for Cheek's murder (Count Two) — are arbitrary. Lang contends that the disparity in sentencing **[***640]** occurred because Burditte was a drug dealer and Cheek was not. Consequently, Lang argues, the jury improperly considered the victim's status as an aggravating circumstance in reaching its death verdict.

[P290]** We reject Lang's argument. The jury verdicts are not inconsistent. ***HN45***[↑] The jury was required to "consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense." *R.C. 2929.04(B)*; see *Wogenstahl, 75 Ohio St.3d at 355, 662 N.E.2d 311*. Here, the nature and circumstances of the offense showed that Burditte was involved in selling illegal drugs to Lang at the time of his murder. There was no evidence showing that Cheek was involved. In weighing the **[****94]** nature and circumstances of the offense, the jurors might have determined that Burditte's murder was mitigated because of Burditte's involvement in the events leading up to his murder. On the other hand, the jury might have decided that Lang's murder of Cheek was not mitigated at all. See *State v. Gapen, 104 Ohio St.3d 358, 2004 Ohio 6548, 819 N.E.2d 1047, ¶ 139*.

[P291]** Moreover, ***HN46***[↑] it is not for an appellate court to speculate about why a jury decided as it did. *State v. Lovejoy (1997), 79 Ohio St.3d 440, 445, 1997 Ohio 371, 683 N.E.2d 1112*. "'Courts have always resisted inquiring into a jury's thought processes * * *; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.'" Id., quoting *United States v. Powell (1984), 469 U.S. 57, 66-67, 105 S.Ct. 471, 83 L.Ed.2d 461*.

[P292]** Additionally, we reject Lang's claim that the jurors improperly considered Burditte's status as a drug dealer as an aggravating circumstance. The trial court properly instructed the jury on the aggravating circumstances that they could consider during their deliberations. The trial court's instructions included the admonition, "The aggravated **[****95]** murder itself is not an aggravating circumstance. You may only consider the aggravating circumstances that were just described to you and which accompanied the aggravated murder." It is presumed that the jury followed the trial court's instructions. See, e.g., *State v. [*554] Cunningham, 105 Ohio St.3d 197, 2004 Ohio 7007, 824 N.E.2d 504, ¶ 90*. Based on the foregoing, we overrule proposition XI.

Remaining Issues

[P293]** *Settled issues.* In proposition of law XX, Lang challenges the constitutionality of the instructions on reasonable doubt during both phases of the trial. However, we have already affirmed the constitutionality of the "reasonable doubt" definition provided by *R.C. 2901.05*. See *State v. Jones (2000), 91 Ohio St.3d 335, 347, 2001 Ohio 57, 744 N.E.2d 1163*.

[P294]** In proposition of law XXI, Lang attacks the constitutionality of Ohio's death-penalty statutes. This claim is summarily rejected. See *State v. Carter (2000), 89 Ohio St.3d 593, 607, 2000 Ohio 172, 734 N.E.2d 345*; *State v. Jenkins (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264*, paragraph one of the syllabus.

[P295]** Lang also argues that Ohio's death-penalty statutes violate international law and agreements to which the United States is a party. We also reject this **[****96]** argument. See *State v. Issa (2001), 93 Ohio St.3d 49, 69, 2001 Ohio 1290, 752 N.E.2d 904*; *State v. Bey, 85 Ohio St.3d at 50285 Ohio St. 3d 487, 1999 Ohio 283, 709 N.E.2d 484*.

[P296]** *Sentencing opinion.* In proposition of law XVII, Lang asserts that there are numerous flaws in the trial court's sentencing opinion.

[P297]** **[***641]** First, Lang argues that the trial court improperly concluded that Cheek was not involved in the drug deal. In summarizing the evidence, the trial court stated, "[T]here is no evidence to suggest that Marnell Cheek was a participant in the drug transaction. All evidence points to the fact that she was a person riding in the vehicle at the wrong place and at the wrong time." The trial court's conclusion represented a fair assessment of the evidence. Thus, there was no error.

[P298]** Second, Lang contends that the court erroneously sentenced him to death because nothing in the record supports imposing the death sentence for

Cheek's murder and a life sentence for Burditte's murder. The court's sentencing opinion analyzed the aggravating circumstances, identified the mitigating factors found to exist, and fully explained why the aggravating circumstances outweighed the mitigating factors as R.C. 2929.03(F) requires. But the trial court was not **[****97]** required to address the propriety of Lang's death sentence in view of the life sentence that Lang received for Burditte's murder. Moreover, our independent review of the sentence will cure any flaws in the trial court's opinion. State v. Fox (1994), 69 Ohio St.3d 183, 191, 1994 Ohio 513, 631 N.E.2d 124.

[P299]** Third, Lang argues that the trial court did not properly consider his youth as a mitigating factor and erroneously concluded that "his conduct and taped statement show a street-hard individual." HN47[] The "assessment and weight to be given mitigating evidence are matters for the trial court's determination." **[*555]** State v. Lott (1990), 51 Ohio St.3d 160, 171, 555 N.E.2d 293. Here, the trial court identified Lang's youth (he was 19 at the time of the offense) as his strongest mitigating factor and fully discussed the weight it was giving to this mitigation. The trial court could reasonably assign minimal weight to this evidence. See State v. Hanna, 95 Ohio St.3d 285, 2002 Ohio 2221, 767 N.E.2d 678, ¶ 103.

[P300]** Fourth, Lang claims that the trial court improperly considered the nature and circumstances of the offense even though the defense never raised it as a mitigating factor. Lang also argues that the trial court's **[****98]** finding that there was nothing mitigating in the nature and circumstances of the offense transformed them into an aggravating factor.

[P301]** The trial court did not err in considering the nature and circumstances of the offense. R.C. 2929.04(B) provides that the court, in determining whether death is an appropriate penalty, "*shall consider*, and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense*" (Emphasis added.) Accordingly, the trial court was required to review these factors. See State v. Steffen (1987), 31 Ohio St.3d 111, 116-117, 31 OBR 273, 509 N.E.2d 383. Nothing, however, in the sentencing opinion indicates that the trial court viewed the nature and circumstances of the offense as an aggravating circumstance rather than a mitigating factor.

[P302]** Finally, Lang argues that the trial court trivialized mitigating evidence about his history, character, and background. Lang claims that the trial court glossed over testimony about his father's abusive relationship with his mother, failed to fully consider the mental and psychological abuse he suffered after being abducted by his father, and faulted him for not always **[****99]** taking his medications.

[P303]** Nothing in the sentencing opinion indicates that the trial court trivialized or glossed over mitigating evidence. The trial court thoroughly discussed mitigating evidence about his father's abuse, mentioned **[***642]** that Lang was treated at various psychiatric facilities on over 30 occasions, and properly summarized evidence that Lang did not always take his medications. The trial court also stated that it had "weighed all of the evidence presented as it relates to Mr. Lang's history, character, and background." Thus, this claim also lacks merit.

[P304]** Based on the foregoing, proposition XVII is overruled.

[P305]** *Imposition of court costs.* The trial court assessed Lang with court costs. In proposition of law XIX, Lang argues that the trial court's imposition of court costs on him, an indigent defendant, "violates the spirit of the *Eighth Amendment*." But Lang's failure to object has waived this issue. See State v. Threatt, 108 Ohio St.3d 277, 2006 Ohio 905, 843 N.E.2d 164, ¶ 23 (motion to waive costs must be made at time of sentencing to preserve issue for appeal).

[P306]** **[*556]** HN48[] Costs may be assessed against and collected from indigent defendants. State v. White, 103 Ohio St.3d 580, 2004 Ohio 5989, 817 N.E.2d 393, **[****100]** paragraphs one and two of the syllabus. Lang cites no authority for his "spirit-of-the-*Eighth-Amendment*" claim. Thus, no plain error occurred. See State v. Hale, 119 Ohio St.3d 118, 2008 Ohio 3426, 892 N.E.2d 864, ¶ 245 (upholding imposition of costs on convicted capital defendant). Proposition XIX is rejected.

[P307]** *Errors in imposition of postrelease control.* In proposition of law XXII, Lang argues that the trial court failed to properly impose postrelease control on him as part of his sentence for the aggravated robbery.

[P308]** Based upon his conviction for aggravated robbery, a first-degree felony, R.C. 2911.01(C), the trial court imposed five years of postrelease control. See *R.C. 2967.28(B)(1)*. However, the trial court failed to specify that if Lang violated his supervision or a condition of postrelease control, the parole board could

impose a maximum prison term of up to one-half of the prison term originally imposed. See *R.C. 2929.19(B)(3)(e)*. The trial court's judgment entry also failed to properly state the length of confinement that could be imposed for a violation of postrelease control.

[P309]** Because the trial court failed to properly impose postrelease control, we remand this case so that **[****101]** the trial court may impose the proper terms of postrelease control and correct the judgment entry. See *State v. Ketterer, 126 Ohio St.3d 448, 2010 Ohio 3831, 935 N.E.2d 9, ¶ 77-79*; *State v. Fry, 125 Ohio St.3d 163, 2010 Ohio 1017, 926 N.E.2d 1239, ¶ 214*. The trial court should follow the procedures set forth in *R.C. 2929.191(C)* because Lang's sentencing occurred after July 11, 2006. See *State v. Singleton, 124 Ohio St.3d 173, 2009 Ohio 6434, 920 N.E.2d 958*, paragraph two of the syllabus.

[P310]** *Cumulative error*. In proposition of law XVIII, Lang argues that cumulative errors during both phases of the proceedings deprived him of a fair trial. However, Lang was not prejudiced by any error at his trial. Thus, proposition XVIII is rejected.

[P311]** *Appropriateness of death sentence*. In proposition of law XVI, Lang argues that the death penalty is not appropriate because of the compelling mitigating evidence presented in his behalf. These arguments will be addressed during our independent sentence evaluation.

INDEPENDENT SENTENCE EVALUATION

[P312]** Having completed our review of Lang's propositions of law, we are required **[***643]** by *R.C. 2929.05(A)* to independently review Lang's death sentence for appropriateness and **[****102]** proportionality.

[P313]** **[*557]** *Aggravating circumstances*. The evidence at trial established beyond a reasonable doubt that Lang murdered Marnell Cheek as part of a course of conduct involving the purposeful killing of two or more people, *R.C. 2929.04(A)(5)*. The evidence also established beyond a reasonable doubt that Lang murdered Cheek during an aggravated robbery and that he was the principal offender in the commission of the aggravated murder, *R.C. 2929.04(A)(7)*.

[P314]** *Mitigating evidence*. Against these aggravating circumstances, we are called upon to weigh the mitigating factors contained in *R.C. 2929.04(B)*. Lang presented two mitigating witnesses.

[P315]** Yahnena Robinson, the defendant's half-sister, had a close relationship with Lang before he was ten years old. She described it as a "typical brother sister relationship." Lang was also a "good student."

[P316]** Robinson testified that ***Lang***'s father, ***Edward Lang*** Sr., abused their mother and was on drugs. Their mother would not allow ***Edward*** to visit ***Lang*** very often because of "his history and his anger problems."

[P317]** After Lang graduated from elementary school, Lang visited his father in Delaware. The visit was supposed to last for two weeks, but Edward did not allow **[****103]** Lang to return home. Two years later, their mother found Lang and brought him home.

[P318]** Lang was happy when he first came home, but later, his mood changed. According to Robinson, "he would be sad sometimes, quiet * * * [and] other times he would look real hurt or be angry." Subsequently, Lang received counseling, went to a psychiatric facility, and spent time in a residential facility for his mental-health problems.

[P319]** Robinson also testified that Lang has a two-year-old daughter whose name is Kanela Lang.

[P320]** Tracy Carter, the defendant's mother, testified that Lang is the third of her four children. Carter met ***Edward Lang*** Sr. when he was her landlord. Carter did not have money to pay the rent, and she slept with him in exchange for lodging. Carter and Edward then developed a relationship.

[P321]** Carter stated that Edward became violently abusive when he was intoxicated and using drugs. After ***Lang*** was born, ***Edward*** went to jail for stabbing Carter and setting her apartment on fire. Edward was also incarcerated for child molestation.

[P322]** Carter would not allow Lang to visit his father until a court order ordered her to do so. Carter lived in Baltimore, Maryland, and Edward lived in Delaware. **[****104]** When he was ten years old, Lang went to see his father in Delaware for a two-week visit. However, Edward did not allow Lang to return home after the two weeks ended, and Carter did not see her son for the next two years. **[*558]** Carter made repeated attempts to find Lang in Delaware, but was unsuccessful. Finally, Carter found Lang and brought him home.

[P323]** Carter stated that her son was malnourished when she found him and was wearing the same clothing

that he had been wearing when he left. Lang also had a burn on his shoulder, a gash on his hand, and other bruises. Lang told his mother that the burn was a cigarette burn.

[P324]** Before he saw his father, Lang had been treated with Depakote, Lithium, and Risperdal for depression and other conditions. Carter made sure that he took **[***644]** these medications on a regular basis. However, Lang did not continue to take them when he was with his father, because Edward did not obtain refills for the prescriptions.

[P325]** After returning home, Lang was withdrawn. Lang told Carter that he was fine and did not want to talk to her about what had happened. But Carter learned from her son, Mendez, that Edward had sexually abused Lang.

[P326]** Lang has received extensive psychiatric and other **[****105]** treatment. Carter testified, "He stayed in the Bridges Program twice for 90 days. He stayed at Woodburn Respiratory Treatment Center for a year. And he stayed off and on at * * * [the] Sheppard Pratt Center [a crisis center] 28 times."

[P327]** Lang has one child, Kanela. Carter states, "He has taken care of his daughter ever since the mother was pregnant. * * * [There] was nothing that he wouldn't do for her and for the baby."

[P328]** Lang did not finish high school. He dropped out of the 11th grade and "went to take care of his baby's mother." Lang got a job working for the census department. In June 2006, Lang moved to Canton.

[P329]** As a final matter, Carter told the jury, "We all are suffering. * * * I never sat here and said my son was a perfect child. I never sat here and said that my child had a good life or a bad life. But I am asking you not to kill my child."

Sentence evaluation

[P330]** We find nothing mitigating in the nature and circumstances of the offense. Lang brutally murdered Marnell Cheek during an attempted robbery of Jaron Burditte, a drug dealer. Cheek's murder was part of a course of conduct during which Lang also murdered Burditte.

[P331]** Although Lang's character offers nothing in mitigation, we **[****106]** give some weight to Lang's history and background. Lang was abused by his father during his childhood. He was also malnourished and physically abused during the two years that he stayed with his father. Moreover, Lang required extensive counseling and psychiatric treatment after returning home to his mother. Nevertheless, **[*559]** there is no evidence of any connection between Lang's abusive treatment and the two murders. See, e.g., *State v. Hale, 119 Ohio St.3d 118, 2008 Ohio 3426, 892 N.E.2d 864, ¶ 265* (decisive weight seldom given to defendants with unstable childhoods).

[P332]** Lang argues that his history of substance abuse deserves mitigating weight. However, nothing in the record shows that Lang had such a history.

[P333]** The statutory mitigating factors under *R.C. 2929.04* include *(B)(1)* (victim inducement), *(B)(2)* (duress, coercion, or strong provocation), *(B)(3)* (mental disease or defect), *(B)(4)* (youth of the offender), *(B)(5)* (lack of a significant criminal record), *(B)(6)* (accomplice only), and *(B)(7)* (any other relevant factors). We find that the *R.C. 2929.04(B)(2)*, *(B)(5)*, and *(B)(6)* factors are inapplicable here.

[P334]** The *R.C. 2929.04(B)(1)* factor would apply only to the course-of-conduct specification because **[****107]** Lang was sentenced to death for Cheek's murder. However, we give no weight to the (B)(1) factor, because Burditte's participation in the drug sale does not mean that he "induced or facilitated" the murders. Id. ***HN49***[⬆] "While participation in criminal activity certainly carries with it an element of serious risk, the unlawful taking of a human life cannot be deemed less serious simply because the victim was involved in unlawful activity." *State v. Williams, 79 Ohio St.3d at 18, 679 N.E.2d 646*.

[P335]** **[***645]** We also find that the *R.C. 2929.04(B)(3)* factor is not applicable because no evidence was presented showing that "at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law."

[P336]** However, we give some weight to Lang's mental problems under the catchall provision, *R.C. 2929.04(B)(7)*. Testimony showed that Lang suffered from depression and received extensive psychological and psychiatric treatment. But again, there was no evidence of any significant connection between Lang's

mental illness and the murders.

[P337]** We give significant **[****108]** weight to Lang's youth pursuant to R.C. 2929.04(B)(4). Lang was a few days older than 19 when the offenses occurred. However, we have upheld the death penalty in other cases in which the defendant committed aggravated murder at Lang's age or younger. See *State v. Bethel, 110 Ohio St.3d 416, 2006 Ohio 4853, 854 N.E.2d 150, ¶ 203* (age 18); State v. Noling, 98 Ohio St.3d 44, 2002 Ohio 7044, 781 N.E.2d 88, ¶ 149 (age 18); State v. Franklin, 97 Ohio St.3d 1, 2002 Ohio 5304, 776 N.E.2d 26, ¶ 98 (age 18); and State v. Slagle, 65 Ohio St.3d at 613, 605 N.E.2d 916 (age 18).

[P338]** **[*560]** We also give weight as an R.C. 2929.04(B)(7) mitigating factor to evidence that Lang shares love and support with his mother and half-sister and has provided care to his young daughter and her mother.

[P339]** Finally, we reject Lang's argument that the disparity in sentencing between himself and Walker weighs in favor of sparing his life. The disparity in sentencing can be explained on the basis that Lang was the principal offender and Walker was not.

[P340]** Upon weighing the aggravating circumstances against the mitigating factors, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Lang's murder of **[****109]** Cheek during an aggravated robbery as the principal offender and his course of conduct in murdering Cheek and Burditte are grave aggravating circumstances. Lang's mitigating evidence pales in comparison to these aggravating circumstances.

[P341]** We also find that the penalty imposed in this case is not "excessive or disproportionate to the penalty imposed in similar cases." R.C. 2929.05(A). The penalty is proportionate to death sentences approved in cases for other robbery-murder cases. See State v. Monroe, 105 Ohio St.3d 384, 2005 Ohio 2282, 827 N.E.2d 285, ¶ 120 (two victims murdered in drug-related robbery); State v. Jackson (2001), 92 Ohio St.3d 436, 453, 2001 Ohio 1266, 751 N.E.2d 946 (two victims shot in back of the head during drug-related robbery); State v. Palmer (1997), 80 Ohio St.3d 543, 577, 1997 Ohio 312, 687 N.E.2d 685 (two victims murdered and robbed). The penalty is also proportionate to death sentences approved for other course-of-conduct murders. State v. Cunningham, 105 Ohio St.3d 197, 2004 Ohio 7007, 824 N.E.2d 504, ¶ 140; State v. Gapen, 104 Ohio St.3d 358, 2004 Ohio 6548, 819 N.E.2d 1047, ¶ 182; State v. Braden, 98 Ohio St.3d 354, 2003 Ohio 1325, 785 N.E.2d 439, ¶ 162.

Conclusion

[P342]** We affirm **[****110]** the capital convictions, the conviction for aggravated robbery, the sentence of death, and the judgment of the trial court, but we remand for the trial court to impose the appropriate **[***646]** term of postrelease control pursuant to R.C. 2929.191.

Judgment accordingly.

O'CONNOR, C.J., and LANZINGER and CUPP, JJ., concur.

PFEIFER, LUNDBERG STRATTON, and MCGEE BROWN, JJ., concur separately.

Concur by: Lundberg Stratton

Concur

LUNDBERG STRATTON, J, concurring

[P343]** Lang brutally murdered two people during an attempted robbery of a drug dealer. In many respects, Lang is no more sympathetic than the defendant **[*561]** in State v. Ketterer, 111 Ohio St.3d 70, 2006 Ohio 5283, 855 N.E.2d 48, who brutally murdered a family friend. But I question their culpability because the two capital defendants share a common bond — mental illness. Ketterer suffered from bipolar disorder. *Id. at ¶ 172*. While Lang's defense never actually introduced documentation of his diagnoses, clearly, at a minimum, Lang suffered from depression as a child, evidenced by his prescriptions for Depakote, Lithium, and the antipsychotic medicine Risperdal, and as evidenced by his frequent stays in psychiatric facilities.

[P344]** In *Ketterer*, I wrote that I believed that the time **[****111]** had come to reexamine whether we as a society should administer the death penalty to a person with a serious mental illness. *Ketterer, 111 Ohio St.3d 70, 2006 Ohio 5283, 855 N.E.2d 48, ¶ 212* (Lundberg Stratton, J., concurring). Because I continue to adhere to that belief, I write separately, five years later, to continue to encourage our General Assembly to take up this critical issue.

Facts

[P345]** Like Ketterer, Lang was seriously abused by his father as a child. Lang's parents met when his father was his mother's landlord. Lang's mother was a single parent and could not pay her rent. Lang's father traded her a place to live for sex. Lang's father was a drug addict who beat Lang's mother, even when she was pregnant. Eventually, Lang and his mother received a brief respite from Lang's father when he was incarcerated for beating and stabbing Lang's mother and setting fire to their apartment. Lang's father also served time in prison for child molestation.

[P346]** The damage inflicted on Lang by this turbulent and violent childhood is probably best illustrated by what was in essence a kidnapping that he suffered at the hands of his father. At age ten, Lang went for a court-ordered two-week visit **[****112]** with his father out of state but was held by his father for two years. Lang's mother testified that after repeated, unsuccessful attempts to find her son, she found him two years later malnourished and emaciated, weighing about 88 pounds, and wearing the shirt and shoes he had left in. Despite its being December in Maryland, he had no coat or warm clothes. When Lang's mother took him to buy new clothes, she discovered that his body showed physical abuse. Lang had bruises, a gash on his hand, and an unmistakable cigarette burn on his back.

[P347]** Before he left to see his father, Lang had been treated for depression and was on three psychotropic drugs. During his forced stay with his father, Lang's father refused to obtain refills for Lang's medications. Not surprisingly, after two years apart from his mother, Lang was withdrawn when he returned home. He kept to himself and refused to discuss the ordeal or any of what had happened to him in those two years. For the next several years, Lang received **[*562]** extensive psychiatric treatment. Lang made 28 visits to Sheppard Pratt, a psychiatric facility, usually **[***647]** staying for two weeks at a time. Twice he spent 90 days at the Bridges Program. He **[****113]** spent a full year at Woodburn Respiratory Treatment Center. Lang's mother testified that her older son, Mendez, told her that Lang's father had sexually abused Lang.

[P348]** As both parties noted, the mitigation evidence was compelling, but unsupported. Two lay witnesses testified on Lang's behalf, but they did not present any documents, medical reports, or other evidence. Lang's half-sister and mother testified about his turbulent family life, and his mother testified how Lang's father had kept him for two years without allowing her to see him. Both witnesses testified to, but did not provide any other evidence of, Lang's mental state. The state noted to the jury that both witnesses had ample reason to lie and that without any proof, the testimony should be dismissed as mere speculation. The defense hired Dr. Jeffrey Smalldon as its mitigation expert, but did not have him testify. It is of concern that Lang was repeatedly hospitalized for extensive psychiatric treatment over a period of years, yet no clear mental-health diagnosis appears in the record-symbolic of a failure of the system.

Evolving Standards of Decency that Mark the Progress of a Maturing Society

[P349]** In *Ketterer*, as here, I noted **[****114]** that guilt is not at issue. *Ketterer, 111 Ohio St.3d 70, 2006 Ohio 5283, 855 N.E.2d 48, ¶ 228* (Lundberg Stratton, J., concurring). Also as in *Ketterer*, I am concurring rather than dissenting because the court's sentence of death is authorized under our current law. Id. But as in Ketterer, I continue to believe that we as a society should reexamine current law. Id.

[P350]** "'The legislators who passed our current death penalty laws did not intend to force grotesque issues to the center stage of constitutional adjudication. The death penalty was supposed to be about getting even with Charles Manson and Ted Bundy, not executing teenagers and the retarded, or wrestling condemned schizophrenics to the gurney for forced doses of Haldol. But here we are.'" Mello, Executing the Mentally Ill (2007) *22 Crim.Just. 30, 30*, quoting David Bruck, a clinical professor of law and director of the Virginia Capital Case Clearinghouse at Washington and Lee University School of Law.

[P351]** "[T]hese questions go to the core of our legal system of death: Who, and why, do we execute? The problem of the intersection between mental illness and capital punishment isn't rocket science. It's much harder than that." Id. at 31

[P352]** Two **[****115]** recent United States Supreme Court rulings barring execution of juvenile offenders and people with mental retardation seem to give hope that **[*563]** others with diminished capacity for judgment will also be spared the fate of a punishment that they may not even comprehend. Malone, Cruel and Inhumane:

Executing the Mentally Ill, Amnesty International Magazine (Mar. 27, 2007) at http://amnestyusa.org/node/87240. Although neither court case addresses persons with mental illness, Victor Streib, an Ohio Northern University law professor, quoted 11 times by the United States Supreme Court in Roper v. Simmons (2005), 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, notes, "If certain mentally ill defendants think and act like juveniles or the mentally retarded, then they should be excluded from death row." Id.

Unconstitutionality of Executing Persons with Mental Retardation/Developmental Disabilities

[P353]** In 1989, the United States Supreme Court held that the *Eighth Amendment to the United States Constitution* **[***648]** did not mandate a categorical exemption from the death penalty for mentally retarded offenders.[3] Penry v. Lynaugh (1989), 492 U.S. 302, 335, 109 S.Ct. 2934, 106 L.Ed.2d 256. At the time, the court noted **[****116]** that only two states had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. Id. at 334. *Penry* held that those two state enactments, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." Id.

[P354]** Thirteen years later, the court reconsidered the constitutionality of executing mentally retarded capital offenders. In Atkins v. Virginia (2002), 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335, the court noted that "standards of decency" had evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. *Atkins* noted, "[I]n the 13 years since we decided *Penry* * * *, the American **[****117]** public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case." Id. at 307.

[P355]** *Atkins* noted the many state legislatures across the country since *Penry* that had begun to address the issue. Citing several states, the court held, "It is not so much the number of these States that is significant, but the **[*564]** consistency of the direction of change." Id. at 315. The court noted that when *Atkins* was decided, only a minority of states permitted the practice, and even in those states, it was rare. Id. at 314-315. Therefore, evolving standards of decency compelled the conclusion that execution of mentally retarded offenders "has become truly unusual and it is fair to say that a national consensus has developed against it." Id. at 316.

Unconstitutionality of Executing Juveniles

[P356]** Another category of persons whose eligibility for execution has rightly caused much consternation for the United States Supreme Court is juveniles. In Stanford v. Kentucky (1989), 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306, the **[****118]** court held that contemporary standards of decency in this country did not proscribe the execution of juvenile offenders who were over 15 but under 18 when they committed their crimes. Id. at 370-371. *Stanford* had noted that 22 of the 37 death-penalty states permitted the death penalty for 16-year-old offenders, and among those 37 states, 25 permitted it for those who had offended at 17 years old. These numbers, in the court's view, indicated no national consensus "sufficient to label a particular punishment cruel and unusual." Id. at 371.

[P357]** Sixteen years later, the court reconsidered that issue and held that the *Eighth* and *Fourteenth Amendments* forbid imposition of the death penalty on offenders who were under the age of 18 **[***649]** when their crimes were committed. Roper, 543 U.S. at 568, 125 S.Ct. 1183, 161 L.Ed.2d 1. The court noted, "The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 states prohibited the death penalty for the mentally retarded. This number comprised 12 **[****119]** that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude

[3] This concurrence uses the term "mentally retarded" rather than the more recently acceptable term "persons with developmental disabilities," because the term "mentally retarded" has been consistently used by the United States Supreme Court and other courts and has a legal significance. Penry, 492 U.S. at 344, 109 S.Ct. 2934, 106 L.Ed.2d 256 (Brennan, J., concurring in part and dissenting in part).

juveniles from its reach." (Citation omitted.) Id. at 564.

[P358]** Again, *Roper* noted the "'consistency of the direction of change.'" Id. at 566, quoting Atkins, 536 U.S. at 315, 122 S.Ct. 2242, 153 L.Ed.2d 335. "As in *Atkins*, the objective indicia of consensus in this case-the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice-provide sufficient evidence that today **[*565]** our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'" Roper at 567, 125 S.Ct. 1183, 161 L.Ed.2d 1, citing Atkins at 316.

The Case for Banning Execution of Persons with Severe Mental Illness

[P359]** Although it is unconstitutional to execute someone **[****120]** who is incompetent at the time of his or her execution, see Ford v. Wainwright (1986), 477 U.S. 399, 417-418, 106 S.Ct. 2595, 91 L.Ed.2d 335, and Panetti v. Quarterman (2007), 551 U.S. 930, 934, 127 S.Ct. 2842, 168 L.Ed.2d 662, the United States Supreme Court has not yet decided whether it is unconstitutional to execute someone who suffered from a serious mental illness at the time of the crime. If executing persons with mental retardation/developmental disabilities or executing juveniles offends "evolving standards of decency," Roper, 543 U.S. at 563, 125 S.Ct. 1183, 161 L.Ed.2d 1, then I simply cannot comprehend why these same standards of decency have not yet evolved to also prohibit execution of persons with severe mental illness at the time of their crimes.

Legislative Enactments and other Indications of our Evolving Standards of Decency

[P360]** Although not the groundswell noted in *Atkins* and *Roper*, since my concurrence in *Ketterer* in 2006, a few states have considered limiting the execution of those who were severely mentally ill at the time of the crime. Connecticut is the only state to prohibit execution of the mentally ill. Entzeroth, The Challenge and Dilemma of Charting a Course **[****121]** to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty (2011), 44 Akron L.Rev. 529, 564. It exempts a capital defendant from execution if the jury or court finds that his or her "mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." Conn.Gen.Stat.Ann. 53a-46(a).

[P361]** Using language from the American Bar Association's Recommendation 122A, legislators in Kentucky and North Carolina have introduced bills to bar the **[***650]** execution of defendants who, at the time of the offense, "had a severe mental disorder or disability that significantly impaired their capacity to (a) appreciate the nature, consequences, or wrongfulness of their conduct, (b) exercise rational judgment in relation to conduct, or (c) conform their conduct to the requirements of the law." Kentucky H.B. No. 446, introduced in the 2009 regular session, and North Carolina H.B. 553/S.B. No. 1075 use nearly identical language.

[P362]** In addition, Indiana established the Bowser Commission to examine the execution of the mentally **[****122]** ill. The Bowser Commission issued a report in **[*566]** November 2007 recommending the exemption of the severely mentally ill from the death penalty. Final Report of the Bowser Commission, Indiana Legislative Services Agency, November 2007, http://www.in.gov/legislative/interim/committee/reports/BCOMAB1.pdf, p. 3. In 2009, Indiana's S.B. No. 22 was introduced to prohibit the imposition of the death penalty on an individual judicially determined to have had a severe mental illness, defined as schizophrenia, schizoaffective disorder, bipolar disorder, major depression, or delusional disorder, at the time of the crime. www.deathpenaltyinfo.org. See Entzeroth at 564.

[P363]** Finally, the Tennessee Disability Coalition reports that in 2011, Tennessee legislators introduced H. B. No. 2064 and S.B. No. 1692 to prohibit the execution of a person who had severe and persistent mental illness at the time of committing murder in the first degree. http://tn.disability.org.

[P364]** Moreover, at least five leading professional associations, the American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and Mental Health America, have adopted **[****123]** policy statements recommending prohibition of execution of persons with severe mental illness at the time of the offense. Winick, The Supreme Court's Evolving Death Penalty Jurisprudence: Severe

Mental Illness as the Next Frontier (2009), 50 B.C.L.Rev. 785, 789.

The Crux of the Issue

[P365]** Mental Health America estimates that five to ten percent of all death row inmates suffer from a severe mental illness. Mental Health America, Death Penalty and People with Mental Illness, www.nmha.org/go/position-statements/54. In my view, a consensus is slowly growing to stop executing persons with severe mental illness. But excluding the severely mentally ill from death row involves a more complicated analysis. Juveniles and persons with mental retardation can be identified by a number, either an age or an IQ score and recognized factors. As I noted in my concurrence in *Ketterer*, "mental illness is not as easily quantified as mental retardation. Mental retardation is a fixed condition with more objective symptoms. Mental illness is a much broader category, with wide ranges of diagnoses and periods of decompensation and remission. Treatment options vary widely, including counseling, behavior modifications, **[****124]** group therapy, and medication. Some treatments and medications are controversial as to effectiveness and side effects. Mental illness as a defense is a difficult issue to quantify in a court of law. * * * Therefore, while I personally believe that the time has come for our society to add persons with severe mental illness to the category of those excluded from application of the death penalty, I believe that the line should be drawn by the General Assembly, not by a court. * * * [N]othing prevents the legislature from examining and using those * * * evolving standards [of decency]. **[*567]** In fact, **[***651]** it is the legislature's role to do so. Therefore, I urge our General Assembly to consider legislation setting the criteria for determining when a person with a severe mental illness should be excluded from the penalty of death. Unlike mental retardation, which can be determined by a number on an IQ test and other basic criteria, mental illnesses vary widely in severity. The General Assembly would be the proper body to examine these variations, take public testimony, hear from experts in the field, and fashion criteria for the judicial system to apply." *Ketterer, 111 Ohio St.3d 70, 2006 Ohio 5283, 855 N.E.2d 48, ¶ 246-248* **[****125]** (Lundberg Stratton, J., concurring).

Conclusion

[P366]** "'A society that denies mental health care to those who need it the most and then subsequently executes them is cruel and inhumane at its very core. All of us need to be asking: "Is this the kind of society that we envision for ourselves?" My answer is that we can and must do better.'" Sue Gunawardena-Vaughn, Director of Amnesty International USA's Program to Abolish the Death Penalty, quoted in Malone, Cruel and Inhumane: Executing the Mentally Ill, Amnesty International Magazine, http://www.amnestyusa.org/node/87240.

[P367]** For these reasons, as well as those expressed in my concurrence in *Ketterer*, I reluctantly concur in the majority decision today, but I continue to fervently urge our General Assembly to take up the critical issue of whether, and/or under what circumstances, this state should continue to execute persons with varying degrees of mental illness.

PFEIFER and MCGEE BROWN, JJ., concur in the foregoing opinion.

End of Document

APPENDIX F

USCS Const. Amend. 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX G

USCS Const. Amend. 14, USCS Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [*21 USCS § 848*], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [*28 USCS § 2254*].