Stojetz v. Ishee

United States District Court for the Southern District of Ohio, Eastern Division

September 24, 2014, Filed

Case No. 2:04-cv-263

Reporter
2014 U.S. Dist. LEXIS 137501 *; 2014 WL 4775209

JOHN C. STOJETZ, Petitioner, v. TODD ISHEE, Warden, Respondent.

Subsequent History: Motion denied by *Stojetz v. Ishee, 2015 U.S. Dist. LEXIS 4343 (S.D. Ohio, Jan. 13, 2015)*

Affirmed by, Writ of habeas corpus denied *Stojetz v. Ishee, 2018 U.S. App. LEXIS 15055 (6th Cir. Ohio, June 5, 2018)*

Prior History: *Stojetz v. Ishee, 2009 U.S. Dist. LEXIS 44265 (S.D. Ohio, May 15, 2009)*

Core Terms

defense counsel, trial court, postconviction, asserts, mitigation, inmates, jurors, sentencing, argues, death penalty, murder, witnesses, grounds for relief, investigate, records, aggravating circumstances, mitigating factors, prison, ineffective, counsel's failure, court's decision, state court, accomplices, voir dire, death sentence, kill, challenges, aggravated, juvenile, prosecutorial misconduct

Counsel: For John C Stojetz, Petitioner: Laurence E Komp, LEAD ATTORNEY, Ballwin, MO; Mark R DeVan **[*1]** , Berkman Gordon Murray & Devan, Cleveland, OH.

For Warden Todd Ishee, Respondent: Thomas E Madden, LEAD ATTORNEY, Seth Patrick Kestner, Office of the Ohio Attorney General, Criminal Justice Section, Columbus, OH; David M Henry, State of Ohio Office of the Attorney General, Columbus, OH.

Judges: GREGORY L. FROST, UNITED STATES DISTRICT JUDGE. Magistrate Judge Norah McCann King.

Opinion by: GREGORY L. FROST

Opinion

OPINION AND ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to *28 U.S.C. § 2254*. This matter is before the Court for consideration of Petitioner's Petition (ECF No. 14), Respondent's Return of Writ (ECF No. 21), Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus (ECF No. 93), Respondent's Merits Brief (ECF No. 101), Petitioner's Amendment to the Petition (ECF No. 130), Respondent's Amended Return of Writ (Answer) (ECF No. 134), and Petitioner's Amended Traverse (ECF No. 137).

I. Overview

In a September 30, 2005 Opinion and Order, the Court dismissed as procedurally defaulted the following grounds for relief: one, sub-part (B)(1); one, sub-part (C); one, sub-part (D); one, **[*2]** sub-part (E) in part; one, sub-part (F) paragraphs 269 and 271; one, sub-part (G) paragraphs 485-494; one, sub-part (H); one, sub-part (I)(1); one, sub-part (I)(2); four, sub-part (1)(C); four, sub-part (1)(D);

four, sub-part (2)(B); nine, sub-part (E); ten; eleven, sub-parts A, B, C, E in part, F, G, H, I, J, and K; twelve; and fourteen, sub-part (A) paragraphs 772-779. (ECF No. 39.) In a February 10, 2006 Opinion and Order, the Court dismissed as procedurally defaulted the following portions of Petitioner's third ground for relief: "Pretrial Matters" paragraphs 338-351; "General Voir Dire by Defense Counsel" paragraphs 366-373; and "Exercise of Peremptories" paragraphs 374-382. (ECF No. 43.) The Court noted that its dismissal of most of these claims was subject to reconsideration, should Petitioner subsequently be able to demonstrate either cause and prejudice to excuse the default or an actual innocence exception to procedural default.

The Court permitted some factual development in this case. In a March 10, 2005 Order, the Court granted Petitioner's motion to expand the record with thirty-five documents essentially reflecting Petitioner's efforts to obtain state post-conviction **[*3]** relief following his conviction. (ECF No. 29.) In a July 10, 2007 Opinion and Order, the Court granted Petitioner's request for funds to employ a private investigator and a mitigation investigator. (ECF No. 69.) On May 21, 2008, this Court issued an Opinion and Order granting Petitioner's request for an order directing the release of records concerning Petitioner in possession of the Ohio Department of Rehabilitation and Correction, the Cuyahoga County Probation Department, the Cuyahoga County Juvenile Court, and the Cuyahoga County Department of Children and Family Services. (ECF No. 87.) The Court on September 4, 2009, issued an Opinion and Order granting Respondent's request to expand the record with additional material from the trial (ECF No. 117), and Respondent filed the material on September 17, 2009 (ECF No. 118). Finally, on June 3, 2013, Respondent supplemented the record with transcripts and other material stemming from Petitioner's more recent attempts to obtain postconviction relief. (ECF Nos. 131, 132, 133.)

This case is now ripe for review of the grounds for relief that are properly before the Court.

II. Factual and Procedural History

The details of this capital murder **[*4]** and aggravated robbery are set forth in numerous state court opinions, including the Ohio Supreme Court's published opinion in *State v. Stojetz, 84 Ohio St. 3d 452, 1999 Ohio 464, 705 N.E.2d 329 (1999)*:

> On April 25, 1996, appellant, John C. Stojetz, Jr., along with five other adult inmates, ran across the prison yard of Madison Correctional Institution and toward the Adams Alpha Unit ("Adams A"), which houses many of the state's juvenile offenders who had been tried as adults and convicted of criminal offenses. Appellant and the other five inmates were each armed with knives commonly known as "shanks." Appellant and the others entered the Adams A unit, circled the control desk, and held corrections officer Michael C. Browning at knifepoint. Appellant then placed a shank to Browning's throat and ordered him to give appellant the keys that opened the cell doors of the Adams A unit. Browning threw the keys down and was allowed to flee the unit.
>
> Corrections officers immediately responded to Browning's "man down" alarm and converged on Adams A. Officers were able to observe appellant and the other five inmates carrying shanks. The corrections officers, armed only with pepper mace, attempted to enter Adams A. However, appellant and the other inmates, wielding shanks, **[*5]** prevented the officers from entering.
>
> Once inside Adams A, appellant and his accomplices proceeded to cell number 144, the cell of Damico Watkins, a seventeen-year-old juvenile inmate. Using keys taken from Browning, appellant unlocked Watkins's cell and appellant and the other adult inmates entered the cell and began attacking Watkins. After eluding the initial attack and escaping

from his cell, Watkins was pursued throughout the Adams A unit and repeatedly stabbed by appellant and the other shank-wielding inmates. Watkins was able to escape his attackers several times only to be again cornered and subjected to repeated stabbings. Eventually, Watkins was cornered by appellant on the second floor of the Adams A unit. As Watkins pleaded for his life, appellant and inmate Bishop repeatedly stabbed Watkins and left him for dead.

During the attack on Watkins, correction officers had surrounded the exterior of the Adams A unit. Deputy Warden Mark Saunders arrived on the scene and began conversing with the inmates who had taken over Adams A. During this conversation, inmate Lovejoy stated that "they [the inmates who had taken over Adams A] would not cell with black inmates." Also during the **[*6]** conversation, appellant stated, "we took care of things because you [prison officials] wouldn't." Subsequently, the inmates were ordered to surrender. The prison yard was cleared and appellant and the five perpetrators passed their shanks through a window in the foyer of Adams A. Once prison officials retrieved the weapons, appellant and the other adult inmates exited the Adams A unit and surrendered to prison authorities.

After prison authorities regained control of the Adams A unit, the coroner arrived at the scene and declared Watkins dead.

In October 1996, appellant was indicted by the Madison County Grand Jury for the aggravated murder of Watkins. The single-count indictment charged appellant with purposely causing the death of Watkins with prior calculation and design in violation of *R.C. 2903.01(A)*. The count also charged appellant with a *R.C. 2929.04(A)(4)* death penalty specification of committing aggravated murder while a prisoner in a detention facility.

Appellant entered a plea of "not guilty" to the charges in the indictment, and the case proceeded to a trial by jury. Evidence submitted at trial indicated that appellant was known to be the head of the "Aryan Brotherhood" gang at the Madison Correctional Institution. **[*7]** Other evidence at trial indicated that appellant and other members of the Aryan Brotherhood did not want to be housed in the same cells as black inmates. Further testimony indicated that appellant and members of the Aryan Brotherhood wanted to be transferred from Madison Correctional to other penal institutions. In fact, following the murder, prison authorities conducted a search of appellant's cell as well as the cells of his accomplices. During the search it was found that appellant and four of the other five inmates who had participated in the attack on Watkins had already packed their personal belongings.

At the conclusion of the trial, and after deliberation, the jury found appellant guilty of the charge and specification in the indictment. Following a mitigation hearing, the jury recommended that appellant be sentenced to death for the aggravated murder of Watkins. The trial court accepted the jury's recommendation and imposed the sentence of death.

Stojetz, 84 Ohio St. 3d at 453-54.

Represented by two new attorneys, Joseph Wilhelm and Kelly Culshaw, Petitioner pursued a direct appeal to the Ohio Supreme Court on December 23, 1997. Counsel raised nineteen propositions of law. On February 17, 1999, the Ohio Supreme **[*8]** Court issued a decision rejecting Petitioner's propositions of law and concluding that Petitioner's death sentence was appropriate and proportionate. *Stojetz, 84 Ohio St. 3d 452, 1999 Ohio 464, 705 N.E.2d 329*. On April 7, 1999, the Ohio Supreme Court denied without opinion Petitioner's motion for reconsideration. (App. Vol. III, at 178.)

The United States Supreme Court denied *certiorari*

on November 10, 1999. (App. Vol. III, at 215.)

Represented by attorney John J. Gideon, Petitioner on May 18, 1999 filed an application to reopen his direct appeal to the Ohio Supreme Court—Ohio's procedure for raising claims of ineffective assistance of appellate counsel. On August 18, 1999, the Ohio Supreme Court summarily denied Petitioner's application. (App. Vol. III, at 214.)

On March 4, 1998, attorney Gideon filed a postconviction action in the trial court while different attorneys were still litigating Petitioner's direct appeal. (App. Vol. IV, at 5.) Petitioner filed five amendments to that postconviction action from March 10, 1998 through March 19, 1999. After conducting an evidentiary hearing and considering briefs by the parties, the trial court issued an extensive decision and entry on September 14, 2000, denying Petitioner's claims and dismissing his postconviction action. (App. Vol. V, at 191-303.)

Attorney Gideon filed a notice of appeal in the trial **[*9]** court on October 13, 2000. After requesting and receiving multiple extensions of time, as well as leave to file a brief in excess of the page-limit, Gideon failed to file his merit brief or request an extension of time. On September 10, 2001, the state appellate court issued a show cause order (App. Vol. VII, at 42) and, after receiving a response from Gideon explaining his lapse, gave Gideon a new deadline for filing a merit brief on behalf of Petitioner (App. Vol. VII, at 51). Gideon again failed to file his merit brief. Consequently, on January 10, 2002, the appellate court dismissed Petitioner's appeal with prejudice. (App. Vol. VII, at 53.)

Represented by the Ohio Public Defender's Office, Petitioner on January 23, 2002 filed a motion in the appellate court to reopen his postconviction appeal. (App. Vol. VII, at 54.) On February 8, 2002, the appellate court summarily denied Petitioner's motion, as well as the instanter brief the Ohio Public Defender's Office had filed. (App. Vol. VII, at 290.) Still represented by the Ohio Public Defender's Office, Petitioner appealed to the Ohio Supreme Court on February 21, 2002. (App. Vol. VII, at 6.) The Ohio Supreme Court summarily denied that appeal on May 15, 2002. (App. Vol. VIII, at 238.)

While Petitioner's postconviction action was pending in the state trial **[*10]** court, attorneys John J. Gideon and Cordelia Glenn filed an April 12, 2000 motion for a new trial on the basis of newly discovered evidence. (App. Vol. IX, at 5.) The trial court reserved judgment on the motion, pending its resolution of Petitioner's postconviction action. And on March 22, 2002, the trial court denied Petitioner's motion for a new trial, relying largely on its consideration of the claims and evidence that Petitioner had introduced in connection with his postconviction action. (App. Vol. IX, at 135.)

Represented by the Ohio Public Defender's Office, Petitioner appealed the trial court's decision to the state appellate court on April 22, 2002. On December 2, 2003, the appellate court issued a decision affirming the trial court's denial of Petitioner's motion for a new trial. (App. Vol. X, at 110.) Petitioner appealed that decision to the Ohio Supreme Court on January 15, 2003. (App. Vol. XI, at 22.) The Ohio Supreme Court summarily denied the appeal on April 2, 2003. (App. Vol. XI, at 63.)

Petitioner recently completed additional state court proceedings while the instant action was pending. On January 6, 2009, Petitioner filed a second postconviction action in the state trial court supported by documents that Petitioner had not previously presented. Petitioner raised **[*11]** the following three claims for relief:

> **First Claim for Relief**: Stojetz's sentence is void or voidable because the trial prosecutors suppressed material exculpatory and impeaching evidence, in violation of Stojetz's rights under the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution*.

Second Claim for Relief: Stojetz's judgment and sentence are void or voidable because the prosecutor knowingly presented false evidence.

Third Claim for Relief: Stojetz's judgment and sentence are void or voidable because the prosecutor committed acts of misconduct during the penalty phase of Stojetz's capital trial.

(ECF No. 132-2, at Page ID # 6283-6332.) The essence of all three claims is that the state failed to disclose records in possession of the Ohio Department of Rehabilitation and Correction documenting a knife-assault Petitioner suffered in prison. The records would have purportedly supported the testimony of Dr. Eberhard Eimer, Petitioner's mitigation-phase psychological expert, that Petitioner suffered from Post Traumatic Stress Disorder and would have undermined the prosecution's attempt during cross-examination of Dr. Eimer to minimize or trivialize the seriousness of that assault and severity of the resulting wound.

On January 6, 2009, **[*12]** Petitioner also filed a motion for discovery (*Id*. at Page ID # 6333), as well as an application for leave to file a motion for a new trial (*Id*. at Page ID # 6341.)

The trial court issued a May 20, 2009 entry dismissing Petitioner's second postconviction action as untimely and overruling Petitioner's untimely motion for a new trial. (*Id*. at Page ID # 6375-6385.) Petitioner was not permitted to conduct discovery.

Petitioner filed a notice of appeal in the trial court on September 23, 2009 (*Id*. at Page ID # 6399) and eventually a merit brief in the state appellate court on September 23, 2009. Petitioner raised the following assignments of error:

Assignment of Error I: The trial court violated Appellant's due process rights when it denied his successor post-conviction petition as time-barred.

(1) The requirements of *O.R.C. § 2953.23* for successive petitions should not apply to Appellant's second in time petition.

(2) Appellant satisfied the statutory requirements for a successive petition on each of his three grounds for relief.

Assignment of Error II: The trial court violated Appellant's due process rights when it denied his request to file a new trial motion.

(1) Appellant was unavoidably prevented from discovering **[*13]** his new evidence within one-hundred and twenty days of the jury verdict under *Criminal Rule 33(B)* and *O.R.C. § 2945.80*.

Assignment of Error III: The trial court violated Appellant's due process rights when it denied his motion for discovery.

(1) Appellant's post-conviction claims warranted discovery.

(*Id*. at Page ID # 6438-6464.)

Following the appearance of new counsel and several extensions of time, the State of Ohio filed its brief on December 7, 2009. (*Id*. at Page ID # 6640-6662.) Petitioner filed a reply brief on December 18, 2009. (*Id*. at # 6688-6697.)

On June 7, 2010, the state appellate court issued a judgment entry and opinion overruling Petitioner's assignments of error and affirming the trial court's judgment. (*Id*. at Page ID # 6698, # 6699-7609.)

Petitioner filed a notice of appeal to the Ohio Supreme Court on July 21, 2010. (ECF No. Page ID # 6713.) In a Memorandum in Support of Jurisdiction that he filed the same day, Petitioner raised the following propositions of law:

Proposition of Law No. I: The requirements of *O.R.C. § 2953.23* for successive petitions should not apply to a second postconviction petition that results from the withholding of material evidence under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*.

Proposition of Law No. II: A capital petitioner **[*14]** who presents compelling evidence that constitutional errors have led to the conviction of a person who is probably innocent, is entitled to a new trial under *O.R.C. § 2953.23* or *Ohio R. Crim. P. 33* and *O.R.C. § 2945.79*. *U.S. Const. amends VI, VIII, XIV*; *Ohio Const. Art. I, § 9*, 10, 16.

Proposition of Law No. III: Where a petitioner supports his successor postconviction petition and new trial motion with evidence warranting an evidentiary hearing, that petition should not be dismissed without granting discovery. Moreover, even if the evidentiary hearing standard is not met, dismissal is inappropriate without first providing the petitioner an opportunity to conduct discovery pursuant to the Ohio Civil Rules and providing funding for an expert.

(ECF No. 132-4, at Page ID # 6719-6749.)

The Ohio Supreme Court issued a January 23, 2013 entry declining to accept jurisdiction over Petitioner's discretionary appeal. (*Id*. at Page ID # 6771.)

Petitioner filed a motion for reconsideration on February 1, 2013. (*Id*. at Page ID # 6772-6776.) The Ohio Supreme Court denied that motion on April 24, 2013. (*Id*. at Page ID # 6777.)

III. Standards for Habeas Review

Provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") which became effective prior to the filing of the instant **[*15]** petition, apply to this case. *See Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*. Under the AEDPA, a federal court shall not issue a writ of habeas corpus on a claim that the state courts adjudicated on the merits unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *28 U.S.C. § 2254(d)(1)*, 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)(2)*. *Section 2254(d)(1)* circumscribes a federal court's review of claimed legal errors, while *§ 2254(d)(2)* places restrictions on a federal court's review of claimed factual errors.

Under *§ 2254(d)(1)*, a state court decision is "contrary to" Supreme Court precedent "when the state court confronts facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from its precedent" or "when the state court 'applies a rule that contradicts the governing law set forth in' Supreme Court cases." *Williams v. Coyle, 260 F.3d 684, 699 (6th Cir. 2001)* (quoting *Williams v. Taylor, 529 U.S. 362, 406-07, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*). A state court decision involves an unreasonable application of Supreme Court precedent if the state court identifies the correct legal principle from the decisions **[*16]** of the Supreme Court but unreasonably applies that principle to the facts of the petitioner's case. *Coyle, 260 F.3d at 699*. A federal habeas court may not find a state adjudication to be "unreasonable" simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Id*. Rather, a state court's application of federal law is unreasonable "only if reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible credible outcomes." *Barker v. Yukins, 199 F.3d 867, 872 (6th Cir. 1999)*. Recently, the Supreme Court clarified that in making the *§ 2254(d)(1)* determination, a federal court in habeas corpus must confine its review to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster, 131 S.Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011)*.

Further, *§ 2254(d)(2)* prohibits a federal court from granting an application for habeas relief on a claim

that the state courts adjudicated on the merits unless the state court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)(2)*. In this regard, *§ 2254(e)(1)* provides that the findings of fact **[*17]** of a state court are presumed to be correct and that a petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence.

IV. Petitioner's Claims

This case is ripe for review of the merits of the grounds properly before the Court.

Ground One: Ineffective Assistance of Trial Counsel.

In his first ground for relief, Petitioner raises numerous allegations of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's performance was objectively deficient, and (2) the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. In *Beuke v. Houk, 537 F.3d 618, 642 (6th 2008)*, the Sixth Circuit explained the first part of *Strickland* as follows:

> We begin by considering the deficiency element. "[T]he proper standard for attorney performance is that of reasonably effective assistance" under "prevailing professional norms," and thus to establish deficient performance, the habeas petitioner must show that "counsel's performance fell below an objective standard of reasonableness." *Id. at 687-88, 104 S.Ct. 2052*. When engaging in this inquiry, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." **[*18]** *Id. at 689, 104 S.Ct. 2052*. *Id*. To satisfy *Strickland*'s prejudice component, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. at 694*. In *Jackson v. Houk*, the Sixth Circuit explained the inherent difficulty in establishing ineffective assistance of counsel:
>
> > The Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA; it requires the petitioner not only to demonstrate the merit of his underlying *Strickland* claim, but also to demonstrate that "there is no possibility fairminded jurists could disagree that the state court's decision [rejecting the *Strickland* claim] conflicts with this Court's precedents." *Richter, 131 S.Ct. at 786* (noting that this was "meant to be" a difficult standard to meet).
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> *687 F.3d 723, 740-41 (6th Cir. 2012)*.

Sub-Part (A): Failure to effectively present a defense or to defend Petitioner.

Petitioner argues in sub-part (A) of his first ground for relief that his trial attorneys performed deficiently and to Petitioner's prejudice because they failed to effectively present a defense. **[*19]** (Petition, ECF No. 14-2, at ¶¶ 95-218; Memorandum in Support, ECF No. 93, at Page ID # 2174-2194.) In his Petition, Petitioner presents the essence of his claim as follows:

> Defense counsel made it clear that they were going to mount a defense to the aggravated murder charge based on Mr. Stojetz's mental state and motivation for the attack on Watkins, Watkins's role in provoking the attack, and the culture of prison that forced the attack on Watkins.
>
> Counsel expressed the intention to defend Mr. Stojetz on the theory that his involvement in

> the murder of Watkins was the direct result of Mr. Stojetz's belief that Watkins attacked Doug Haggerty, announced an intent to kill Mr. Stojetz and the others, and that Mr. Stojetz had no intent to cause the death of Watkins.
>
> Despite the clear intent to defend on these theories counsel took no steps to investigate these theories or to present any evidence to support this defense.

(Petition, ECF No. 14-2, at ¶¶ 95-97.)

According to Petitioner, his trial counsel not only failed to present the defenses they had promised but also actually undermined those defenses. Petitioner asserts that his defense attorneys did not interview a single witness or retain **[*20]** an investigator to interview witnesses. Rather, Petitioner claims, defense counsel's investigation consisted solely of reviewing the discovery that the state provided.

Petitioner was represented at trial by two appointed attorneys: James Doughty and his son, Jon Doughty. Petitioner explains that James Doughty admittedly did almost no work on the case—James Doughty could not even recount the theory of defense when asked—despite billing a considerable amount of hours. Petitioner asserts that James Doughty did not file or review any motions, did not review the discovery, did not conduct any investigation, did not discuss the case with his son Jon, did not interview any witnesses, and did not prepare Petitioner to give a mitigation statement. Petitioner argues that James Doughty essentially abdicated preparation of the case to the prosecution. Asserting that James Doughty never acted as his counsel, Petitioner notes that Ohio law entitles an indigent defendant charged with capital murder to two attorneys.

Petitioner proceeds to assert that "Jon Doughty's dedication to Mr. Stojetz, pretrial work and investigation, and trial preparation was no better than his father's." (Petition, ECF No. **[*21]** 14-2, at ¶ 120.) Petitioner states that Jon Doughty met with Petitioner only twice prior to trial. Petitioner further states that Jon Doughty did not interview any of the state's witnesses or potential defense witnesses or retain an investigator to conduct interviews. Rather, Jon Doughty's investigation consisted solely of reviewing the discovery that the prosecution provided. Petitioner also states that Jon Doughty admitted that most of the motions he filed were "form" motions that the Ohio Public Defender's Office provided. Petitioner emphasizes that Jon Doughty conducted almost no investigation and presented almost no evidence to support his theory of defense: that "Mr. Stojetz and a group of his friends went into Adams A basically to do some corrective action and that it got out of hand." (Petition, ECF No. 14-2, at ¶ 132 (quoting Tr. Vol. VIII, at 62).) Counsel's failure in this regard, Petitioner explains, included decisions not to interview Petitioner's accomplices and not to call Petitioner to testify.

"Jon's performance in mitigation," Petitioner continues, "was equally pitiful." (Petition, ECF No. 14-2, at ¶ 138.) With respect to his mitigation theory of establishing that **[*22]** Petitioner had had a difficult life, Petitioner asserts that Jon Doughty met Petitioner's family but did not interview them or gather any evidence. With respect to the additional mitigation theory of establishing that Damico Watkins had played a role in provoking the attack that killed him, Petitioner contends that Jon Doughty conducted no investigation despite, according to Petitioner, a wealth of evidence that would have supported that theory and rebutted the state's theory that the killing was deliberate and racially motivated. Petitioner maintains that evidence was also available to establish that he was not the leader of the Aryan Brotherhood gang at Madison Correctional Institution ("MaCI") and was not the actual killer of Damico Watkins. In support of these arguments, Petitioner relies heavily on postconviction testimony that accomplices James Bowling and William Vandersommen and inmates Kevin Fulkerson, Robert Sheets, and David Hicks provided.

Petitioner asserts that no strategic reason exists for a total failure to investigate—not even Jon

Doughty's conclusion after reviewing the state's evidence (according to Petitioner) that Petitioner's case was hopeless. As evidence that **[*23]** he was prejudiced by counsel's deficient investigation and failure to present a defense, Petitioner points out that several of the witnesses defense counsel failed to call or even interview *did* testify at the trial of co-defendant James Bowling. Bowling, Petitioner notes, received a life sentence.

In his Memorandum in Support, Petitioner adds to the arguments that he raised in his Petition. (ECF No. 93, at Page ID # 2174-2194.) First, Petitioner disputes Respondent's assertion that Petitioner's claim is without merit for the reason that the evidence against Petitioner was so overwhelming that any defense at the guilt phase would have been fruitless (ECF No. 21, at Page ID # 386-392). With respect to Respondent's suggestion that Petitioner's own postconviction testimony undermined any claim that his attorneys were ineffective for failing to investigate and prepare a defense, Petitioner insists that nowhere at any time has he admitted to the crimes that the state charged. Petitioner further emphasizes that the attackers had no intent to cause the death of Damico Watkins, only that they intended to fight Watkins, and that Respondent misrepresents accomplice James Bowling's testimony as **[*24]** to the assailants' intent. Petitioner proceeds to argue that this Court should not discount Petitioner's postconviction witnesses as the state trial court did.

To that point, Petitioner offers a myriad of ways in which he asserts that the trial court's postconviction decision rejecting Petitioner's claim unreasonably applied clearly established federal law and/or relied on unreasonable factual determinations in light of the evidence that the parties presented in postconviction. Petitioner takes issue with the trial court's postconviction conclusion that in view of the overwhelming evidence against Petitioner that defense counsel reviewed during discovery, defense counsel reasonably concluded that any culpability-phase defense would be fruitless. Citing *Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997)*, and *Dickerson v. Bagley, 453 F.3d 690, 694 (6th Cir. 2006)*, Petitioner asserts that any conclusion by counsel that no defense could make a difference does not constitute a legitimate tactical decision deserving of the sort of deference to which a trial attorney's decisions are normally entitled. To support his argument, Petitioner also points to the "unchallenged" postconviction testimony of attorney David Stebbins regarding a defense attorney's duties in a capital trial. Petitioner also **[*25]** faults as unreasonable that the trial court provided rationales for counsel's actions and omissions that were not counsel's actual reasons.

Petitioner proceeds to characterize as unreasonable the trial court's determination that Petitioner had admitted to everything that the state charged. Insisting that this was not the case, Petitioner points out that the trial court cited no evidence in support of its determination. In a related argument, Petitioner contends that the trial court mischaracterized the evidence when concluding that forensic proof established that Petitioner had dealt at least two of the fatal thrusts.

Petitioner next attacks as unreasonable the trial court's determination that had defense counsel presented the witnesses that Petitioner wanted them to call, the state in response would have called numerous additional witnesses further inculpating Petitioner. According to Petitioner, the trial court's determination in that regard ignores the reality of the trial process—namely that the state called (and would have called) only those witnesses who *best* supported the state's case against Petitioner. Petitioner complains that defense counsel's failure to interview or call **[*26]** witnesses of its own paved the way for the state to present a tidy, concise case against Petitioner using only those witnesses who were most damning to Petitioner. Calling forty additional inmate witnesses with varying degrees of credibility issues and differing views of the event, Petitioner reasons, would have enhanced Petitioner's defense and undermined the strength of the state's case.

Petitioner points to the inmate witnesses that he presented in postconviction as evidence of what kind of defense counsel could have presented had they interviewed and called those witnesses. Petitioner also characterizes as unreasonable the trial court's discounting those witnesses. For instance, Petitioner explains, the trial court acted unreasonably in downplaying accomplice Vandersommen's admission of guilt as the actual murderer of Damico Watkins. According to Petitioner, the trial court also gave little consideration to accomplice Bowling's admission to being the leader of the Aryan Brotherhood at MaCI and to planning the attack on Damico Watkins, Bowling's insistence that the assailants had no intent to kill Watkins and only planned for Petitioner to fight Watkins, Bowling's insistence that **[*27]** Petitioner did not have a shank during the attack, and Bowling's insistence that accomplices Vandersommen and Bishop were the actual killers of Watkins. Petitioner emphasizes that during his postconviction hearing, the state called no witnesses who could place Petitioner on the second floor of the prison unit at any time during the incident and that all of the witnesses who testified stated that Petitioner remained on the first floor during the incident.

Petitioner also assails as unreasonable the trial court's crediting defense counsel for *not* attempting to interview Petitioner's accomplices. The trial court reasoned that had Petitioner's defense counsel called any accomplices, those men would have raised their own exposure to the death penalty. Petitioner asserts that defense counsel owed their duty to Petitioner, not his accomplices. Petitioner further takes the state to task for suggesting that it wielded the death penalty as a deterrent to Petitioner's accomplices taking the stand to testify. Petitioner proceeds to recount, as he did in his Petition, the testimony that inmates Fulkerson, Sheets, and Hicks could have provided at Petitioner's trial. Finally, pointing to the testimony **[*28]** of Dr. Eimer as to the Post Traumatic Stress Disorder ("PTSD") that Petitioner suffered as a result of enduring a horrific contract assault in prison, Petitioner emphasizes with respect to the assault on Watkins that Petitioner was responding to a threat—a threat exponentially escalated in Petitioner's mind due to his PTSD.

Respondent asserts that Petitioner's claim is without merit. (ECF No. 101, at Page ID # 2427-2436.) Respondent begins by emphasizing key conclusions that the state courts reached in reviewing Petitioner's case—namely that Petitioner was the leader of the Aryan Brotherhood at MaCI, that Petitioner was armed with a shank during the attack on Watkins, that it was Petitioner who murdered Watkins, and that Petitioner confessed to murdering Watkins. Respondent proceeds to address Petitioner's claim point by point, beginning with Petitioner's complaint that his defense counsel conducted no pretrial hearings or otherwise made any pretrial appearances. Respondent dismisses any argument that Petitioner's attorneys were ineffective in this regard, noting that defense counsel did file numerous pretrial motions—one of which to suppress damaging remarks by C.O. Vanover that the **[*29]** trial court granted—and that the trial court addressed counsel's motions without conducting hearings. Respondent further asserts that defense counsel conducted an extensive view of the detailed investigation that the state authorities conducted and that the strong indicia of reliability inherent in the interviews that the authorities conducted negated any need on defense counsel's part to re-interview witnesses. As for the three witnesses that Petitioner faults defense counsel for neglecting to call, Respondent argues that each had significant credibility deficits. Respondent explains that Robert Sheets initially stated that he was sleeping during the incident and did not see anything, that David Hicks initially stated that he did not see anything during the incident, and that Kevin Fulkerson contradicted Petitioner's claim that Petitioner was not the leader of the Aryan Brotherhood at MaCI. Respondent contends that in view of the foregoing, as well as the state's intent to call countless rebuttal witnesses had defense counsel called the witnesses Petitioner advocated, there exists no reasonable probability

that the outcome of Petitioner's trial would have been different had defense **[*30]** counsel interviewed witnesses or called the witnesses Petitioner wanted. The state courts concluded as much, Respondent explains, and Respondent urges this Court to defer to that conclusion.

Respondent proceeds to address additional arguments that Petitioner makes. For instance, Respondent disputes Petitioner's argument that defense counsel were ineffective for failing to interview Petitioner's accomplices. Respondent explains that Petitioner was the first to go to trial for Damico Watkins' murder and that Petitioner's accomplices, having been represented by their own counsel, were effectively off-limits to Petitioner's defense counsel. Even if any of those accomplices had testified, Respondent asserts, their testimony would have been undermined by eye-witness accounts of fifty juvenile inmates who saw the attack, forensic evidence inculpating Petitioner, and Petitioner's own admissions against his interests. Respondent next argues that Petitioner's claim is without merit because beyond the evidence that Petitioner argued during state postconviction defense counsel should have developed and presented—evidence that, Respondent notes, the state courts soundly discredited—Petitioner offers **[*31]** no other evidence that counsel's alleged lapse failed to yield. To that point, Respondent asserts that defense counsel *did* know from Petitioner's sister and Dr. Eimer about the previous attack that Petitioner had suffered in prison. According to Respondent, defense counsel fully understood the facts and circumstances surrounding the attack and Petitioner's role in it, conducted a thorough review of the state-provided discovery, and formed a sound strategy: to assert that Petitioner never intended to kill Damico Watkins but was merely protecting Doug Haggerty and himself from a future attack and to assert that a weapon (a screwdriver) other than that with which Petitioner was found was the murder weapon. Respondent notes that the essence of this theory continued through the mitigation phase of Petitioner's trial, in Petitioner's unsworn statement, and into the instant proceedings. Respondent appears to suggest that this fact undermines any argument by Petitioner that his trial attorneys were ineffective for failing to investigate and present the very defense that they did present and by which Petitioner still stands. Respondent concludes by asserting that the Ohio Supreme Court justifiably **[*32]** concluded that Petitioner's defense counsel were not ineffective as Petitioner asserted and that even assuming defense counsel had conducted a deficient investigation and defense, no prejudice ensued.

The state court decisions that addressed Petitioner's claim on the merits form the starting point for this Court's analysis. The inquiry before this Court is whether those state court decisions rejecting Petitioner's claim contravened or unreasonably applied clearly established federal law or relied on an unreasonable factual determination in light of the evidence presented. Only if the Court answers one of those queries in the affirmative may the Court proceed to consider whether Petitioner's claim warrants habeas corpus relief. Two state courts issued merits-based decisions rejecting Petitioner's claim —the Ohio Supreme Court on direct appeal and the state trial court in postconviction. Both decisions inform this Court's analysis.

As the Court noted, Petitioner presented this claim of ineffective assistance on direct appeal, albeit limited in substance due to Petitioner's being confined to the evidence contained in the trial record. Petitioner also presented the claim in postconviction, **[*33]** this time expansive in nature due to Petitioner's inclusion of and reliance on a plethora of evidence outside the trial record. Petitioner preserved the former but defaulted the latter. Respondent initially argued that Petitioner had procedurally defaulted the claim in its entirety due to Petitioner's failure to prosecute a timely appeal from the trial court's decision denying Petitioner's postconviction action. (ECF No. 23, at Page ID # 730.) Apparently agreeing with Petitioner's argument in response that he had

preserved this ineffective assistance claim in an April 12, 2000 motion for a new trial (ECF No. 34, at Page ID # 1253), Respondent subsequently withdrew his procedural default argument against this claim of ineffective assistance of counsel (ECF No. 35, at Page ID # 1385).

Petitioner's April 12, 2000 motion for a new trial—premised on the new and not previously available sworn testimony of Phillip Wierzgac—included Petitioner's claim that his attorneys were ineffective for failing to investigate and present a defense. (App. Vol. IX, at 5.) The trial court denied Petitioner's motion by relying on its 113-page decision denying Petitioner's postconviction action. (*Id*. at 134, 135.) Petitioner timely appealed **[*34]** the trial court's decision denying his motion for a new trial. (App. Vol. X, at 31.) The appellate court rejected Petitioner's appeal and affirmed the trial court's decision denying the motion for a new trial. (*Id*. at 110.) The Ohio Supreme Court agreed with the court of appeals when it declined to review Petitioner's appeal. (App. Vol. XI, at 63.) Thus, Petitioner fully preserved the claims that he raised in his April 12, 2000 motion for a new trial.

The arguments that Petitioner presents in his Memorandum in Support rely on *all* of the evidence from trial, postconviction, and the motion for a new trial. The arguments with which Respondent countered in his Merits Brief addressed all of the same evidence. This Court will also consider that universe of evidence, including the trial court's 113-page postconviction decision, as that opinion formed the basis of the trial court's decision denying Petitioner's motion for a new trial.

Returning to its analysis of Petitioner's claim, the Court turns first to the Ohio Supreme Court's direct appeal decision. The Ohio Supreme Court rejected Petitioner's ineffective assistance claim as follows:

> Appellant, in his third proposition of law, argues that he was deprived of the effective assistance **[*35]** of trial counsel. Many of the claimed errors raised by appellant have been or will be addressed in our discussions of other propositions of law. See Part II, *supra*, Parts VII, VIII, IX, X, XVI, XXI, *infra*. Assuming *arguendo* that defense counsel was ineffective, this alone would not warrant reversal. To warrant reversal, "[t]he defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington (1984), 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698*. After reviewing the record in its entirety and considering all claims of alleged ineffectiveness, we find that appellant has failed to establish ineffective assistance of counsel under the standards spelled out in *Strickland*.

Stojetz, 84 Ohio St. 3d at 457-58. Although the Ohio Supreme Court's decision was little more than a cursory rejection of all of Petitioner's claims asserting ineffective assistance of counsel, it nonetheless constitutes an adjudication on the merits and this Court will accordingly give that decision its due—in other words, determine whether the decision contravened or unreasonably applied clearly established federal law as *28 U.S.C. § 2254(d)* requires.

Subject to the same *§ 2254(d)* inquiry is the 113-page decision that the state trial court issued in postconviction **[*36]** (and relied upon in denying Petitioner's motion for a new trial). (App. Vol. V, at 191-303.) The trial court considered a significant amount of material in rendering its September 14, 2000 decision, including the original March 4, 1998 postconviction petition and five amendments to that petition filed between March 10, 1998 and March 19, 1999. Supporting the petition and those five amendments were thirty-nine exhibits. The trial court heard testimony on August 10, 11, and 12, 1999, during which ten witnesses testified. The trial court also had before it several inmate-witness depositions. The trial court additionally considered all of the discovery that Petitioner's defense attorneys received from the state. (App. Vol. V, at 69.) Finally, the trial court solicited and received

post-hearing briefs by the parties. (*Id*. at 68.)

Upon exhaustive review of the substantial record in this case, the Court concludes for the reasons that follow that Petitioner's trial attorneys were not constitutionally ineffective for failing to investigate and present a defense as Petitioner alleges. The theory of defense for which Petitioner now advocates was essentially the theory that defense counsel *did* present during Petitioner's trial—namely that Petitioner **[*37]** and his Aryan Brotherhood accomplices entered Adams A with the intent for Petitioner to fight Damico Watkins in retaliation for an assault against Doug Haggerty the preceding evening, but that events spiraled out of control and Watkins was stabbed to death. The Court further concludes that, contrary to Petitioner's assertions, defense counsel *did* conduct sufficient investigation and *did* offer evidence supporting the defense theory.

As noted above, to establish ineffective assistance of counsel, a petitioner must demonstrate both that counsel rendered unreasonably deficient performance and that the deficient performance prejudiced the petitioner. Inherent in the duties that an attorney owes to his or her client is a duty to investigate. The Supreme Court in *Strickland v. Washington* made clear that:

> [S]trategic 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. In other words, counsel has a duty to make reasonable investigations or to make a reasonable **[*38]** decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate 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 690-91.

The Sixth Circuit has held that an attorney's duty to investigate "includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Parrish Towns v. Smith, 395 F.3d 251, 258 (6th Cir. 2005)* (citing *Bryant v. Scott, 28 F.3d 1411, 1419 (5th Cir. 1994))*. Thus, "'[a] lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance.'" *Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007)* (quoting *Reynoso v. Giurbino, 462 F.3d 1099, 1112 (9th Cir. 2006))*.

Jon Doughty admitted during postconviction testimony that the defense team did not interview any of the witnesses that the prosecution identified in its discovery or on its witness list. (Tr. Vol. VIII, at 53-54.) Although Doughty suggested at one point during his postconviction testimony that he thought the defense team had interviewed some of the inmate witnesses, Doughty was unable to recall those inmates' names or any details of the purported **[*39]** interviews. (*Id*. at 55-57.) Jon Doughty also testified, and the trial record independently confirms, that defense counsel never hired their own investigator. (*Id*. at 58-59.) Notwithstanding the foregoing, the record demonstrates that defense counsel—certainly Jon Doughty if not James Doughty—conducted a thorough review of the discovery that the prosecution provided. Jon Doughty testified during postconviction about his review of the state's discovery (Tr. Vol. VIII, at 58, 82, 82-83), and the trial transcript reflects that Jon Doughty had a command of the facts and evidence not only that the state presented but also that favored Petitioner. For example, Doughty conducted an effective cross-examination of inmate Andre Wright, persuasively pointing out inconsistencies between Wright's two pretrial statements and Wright's trial testimony, as well as possible bias on Wright's part.

(Tr. Vol. V, at 628-34, 637-38.) Further, it bears noting that Doughty's proffered cross-examination of Correction Officer Vanover succeeded in keeping out of evidence incriminating statements that, according to Vanover, Petitioner had uttered immediately after the incident. (Tr. Vol. V, at 796-99.) Doughty also conducted a thorough, **[*40]** well-prepared cross-examination of the state's DNA expert. (Tr. Vol. VI, at 890-95.)

Petitioner equates defense counsel's failure to interview witnesses identified in the state's discovery or to employ an investigator in finding and developing evidence in support of the defense theory with a total failure to investigate. That position is specious. The fact that defense counsel's pretrial investigation consisted solely of reviewing the discovery that the prosecution provided, even if not optimal on its face, was sufficient in the instant case to satisfy counsel's duty to investigate because of the exhaustive nature of the discovery that that the prosecution provided. This Court agrees with the state trial court's observations that the (essentially open file) discovery that the state provided to defense counsel was "unprecedented," far more extensive than that contemplated by the state criminal rules, and ongoing from the beginning of February 1997 through the end of March 1997. The state trial court noted in its postconviction decision that the court was "unaware of any case in which the State provided a complete summary of accounts of the event from every single witness." (App. Vol. V, at 265.)

Another **[*41]** reason why review of the state's discovery was sufficient to satisfy counsel's duty to investigate was because the manner in which defense counsel decided to present their theory of defense—namely through targeted cross-examination of the state's witnesses and limited presentation of defense witnesses (Tr. Vol. VIII, at 63-64)—rendered unnecessary any need for defense counsel to interview inmates, correctional personnel, or state highway patrol investigators or to hire an investigator to find and develop evidence. When asked during postconviction what independent investigation counsel had conducted, Jon Doughty testified that "we reviewed the entire file [provided by the prosecution], reviewed the statements, the various versions of the statements, watched the video tape and reviewed the evidence." (Tr. Vol. VIII, at 58.) Jon Doughty also testified that "the defense theory was that Mr. Stojetz and a group of his friends went to Adams A basically to do some corrective action and that it got out of hand." (*Id*. at 62.) They arrived at the theory, Jon Doughty continued, "after talking with John [Stojetz] and look[ing] over the evidence that we had to deal with." (*Id*.) When asked whether the factual basis **[*42]** for their theory consisted of information they received from Petitioner himself, Jon Doughty affirmed that "John [Stojetz] told us why they went over there, the guards had wanted them to go over there to basically bring the pod under control and that sort of thing." (*Id*.) With respect to how defense counsel intended to prove their theory of defense, Jon Doughty testified:

> [W]e were in kind of a tough situation. We, of course, had Doug Haggerty and I believe Doug testified about what had happened between him and Damico. And basically with that and using the other witnesses that were called by the prosecution primarily.

(Tr. Vol. VIII, at 63-64.) Jon Doughty further testified that defense counsel planned to use the testimony of Doug Haggerty and prosecution witnesses to also illustrate the culture of prison and role that gangs played in prison, as well as Damico Watkins' membership in a gang. (*Id*. at 65-66.) Finally, regarding what evidence defense counsel planned to present to demonstrate why Petitioner and his accomplices entered Adams A—namely for Petitioner to fight Watkins and not for Watkins to be killed—Jon Doughty conceded:

> [T]hat was real tough because we felt it would be a bad idea for John to testify. **[*43]** The only other testimony we could have had on that would have been from his what were then co-defendants, and we had the testimony of Doug Haggerty.

(*Id*. at 66.) Defense counsel never called any of Petitioner's co-defendants. Jon Doughty also conceded that he did not recall defense counsel addressing at trial an explanation for why Petitioner's belongings were already packed on the day of the incident (*Id*. at 68), alternative to the state's theory that Petitioner had packed his belongings knowing that the AB's killing of Damico Watkins would cause prison officials to transfer the assailants out of MaCI.[1]

Defense counsel's mitigation theory was that Petitioner had had a difficult life **[*45]** and that the victim in this case played a role in inducing the attack that claimed his life. Jon Doughty testified the defense intended to prove that theory by calling some of Petitioner's family members and through evidence of the fight between Damico Watkins and Doug Haggerty, respectively. (*Id*. at 72.)

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[1] The Court notes that Petitioner's counsel in postconviction went out of their way to establish that Jon Doughty did not interview anyone listed in a supplemental notice of evidence (Tr. Vol. VIII, at 53), anyone listed in a document entitled MaCI employee witnesses (*Id*.), anyone listed in additional supplemental notices of evidence (*Id*. at 54-55), anyone listed in a document entitled OHSP witness roster (*Id*. at 55), or anyone from a document entitled the prosecutor's list of witnesses (*Id*. at 55-56). Not once, however, did postconviction counsel ask why. Postconviction counsel also painstakingly demonstrated that the Doughty's did not **[*44]** interview any of Petitioner's accomplices—not James Bowling, nor William Vandersommen, nor David Lovejoy, nor Phillip Wierzgac, nor Jerry Bishop. (*Id*. at 66.) Not once, however, did postconviction counsel ask why.

This Court also notes, as the state trial court did, that neither the state nor Petitioner's postconviction counsel asked Jon Doughty what Petitioner had told defense counsel about the events before, during, and after the murder of Damico Watkins, even though Petitioner had arguably waived any attorney-client privilege when he testified as to what he had told defense counsel.

The foregoing suggests to this Court that Jon Doughty's answers would have been answers postconviction counsel did not want on the record—answers that would have inconveniently precluded virtually every argument that Petitioner now makes and hopes to prevail on. Of course, although reasons prompting Petitioner's postconviction counsel *not* to ask pointed questions are readily apparent, this Court can conceive of *not one* reason why the prosecution would not have asked the Doughty's why they did not interview any witnesses or accomplices.

With respect to the decision not to have Petitioner testify, Jon Doughty testified that he was aware that criminal defendants enjoy a constitutional right to testify and that the decision whether to exercise that right belongs to the accused, not the attorney. (*Id*. at 73.) To that point, Jon Doughty testified that it was Petitioner who made the decision not to testify and that Petitioner did so after consulting Jon, who had advised Petitioner not to testify. (*Id*. at 73-74.) Jon agreed that absent Petitioner testifying, defense counsel had no evidence to explain why Petitioner's belongings were packed or what Petitioner's plan was upon entering Adams A. (*Id*. at 75.)

The trial court's decision rejecting this allegation of ineffective assistance (App. Vol. V, at 295-97) was reasonable within the meaning of *28 U.S.C. § 2254(d)*. As the Court noted earlier, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations **[*46]** unnecessary." *Strickland, 466 U.S. at 690-91*. This Court is of the view that counsel's theory of defense, the evidence and information that informed their theory, and the manner in which they planned to present that theory constituted a reasonable decision that made unnecessary particular investigations—specifically, interviewing witnesses whose statements counsel had reviewed and/or employing an investigator to do so. It is not unreasonable for counsel to limit investigation that would produce information or evidence harmful to counsel's client. In *Strickland*, the Supreme Court stated that "[w]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless *or even harmful*, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *466 U.S. at 691* (emphasis added). *See also Wood v. Allen, 558 U.S. 290, 297, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010)* (counsel made reasonable strategic decision not to investigate mental deficiencies, despite availability of favorable report, because the report also contained details about nineteen prior arrests and an attempted murder); *Wong v. Belmontes, 558 U.S. 15, 27-28, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009)*

(counsel made reasonable strategic decision not to put on additional mitigation evidence where doing so would have opened the door to damaging evidence of another **[*47]** murder); *Burger v. Kemp, 483 U.S. 776, 795, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)* (finding that limited investigation was reasonable where all of the witnesses of which defense counsel was aware provided predominantly harmful information); *Strickland, 466 U.S. at 699* ("Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in."). In other words, sometimes less is more.

As noted above, Jon Doughty testified that counsel formulated their theory of defense based on the evidence and statements they reviewed, as well as information that Petitioner provided. It is apparent from the record what evidence and statements defense counsel reviewed: numerous statements identifying Petitioner as being among those intruders who chased and stabbed Damico Watkins (including on the top range of the cellblock where Watkins finally died) and identifying Petitioner as the leader of the Aryan Brotherhood gang at MaCI, or, at a minimum, the person who was giving orders during the incident.

Even inmate statements that did not implicate Petitioner as one of the assailants were problematic. For example, inmate Brandon **[*48]** Hill stated that he saw Petitioner only on the lower range and never saw Petitioner on the upper range. Hill made clear, however, that he deliberately backed away from the window of his cell after he saw the beginning of the incident and realized what was happening. (App. Vol. IV, at 143.) Thus, Hill's failure to observe Petitioner on the upper range of the cellblock was just as likely the product of Hill's deliberately looking away from the events as it was of Petitioner not having been on the upper range of the cellblock.

The record is devoid of any *direct* evidence demonstrating what information Petitioner provided to defense counsel about his involvement in the incident—a point that the state trial court in postconviction noted with a perceptible air of frustration. (App. Vol. V, at 266.) The state trial court accordingly deduced from its review of the record that "[i]t is clear that defendant had admitted to his counsel that he had committed every act that the discovery and trial evidence established that he committed." (App. Vol. V, at 273.) Petitioner takes issue with that conclusion, noting that "[t]he trial court cites no record evidence for these alleged admission [*sic*]." (ECF No. 93, at Page ID # 2187.)

Even if this Court is hesitant to go **[*49]** so far as to conclude that Petitioner admitted to his defense attorneys "every act that the discovery and trial evidence established that he committed," this Court surmises at the very least that whatever information Petitioner provided to his defense counsel was damaging to Petitioner. The Court bases that supposition on counsel's advice that Petitioner not testify (even knowing that Petitioner's failure to testify left defense counsel without evidence to explain why Petitioner's belongings were packed or the Aryan Brotherhood group's actual plan upon entering Adams A). The Court also bases its conclusion on counsel's decision not to parade in a handful of inmate witnesses in an attempt to prove the components of the defense theory, presumably on the grounds that doing so would have given rise to a risk that the prosecution would have responded by calling even more inmate witnesses implicating Petitioner in the murder. To the latter point, the trial court determined that of the 65 inmates whose statements OHSP investigators transcribed, at least thirty— a handful by photographs or physical description that matched only Petitioner but most by name—implicated Petitioner either in stabbing **[*50]** Watkins, chasing Watkins, or giving orders during the attack. (App. Vol. V, at 204-211.) Petitioner does not appear to challenge that finding. Rather, Petitioner relies on conjecture that the state never would have countered with additional inmate witnesses had defense counsel presented a few inmate witnesses to support

Petitioner's account of the events. (ECF No. 93, at Page ID # 2188.) According to the trial court's recounting of the interview transcripts, multiple inmates stated that: they observed Petitioner on the upper range of Adams A (Petitioner maintains that he remained on the lower range of Adams A during the entire incident and never went to the upper range); Petitioner was the leader of the Aryan Brotherhood at MaCI or otherwise was the apparent leader of the assailants during the incident (Petitioner denies that he was the AB leader at MaCI and insists that James Bowling was the AB leader at MaCI); and stated that it was Petitioner who took the Adams A keys from C.O. Browning while holding a knife (the longest of the shanks) to Browning (Petitioner denies that he had a knife when he entered Adams A or that it was he who took the keys from C.O. Browning at knifepoint). Defense counsel's decision **[*51]** not to present a handful of witnesses in support of the defense theory, however disparaged by Petitioner now, reduced the risk that the State would counter with even more inmate witnesses incriminating Petitioner. The strategy enabled defense counsel not only to focus pointed cross-examination on just three inmate-witnesses, but also to question during culpability-phase closing arguments why, if Adams A housed 80 to 90 juvenile inmates, the jury heard from only three. That approach arguably had a better chance of creating reasonable doubt in the minds of the jurors than a strategy giving rise to a risk that numerous inmate witnesses would take the stand, a few of whom might have marginally boosted Petitioner's theory of defense but far more of whom would have offered accounts detrimental to Petitioner's case.

Petitioner also characterizes as unreasonable the trial court's conclusion that expert forensic evidence established that Petitioner dealt at least two of the six lethal wounds that Watkins suffered. (ECF No. 93, at Page ID # 2188.) Although an argument could be made, based on the facts in this case, that a determination of who delivered the fatal wounds is not dispositive of the **[*52]** charges for which Petitioner was convicted and sentenced to death, the trial court's conclusion finds reasonable support in the record. Dr. Norton testified that of the forty knife wounds that Damico Watkins suffered, six were lethal in and of themselves. (Tr. Vol. IV, at 520, 525-26.) Dr. Norton further testified that of the knives prison authorities recovered from the attackers, the knife marked as state's exhibit 3 was responsible for two of the six fatal blows. (*Id*. at 540-41.) The trial record contained testimony that during the attack in Adams A, Petitioner was in possession of the knife marked as state's exhibit 3. (*Id*. at 568, 577 (C.O. Michael Browing); Tr. Vol. V, at 624, 636, 637-38 (inmate Andre Wright); *Id*. at 654, 658 (Deputy Warden Mark Saunders); 765, 766 (C.O. Timothy Follrod); 774 (Sergeant Martha Crabtree); 785-86 (C.O. J.W. Wolverton); Tr. Vol. VI, at 914, 917 (C.O. Charles B. Krueger); 922 (Sergeant Raymond Campbell); 981 (C.O. Terry Shaw).) And as noted earlier, the number of witnesses who testified that Petitioner was in possession of the knife marked as state's exhibit 3 *from the outset* of the attack undermines any assertion by Petitioner that he gained possession of state's exhibit 3 only after he took it from William Vandersommen and only after Vandersommen **[*53]** had stabbed Watkins in his cell. For instance, inmate Derrick Hunter told investigators that when the incident began, it was Petitioner who held a knife to C.O. Browning's throat to obtain Browning's Adams A keys and William Vandersommen was wielding a knife that had a screwdriver handle—a description that does not fit state's exhibit 3. (App. Vol. IV, at 272.) After Petitioner's trial, accomplice Phillip Wierzgac confirmed in a sworn statement dated December 19, 1997, that when the Aryan Brotherhood attackers entered Adams A, Vandersommen had a screwdriver-type knife and Petitioner had the largest knife—a description that fits state's exhibit 3. (*Id*. at 243.) The foregoing provides a reasonable foundation for the trial court's conclusion that Petitioner delivered two of the six fatal blows that Watkins suffered.

The Court finds unpersuasive and unsupported Petitioner's argument that his defense counsel

conducted *no* investigation. Defense counsel's investigation consisted of a thorough review of the discovery that the prosecution provided, discovery that by all accounts consisted of all of the investigation materials that the prosecution had. Similarly, Petitioner will not be heard to argue that his defense counsel **[*54]** abandoned their duty to investigate—in other words, failed to interview witnesses identified in the state's discovery—on the basis of an invalid strategic determination that Petitioner's case was hopeless. Nowhere did Jon or James Doughty state or suggest that their investigation decisions or theory of defense were informed by a determination that Petitioner's case was hopeless. That is conjecture by Petitioner that is not indicated by the facts. Rather, the record more plausibly demonstrates that, in view of the evidence defense counsel had reviewed and what Petitioner had told them, defense counsel's investigative decisions and theory of defense were crafted as a result of a determination that the best way to defend Petitioner was to limit the damage the prosecution could have inflicted.

In addition to faulting defense counsel for failing to interview witnesses and limiting their investigation to a review of discovery, Petitioner also criticizes counsel for the infrequency of their meetings with Petitioner. Petitioner explains that his defense attorneys met with him only twice prior to trial, despite persistent requests on the part of Petitioner and his family members to meet with **[*55]** defense counsel or gain information about the status of Petitioner's case. Jon Doughty testified during postconviction that he (possibly with James Doughty) met with Petitioner once in connection with Petitioner's arraignment and on another occasion closer to trial. (Tr. Vol. VIII, at 47-48.) With respect to Petitioner's family members, Jon Doughty testified that he met with Petitioner's brother-in-law Timothy Holdreith once when Holdreith was passing through town and with Holdreith, two of Petitioner's sisters, and Petitioner's fiancée another time. (*Id*. at 59-61.) Jon Doughty recalled nothing remarkable about either meeting.

The Court is aware that Petitioner's family members tell a different tale. Petitioner's fiancée, Diane Ash, testified in a postconviction affidavit about the meeting that Petitioner's family members had with Jon Doughty on February 17, 1997 at Doughty's office. (App. Vol. IV, at 96-98.) Attending, according to Ash, were Petitioner's sisters Denise Croston and Lori Holdreith, as well as Petitioner's brother-in-law Timothy Holdreith. James Doughty did not attend but stopped by to say hello. Ash explained that she had sent a fax to Jon Doughty a few weeks earlier asking about whether Jon Doughty **[*56]** had filed certain motions, which prompted Jon not only to set up the meeting, but also to call Ash irate about why she assumed he was not doing his job and explaining that it was less expensive to let the prosecutor do the investigation for defense counsel. (*Id*. at 97.) Ash stated that Jon Doughty gave her a videotape and told her that it showed Petitioner in the juvenile unit armed with a shank but that when Ash watched the videotape later at home, it showed no such thing. Ash also stated that she and Timothy Holdreith repeatedly asked Jon Doughy how he planned to defend Petitioner, only to have Doughty avoid their questions and explain that he did not have time to go through all of the state's witnesses. (*Id*. at 98.) According to Ash, all that Jon Doughty wanted to talk about was Petitioner's family members testifying at the second phase of the trial; to that end, Doughty asked Denise Croston and Lori Holdreith to write up a family history. Ash testified that she was shocked that defense counsel called only a few witnesses to testify when, according to Ash, there were so many people who witnessed the incident. Finally, Ash testified that when Petitioner's "Aunt Lillian" called defense counsel in January **[*57]** 1997 to ask what Petitioner's family could do to help, James Doughty told her they could write letters requesting clemency once Petitioner received the death penalty.

Petitioner's sister Denise Croston[2]

[2] Although the state courts repeatedly spelled Denise Croston's name as "Crosston," her she spelled her name as "Croston" in her own

also provided a postconviction affidavit recounting the February 17, 1997 meeting and other observations from Petitioner's trial. (App. Vol. IV, at 103-05.) She testified that when the family entered Jon Doughty's office, the counter was littered with photographs, papers, and a videotape. Jon told them that the prosecutor's office had sent the materials but that defense counsel had not had a chance to review the materials because they were in the middle of another case. Croston also testified that, prior to the meeting, she had placed many telephone calls to the Doughty's but had never received a call back. According to Croston, during the lone instance when she managed to get a hold of James Doughty, he was "abrupt and rude" and told me that they would start working on Petitioner's case once their other case had concluded. (*Id*. at 104.) Croston testified that the meeting was tense because after Diane Ash repeatedly asked questions about the case, Jon Doughty finally said, "Your [*sic*] starting to piss me off." (*Id*.) **[*58]** Croston continued that when she asked what had happened, Jon responded that a kid had been killed and then mentioned that Petitioner had been accused of being a leader of the Aryan Brotherhood. Croston testified that at no time during Petitioner's years of incarceration had they ever heard anything about the Aryan Brotherhood. When they then inquired about the Aryan Brotherhood, according to Croston, Jon Doughty responded that the Aryan Brotherhood were cold-hearted people. Croston testified that Jon seemed unprepared and that she got the sense that Jon Doughty believed from the outset that Petitioner was guilty. With respect to Petitioner's trial, Croston testified that she was shocked that defense counsel called only Doug Haggerty and did not address the Aryan Brotherhood or who was its leader. She also testified that she believed defense counsel throughout the trial had shown Petitioner's jury no respect and had engaged in too much laughing and socializing. (*Id*. at 105.)

Timothy Holdreith, Petitioner's brother-in-law, also provided a postconviction **[*59]** affidavit. (*Id*. at 108-10.) Prior to the February 17, 1997 meeting, Timothy Holdreith stopped by the Doughty office in January 1997 on his way home to Cleveland from Cincinnati. He had done so after receiving a phone call from his wife, Lori Holdreith, who was concerned about what her brother's attorneys were doing to prepare for his case. Timothy Holdreith opined that "[t]hey were quite surprised to see me." (*Id*. at 109.) According to Holdreith, Jon Doughty stated that defense counsel had just started receiving evidence from the prosecution and that there were over 100 witnesses. Doughty placed a call to Petitioner while Holdreith was present, during which Petitioner repeatedly asked about the filing of certain motions. Holdreith testified that when he asked after the phone call what a discovery motion was, Doughty explained that they did not have to file one because the prosecutors were already sharing all of their evidence. At one point, according to Holdreith, James Doughty entered and complained about all of the telephone calls Denise Croston had been making to defense counsel. With respect to the February 17, 1997 meeting, Holdreith testified that Jon Doughty repeatedly asked for family history details, **[*60]** as if assuming that Petitioner would be convicted. Further, according to Holdreith, Doughty made what Holdreith considered inappropriate remarks to Denise Croston about what she wore in her job as a waitress. (*Id*. at 109-10.) During the trial, when an article contained information that had been presented out of the hearing of the jury, Holdreith and Petitioner's sisters brought it to Jon Doughty's attention and suggested that he request a mistrial. Doughty refused, according to Holdreith, and disgustedly walked off. When someone asked Doughty as he walked away how he was doing, Holdreith asserted, Doughty replied that he was doing fine until "dumb ass" people kept trying to tell him how to do his job. (*Id*. at 110.) Finally, Holdreith testified that during the mitigation hearing, when he leaned over the rail to express concerns to James Doughty about Petitioner's unsworn statement, James snapped loudly enough

affidavit. (App. Vol. IV, at 103-05.)

for everyone to hear, "Jesus Christ, Tim. Do you think were [*sic*] stupid?" (*Id*.)

Finally, Petitioner's sister, Lori Holdreith, also submitted a postconviction affidavit. (App. Vol. IV, at 113-16.) Holdreith testified that in November and December of 1996, Petitioner began writing letters begging his family members to contact **[*61]** the Doughty's because Petitioner had had no communication with them since his arraignment in September 1996. Holdreith further testified that every time she or her sister Denise called defense counsel, they were told that the Doughty's were busy with another case. Holdreith stated that when she and her sister Denise did finally reach the Doughty's, "they were very rude and evasive." (*Id*. at 114.) Holdreith characterized the February 1997 meeting as "unsettling," noting that Jon Doughty focused primarily on gathering family and personal histories from everyone. According to Holdreith, Jon Doughty remarked that he did not believe that the prosecution had much evidence or that there was any chance Petitioner would get the death penalty. Holdreith also testified that Doughty told them Petitioner's trial would begin April 1, 1997, and would not proceed beyond April 18, 1997, because the trial judge had a vacation scheduled. During the trial, according to Holdreith, the Doughty's were dismissive whenever family members voiced concerns or asked questions. At one point, Holdreith asserted, a member of the *victim's* family approached Petitioner's family to remark how poorly defense counsel were performing. **[*62]** In addition to echoing the account of Jon Doughty's "disgustedly" rejecting the family's suggestion that he request a mistrial, Holdreith also testified that she thought defense counsel were overly friendly with the prosecution and the trial judge. (*Id*. at 114-15.)

Curiously, Petitioner's postconviction counsel failed to confront James or Jon Doughty with any of the accounts and allegations set forth above.

The Sixth Circuit has held that in the absence of a demonstration of prejudice, counsel's failure to meet with his or her client as often as the client wanted does not constitute ineffective assistance. In *Bowling v. Parker*, the Sixth Circuit held that "the mere fact that counsel spent little time with [Bowling] is not enough under *Strickland*, without evidence of prejudice or other defects." *344 F.3d 487, 506 (6th Cir. 2003)*. Bowling had alleged that his counsel had met with him for a total of one hour before going to trial, that Bowling had never been able to provide his version of the facts without counsel interrupting or ignoring him, and that his counsel presented no witnesses despite the availability of several favorable ones. The Sixth Circuit rejected Bowling's claim not only because Bowling failed to substantiate his **[*63]** implausible claim that counsel's pre-trial consultation consisted of merely one hour, but also because Bowling failed to demonstrate or even allege how additional meetings would have affected the outcome of his trial. *Id*.

In *Hill v. Mitchell*, the Sixth Circuit rejected a claim of ineffective assistance for counsel's infrequent pretrial visits and general failure to foster a more amenable attorney-client relationship. *400 F.3d 308, 324-25 (6th Cir. 2005)*. The Sixth Circuit explained that "Hill has given us no explanation how additional meetings with his counsel, or longer meetings with his counsel, would have led to new or better theories of advocacy or otherwise would have created a 'reasonable probability' of a different outcome." *Id. at 325*.

In the instant case, the Court is not persuaded that the alleged infrequency of counsel's pretrial meetings with Petitioner rises to the level of ineffective assistance, either as a free-standing allegation or as indicative of, as Petitioner asserts, a larger allegation of counsel's failure to investigate or present an adequate defense. It appears from the record that counsel met with Petitioner two or three times in the weeks and months prior to trial and spoke with Petitioner on the telephone **[*64]** at least once. The trial court further notes that, in the days leading up to Petitioner's trial, defense counsel met with Petitioner seven times at the London

Correctional Institute. (App. Vol. V, at 201.) The record also demonstrates that counsel met with Petitioner's family once in February 1997 and with Petitioner's brother-in-law one additional time prior to the February 1997 meeting. The Court has already determined that counsel conducted adequate pre-trial investigation and preparation. Specifically, the Court found that Petitioner's defense counsel had conducted a thorough review of the prosecution's extensive open-file discovery and demonstrated during trial a command of the facts and evidence not only that the state presented but also that favored Petitioner. As in *Bowling* and *Hill*, the infrequency of counsel's meetings does not constitute ineffective assistance where Petitioner fails to suggest and the record does not otherwise demonstrate what more counsel could have accomplished by meeting or communicating with Petitioner more frequently. Under the facts of this case, where pretrial investigation required counsel to conduct a thorough review of extensive discovery, an argument could be made that efforts by counsel to meet **[*65]** with Petitioner more frequently would have undermined counsel's representation by diverting their time and attention away from investigation and preparation. *See Aaron v. Scutt, No. 2:11-CV-11147, 2013 U.S. Dist. LEXIS 167845, 2013 WL 6182771, at *14 (E.D. Mich. Nov. 26, 2013)* (finding no ineffective assistance for infrequency of meetings where record demonstrated that counsel met with the petitioner before trial, reviewed the file, questioned witnesses, and advocated for the petitioner); *Pillars v. Palmer, No. 2:10-CV-13105, 2013 U.S. Dist. LEXIS 98167, 2013 WL 3732872, at *10 (E.D. Mich. Jul. 15, 2013)* (same); *Zimmerman v. Davis, No. 03-60173, 2011 U.S. Dist. LEXIS 34490, 2011 WL 1233357, at *5 (E.D. Mich. Mar. 30, 2011)* ("Counsel's failure to meet with Petitioner as much as his client wanted does not make counsel's performance unreasonable under the facts of this case.")

For the same reasons, the Court is not persuaded that Petitioner's counsel were ineffective for not being as communicative, accessible, or friendly as Petitioner or his family wanted. Assuming as true all of the accounts of Petitioner's family members concerning their negative interactions with and observations of defense counsel, the Court is not persuaded that counsel violated any duty they owed to Petitioner or that their behavior affected the outcome of Petitioner's trial. *See Soltero v. Kuhlman, No. 99CIV10765, 2000 U.S. Dist. LEXIS 17409, 2000 WL 1781657, at *5 (S.D.N.Y. Dec. 4, 2000)* (finding no ineffective assistance where the petitioner failed **[*66]** to demonstrate that counsel's alleged rudeness or failure to keep the petitioner informed affected the outcome of the petitioner's trial). Also for the same reasons that the Court discussed above, the Court is not persuaded that any of the negative accounts that Petitioner's family related were indicative or evidence of a failure on defense counsel's part to investigate or prepare a defense. And any opinions that Petitioner's family members expressed about prejudgments that Jon Doughty allegedly had made about the strength of the prosecution's case or Petitioner's factual guilt are just that: opinions.

To the extent that Petitioner intimates that James Doughty's allegedly limited participation in Petitioner's defense constitutes evidence of defense counsel's failure to investigate or support their defense, the Court finds his argument not well taken. First, the record contains evidence that James Doughty *did* participate in Petitioner's defense. James Doughty testified during postconviction that he had met with Petitioner several times before trial (Tr. Vol. VIII, at 11-12, 13, 14-16) and that while Jon Doughty's role was to handle the trial, his (James's) role was to handle the examination **[*67]** of the defense psychologist and give a short closing argument (*Id.* at 22). James further testified that he may have helped with Petitioner's unsworn statement. (*Id.* at 40.) James Doughty billed a total of 452 out-of-court hours of work on Petitioner's case, consisting of such tasks as research, writing, and investigation. (App. Vol. I, at 296-300.) James Doughty did so by way of a motion that he signed certifying, among other things, that he had performed all of the legal

services itemized in the motion. (*Id*. at 296.) Jon Doughty testified with certainty that he and his father James discussed many of the motions that they filed. (*Id*. at 49-50.) The only proof that Petitioner offers to refute record evidence of James Doughty's participation in Petitioner's defense is the vagueness of James Doughty's recollections during postconviction testimony more than two years after Petitioner's trial. That is insufficient to refute the record evidence demonstrating that James Doughty participated in Petitioner's defense. Petitioner also suggests that the paucity of James Doughty's participation amounted to no participation, in violation of Ohio statutory law requiring the appointment of two attorneys for capital cases. Petitioner's argument lacks merit **[*68]** because alleged errors of state law do not warrant habeas corpus relief, absent a denial of fundamental fairness, and Petitioner fails to show a denial of fundamental fairness.

Petitioner also argues that the fact that most if not all of the pretrial motions that defense counsel eventually filed were "form" motions that the Ohio Public Defender's Office provided constitutes further evidence of counsel's failure to conduct any investigation to support their defense theory. The state trial court in postconviction rejected this allegation, concluding that Petitioner had "established no deviation from standards nor derivative procedure from the failure of his counsel to file boilerplate pretrial motions until March 14, 1997, and more than that two weeks prior to trial." (App. Vol. V, at 265.) The trial court explained:

> [A] review of all the motions filed on behalf of defendant reflects that there was nothing unique or novel in their substance or content. They were a series of boiler plate motions supplied by the State Public Defender to be filed on behalf of indigent capital defendants and tailored to specific cases. Having tried more than twenty aggravated murder cases in the last twenty-five years, the boiler **[*69]** plate motions are reasonably expected by judges in every case where the defendant is represented by qualified counsel.

(*Id*. at 264.) The trial court also noted that everything Petitioner had requested his counsel to obtain in October 1996—a bill of particulars, discovery, suppression of evidence—"counsel received voluntarily or by motion in February and March, 1997." (*Id*. at 265.) The trial court agreed that Petitioner's "motion for a change of venue should have been supplemented with evidence of pretrial publicity," but concluded that the "the lack of such supplementation had no negative impact on the merits of the motion or the results of the trial." (*Id*.)

The trial court's decision rejecting this allegation of deficient performance did not contravene or unreasonably apply clearly established federal law and did not rely on an unreasonable determination of the facts. The filing of boilerplate, inartful, or sloppy motions does not amount to ineffective assistance absent a showing that counsel's performance fell below prevailing professional norms and prejudiced the accused's defense. *See, e.g.*, *King v. Greiner, No. 02civ5810, 2008 U.S. Dist. LEXIS 74493, 2008 WL 4410109, at *46 (S.D.N.Y. Sep. 26, 2008)* (and cases cited therein). As the trial court correctly noted, the filing in **[*70]** aggravated murder cases of boiler plate motions supplied by the Ohio Public Defender's Office—far from falling below prevailing professional norms—actually falls squarely within prevailing professional norms in Ohio. Petitioner's own death penalty attorney expert testified during Petitioner's postconvicition hearing about the practice. (Tr. Vol. VIII, at 106-07.) The "boilerplate" pretrial motions that Petitioner's defense counsel were not frivolous, as they served the important purpose in capital cases of preserving constitutional issues for appeal and contained no glaring deficiencies. The foregoing supports the trial court's determination that the filing of these boilerplate motions by Petitioner's defense counsel did not fall below prevailing professional norms.

Even assuming that counsel's performance was

deficient in this respect—a conclusion this Court expressly rejects—Petitioner cannot demonstrate that he suffered prejudice. The unprecedented, extensive, and ongoing open-file discovery that the state provided Petitioner's defense counsel unquestionably mitigated any need for an aggressive pretrial motion practice. To that point, as the trial court correctly noted, all of the **[*71]** information or action that Petitioner in October 1996 requested defense counsel to obtain or undertake, counsel managed to accomplish either through the state's voluntary disclosure or by motion. In fact, it bears repeating that one of defense counsel's motion to suppress statements prevailed, keeping out of evidence damaging statements against interest that Petitioner had allegedly uttered to Correction Officer Vanover following the incident.

The foregoing demonstrates that the filing of "boilerplate" motions by defense counsel did not constitute ineffective assistance of counsel, either as a free-standing allegation or as indicative of a larger failure on counsel's part to conduct an adequate investigate in support of the theory of defense. This Court cannot disagree with, much less find unreasonable, the state trial court's postconviction decision rejecting the allegation.

As the Court touched upon above, the crux of Petitioner's argument that counsel failed to investigate or present evidence to defend Petitioner is that counsel devised a theory of defense but did nothing to investigate their theory or the facts and consequently presented no evidence to support their theory or the **[*72]** facts, despite the availability of a plethora of such evidence. (ECF No. 14-2, at Page ID # 211-220; ECF No. 93, at Page ID # 2179-2194.) Petitioner proceeds to list a litany of witnesses defense counsel failed to interview or call "who could have testified in direct support of Jon Doughty's professed theory of defense." (ECF No. 14-2, at Page ID # 217 ¶ 198.) To that point, Petitioner notes as an example that juvenile inmate Kevin Fulkerson and correction officer Parrish testified at James Bowling's trial and that Bowling received a life sentence. Petitioner insists that "[t]here can be no 'strategic decision' predicated on a total lack of investigation." (*Id.* at ¶ 201.) In short, Petitioner argues that counsel's failure to investigate the viable defense supported by uncalled witnesses Bowling, Parrish, Vandersommen, Fulkerson, and Sheets constituted deficient performance. Petitioner further argues that the deficient performance prejudiced him, insofar as counsel's failing "offered the jury no alternative but to convict Mr. Stojetz of aggravated murder." (*Id.* at Page ID # 219 ¶ 209.)

In its postconviction decision, the state trial court in painstaking detail rejected Petitioner's allegations **[*73]** against the backdrop of *Strickland v. Washington* and its progeny. (App. Vol. V, at 265-76.) Petitioner assails as unreasonable the trial court's and Respondent's dismissive position toward the witnesses Petitioner asserts his defense counsel should have interviewed before trial and called to testify. (ECF No. 93, at Page ID # 2182, 2188-2192.) This Court has reviewed the record before it, as well as the trial court's decision, and concludes that it would have been unreasonable for the trial court *not* to have pointed out shortcomings with each of Petitioner's proposed witnesses and to have discredited their accounts as a result.

Accomplice James Bowling provided an affidavit and deposition testimony during Petitioner's postconviction proceeding. Petitioner complains that had defense counsel interviewed Bowling or called him to testify, Bowling would have corroborated Petitioner's assertions that he (Bowling) was the leader of the Aryan Brotherhood at MaCI; that he (Bowling) solely planned the siege of Adams A and Petitioner's fight with Damico Watkins; that Petitioner did not have a shank when the group entered Adams A because the plan was only for Petitioner to fight Watkins; that at least one guard was **[*74]** aware of the planned attack and overtly assisted by ensuring the attackers access to Adams A; that it was Jerry Bishop and William Vandersommen who attacked and killed

Watkins; and that Petitioner was on the first floor of Adams A guarding a door at the time Watkins was killed. (ECF No. 14-2, at Page ID # 212-13.) Bowling stated that he "might have testified" at Petitioner's trial had Petitioner's defense counsel called him. (*Id*. at Page ID # 213.)

The record in this case supports an inference that Petitioner's defense attorneys made a strategic decision not to interview or call Bowling. First, defense counsel had no reason to believe that Bowling or any other accomplices would have been willing to talk to them, much less testify at Petitioner's trial. Immediately following the incident, each of the assailants refused to speak to investigators and, according to an investigative summary by OSHP Trooper Downey, Bowling, Bishop, Vandersommen, and Wierzgac expressed a desire to speak to attorneys. (App. Vol. IV, at 270.) Petitioner was the first to be tried and, at no time prior to Petitioner's trial did Bowling make any statements or provide any evidence beneficial to Petitioner's case. Bowling continued **[*75]** to evade responsibility for any role in the events leading up to the death of Damico Watkins, proceeding to trial *after* Petitioner's trial and sentencing. On August 31, 1998, Bowling received a sentence of thirty years to life. (Tr. Vol. IX, at 7; ECF No. 133-9, at Page ID # 8527.) One year later, in September 1999, Bowling provided deposition testimony in support of Petitioner's postconviction action. (Tr. Vol. IX, at 1; ECF No. 133-9, at Page ID # 8524.) Bowling's earlier May 1997 affidavit contained no statements damaging to himself or beneficial to Petitioner. (Appl. Vol. IV, at 56-57.) Thus, it was only after he went to trial and received a sentence less than death that Bowling provided statements inculpating himself and exculpating Petitioner. Even during his postconviction deposition, Bowling was less than definitive about whether he would have been willing to testify at Petitioner's trial had defense counsel asked. (Tr. Vol. IX, at 58; ECF No. 133-9, at Page ID # 8579.)

Beyond the foregoing, Bowling's deposition testimony contains a wealth of information that the record soundly contradicts. Bowling testified during his September 1999 deposition that *he* was the leader of the AB at MaCi, not Petitioner. Walt Ashbridge **[*76]** and Correction Officer John Vanover testified at trial that Petitioner was the leader of the AB at MaCi at the time of the incident. (Tr. Vol. V, at 679; Tr. Vol. VI, at 948.) Further, the discovery that defense counsel received before trial included statements by inmate-witnesses Thomas Coleman, David Brown, and Roman Ward demonstrating that Petitioner was the leader of the AB at MaCi or otherwise was giving orders during the incident. (App. Vol. IV, at 157, 300, 302.)

Bowling also testified during his postconviction deposition that Petitioner did not have a knife (or shank) when Petitioner entered Adams A. But Correction Officer Michael Browning and inmate-witness Andre Wright testified at trial that it was Petitioner who obtained the Adams A keys from Browning by holding a knife to Browning's throat. (Tr. Vol. IV, at 565-66; Tr. Vol. V, at 615-16.) Further, the discovery that defense counsel received before trial included statements by Browning and inmate-witness Derrick Hunter establishing that Petitioner had a knife from the time he entered Adams A. (App. Vol. IV, at 269, 272.) Subsequent to Petitioner's trial, co-defendant Phillip Wierzgac, after pleading guilty but before being sentenced, gave a sworn statement and testified at Bowling's trial **[*77]** that Petitioner had a knife when he entered Adams A. (App. Vol. IV, at 242, 364.)

Most damaging to Petitioner vis-à-vis this allegation, any suggestions by Bowling that Petitioner did not participate in stabbing Watkins and was never on the upper range of Adams A are also soundly contradicted by pretrial discovery and trial testimony. As the Court noted earlier, the trial court in postconviction described summaries of no fewer than thirty juvenile inmates who witnessed Petitioner stabbing Watkins. (App. Vol. V, at 204-10.) Accomplice David Lovejoy also told investigators that Petitioner had participated in the stabbing of Watkins. (App. Vol. IV, at 276.)

Further undercutting any assertion by Petitioner that he never stabbed Watkins is the fact that Watkins' blood was found on Petitioner's sweatshirt sleeves. (Tr. Vol. VI, at 880.) Moreover, by this Court's review of the record, at least five inmate-witnesses—Thomas Coleman, Paul Carter, David Brown, Henry Williams, and John West—maintained in pretrial statements that Petitioner was definitely on the upper range of Adams A during the incident. (App. Vol. IV, at 159, 300.) One accomplice, Phillip Wierzgac, testified following Petitioner's trial that Petitioner was on the upper range of Adams A during the incident. (*Id*. 368.)

Accomplice William Vandersommen also **[*78]** provided an affidavit and deposition testimony during Petitioner's postconviction proceeding. Petitioner complains that had defense counsel interviewed Vandersommen or called him to testify, Vandersommen would have corroborated Petitioner's assertions that an inmate named John West had told Vandersommen about several juvenile inmates having attacked fellow juvenile inmate Doug Haggerty the night before the assault on Damico Watkins. According to Petitioner, Vandersommen sent West to speak to Bowling, after which Bowling planned the attack on Watkins inside Adams A in response to the anticipated attack on the Aryan Brotherhood by black juvenile inmates. Petitioner further asserts that Vandersommen would have corroborated Petitioner's account as to the shanks that each assailant carried and to Vandersommen's bringing into the group his cellmate Phillip Wierzgac. Vandersommen also could have corroborated that the prison yard was devoid of any guards at the time the Aryan Brotherhood gathered to storm Adams A, which was unusual and which Vandersommen learned from Bowling had been prearranged. Vandersommen also could have verified that the plan was for Petitioner to fight Damico Watkins, **[*79]** not for the assailants to kill anyone. Further, Vandersommen could have substantiated that the door into Adams A, which was usually always locked, was propped open with a soda can, and that Vandersommen, not Petitioner, held a knife to Correction Officer Browning's throat to get Browning to drop his keys, which keys either Petitioner or Bowling picked up. Finally, Petitioner asserts that Vandersommen could have testified that he and Bishop ran into Watkins' cell, snapped, and started stabbing Watkins—Vandersommen in the back and Bishop in the front; that while Vandersommen and Bishop were stabbing Watkins in his cell, Petitioner was trying to dislodge the key from the cell door; that Watkins ran out of his cell, at which time Petitioner took the knife that Vandersommen was carrying; that Vandersommen knew he had violated the plan; that Vandersommen chased Watkins up the stairs to the upper range, where Vandersommen and Bishop stabbed Watkins to death; that Petitioner did not stab Watkins or tell anyone else to stab Watkins; that Vandersommen would have talked to defense counsel had they asked but does not know if he would have testified. (ECF No. 14-2, at Page ID # 213-215.)

The record **[*80]** in this case supports an inference that Petitioner's defense attorneys made a strategic decision not to interview or call Vandersommen. First, as the Court discussed in more detail with respect to accomplice James Bowling, defense counsel had no reason to believe that Vandersommen or any other accomplices would have been willing to talk to defense counsel, much less testify at Petitioner's trial. And, as with Bowling's postconviction testimony, many of Vandersommen's postconviction assertions—specifically any statements that it was Vandersommen, not Petitioner, who held a knife to Officer Browning's throat to get Browning's Adams A keys; that Petitioner took the large knife from Vandersommen after Watkins, already stabbed, fled his cell; and that Petitioner played no role in the stabbing of Damico Watkins—are directly contradicted by the pretrial discovery and trial record.

In view of Petitioner's touting what Bowling and Vandersommen could have contributed to Petitioner's defense—an occurrence this Court views as wholly unlikely—it is worth taking note of

accomplices who Petitioner does *not* include among un-interviewed, un-called accomplices who could have bolstered Petitioner's defense. **[*81]** Phillip Wierzgac provided testimony in a December 19, 1997 sworn statement and during Bowling's trial the following year. Wierzgac testified that, among other things: it was Petitioner who held Officer Browning against the wall to get Browning's keys (App. Vol. IV, at 242); Petitioner was giving orders during the incident, directing Wierzgac to watch the door (*Id*. at 242, 366); from the outset, Petitioner had the longest shank and Vandersommen had a screwdriver-like shank (*Id*. at 243); when Watkins ran to the upper range with Vandersommen chasing him, Petitioner and Bowling were also on the upper range (*Id*. at 367-68); Bowling and Petitioner directed Bishop to stab Watkins (*Id*. at 369); Petitioner was on the upper range where Watkins died (*Id*. at 247); and immediately after the incident, when the assailants were rounded up together, Petitioner stated that he had stabbed Watkins (*Id*. at 379). David Lovejoy told investigators that Petitioner had participated in the stabbing of Damico Watkins. (*Id*. at 276.)

Further undermining Petitioner's assertion that defense counsel were ineffective for failing to interview or call Bowling and Vandersommen is the fact that, in addition to the near-zero likelihood that any of Petitioner's accomplices would have provided exculpatory testimony at Petitioner's **[*82]** trial, accomplice testimony is inherently suspect and often disfavored. *See e.g.*, *Gregory v. Thaler, 601 F.3d 347, 353 (5th Cir. 2010)* (finding no ineffective assistance for failing to interview accomplices who had suggested in affidavits potentially exculpatory information because accomplice testimony was inherently suspect under state law and because accomplices had not provided any exculpatory information prior to the petitioner's trial). Moreover, it is difficult for the Court to find either deficient performance or prejudice stemming from counsel's failure to pursue accomplice evidence that contradicted their client's statements or counsel's defense theory. *Cf. Ford v. Schofield, 488 F. Supp. 2d 1258, 1351-52 (N.D. Ga. 2007)* (finding no prejudice from counsel's failure to interview accomplice where accomplice's affidavit contradicted the petitioner's version of the events).

Petitioner complains that had counsel interviewed inmate-witness Kevin Fulkerson and called him at trial, Fulkerson would have testified that he understood Damico Watkins to be the leader of the Ffolknation gang at MaCI; that while in the commissary on the morning of the incident, Fulkerson overheard juvenile inmates Andre Wright and Watkins trying to recruit other juvenile inmates to join in an attack on the Aryan Brotherhood **[*83]** gang at MaCI for the purpose of the Ffolknation gang to "take over" at MaCI; that Fulkerson told Petitioner what he (Fulkerson) had learned but that Petitioner already knew; that the failure of the Aryan Brotherhood to respond to a known threat would have caused more problems at MaCI; that during lunch immediately preceding the attack, plenty of guards were in the chow hall but none were on the yard; that Bowling's attorneys interviewed Fulkerson and that Fulkerson testified at Bowling's trial; and that Fulkerson would have spoken to Petitioner's defense attorneys had they contacted him. (ECF No. 14-2, at Page ID # 215-216.) Undercutting Petitioner's accusation is the fact that when investigators initially questioned Fulkerson, he provided no such information. (Tr. Vol. IX, at 38-39, ECF No. 133-9, at Page ID # 8744-8745.) Further, Fulkerson identified Petitioner as the Aryan Brotherhood leader at MaCI, which would have been damaging to Petitioner's defense at trial (and insistence now) that he was not the Aryan Brotherhood leader. (Tr. Vol. IX, at 42; ECF No. 133-9, at Page ID # 8748.) Finally, the statements set forth above are not so essential or beneficial to Petitioner's case **[*84]** as to outweigh their damaging aspects or to call into question defense counsel's failure to pursue Fulkerson as a defense witness.

Petitioner also takes his trial counsel to task for failing to call inmate Robert Sheets as a defense witness. According to Petitioner, Sheets could have

testified that he witnessed the attack on Doug Haggerty the evening prior to the storming of Adams A; that Adams A was disproportionately African-American and that Petitioner often played the role of a peacemaker; and that he (Sheets) saw men chasing Watkins around Adams A but that Petitioner did not attack Watkins. (ECF No. 14-2, at Page ID # 216.) Sheets also stated in a postconviction deposition that he "possibly" would have spoken to defense counsel and that it was "possible" he would have testified. (Tr. Vol. IX, at 35; ECF No. 133-9, at Page ID # 8786.) Sheets told a different story when investigators interviewed him immediately following the incident. Specifically, Sheets told investigators he did not want to get involved. (App. Vol. IV, at 273.) Sheets also identified by photos David Lovejoy, James Bowling, William Vandersommen, and Petitioner as adult inmates involved in the attack. (*Id*.) Sheets even conceded during **[*85]** his postconviction deposition that because he had told investigators that he had not seen anything, he did not "guess" anyone would have sought to speak to him about the incident. (Tr. Vol. IX, at 40, ECF No. 133-9, at Page ID # 8791.)

Petitioner further asserts that his attorneys performed deficiently and to Petitioner's prejudice in failing to interview or call inmate David Hicks. According to Petitioner, Hicks could have testified that he witnessed the attack on Doug Haggerty; that he saw the attack on Damico Watkins and that Watkins died outside of Hicks's cell; that Hicks saw Petitioner on the first floor of Adams A after Watkins collapsed in front of Hicks's cell; and that Hicks never saw Petitioner on the second floor of Adams A. (ECF No. 14-2, at Page ID # 216-17.) Hicks also testified in a postconviction deposition that he would have talked to defense counsel and would have testified at Petitioner's trial. (Tr. Vol. IX, at 24-25; ECF No. 133-9, at Page ID # 8621-8622.) But like Sheets, Hicks initially told investigators that he had not seen anything. (Tr. Vol. IX, at 23; ECF No. 133-9, at Page ID # 8620.) Investigative statements indicating that a subject saw nothing would **[*86]** not alert a reasonable attorney to further investigate that subject. Thus, as to Sheets and Hicks, the Court declines Petitioner's invitation to deem as unreasonable counsel's failure to tap what appeared to be an empty well.

To the extent Petitioner faults defense counsel for failing to call him to testify and for failing to explain to him that he had a constitutional right to testify, this Court has considered and rejected these allegations. As the Court noted, defense attorney Jon Doughty testified during postconviction that it was Petitioner who made the decision not to testify and that Petitioner did so after consulting Jon, who had advised Petitioner not to testify. (Tr. Vol. VIII, at 73-74.) Jon agreed that absent Petitioner testifying, defense counsel had no evidence to explain why Petitioner's belongings were packed or what Petitioner's plan was upon entering Adams A. (*Id*. at 75.) To these points, the Court adds that although Petitioner insists now that he wanted to testify and that the Doughty's never advised him of his constitutional right to testify, the trial record contains no evidence or indication that Petitioner wanted to testify or demonstrated surprise that defense counsel **[*87]** did not call him. It is also worth noting that notwithstanding Petitioner's assertion that only he was able to explain why his belongings were packed prior to the incident, the record—including evidence that Petitioner submitted in support of his postconviction action—actually contains conflicting evidence on that issue. For example, Petitioner insists that he had packed his belongings because a correction officer had informed him that he was getting a transfer; his cellmate Elbert Leach told investigators that Petitioner's belongings were packed because prison staff were always harassing him and putting him in isolation. (App. Vol. IV, at 291.) Regarding Petitioner's alleged impending transfer, Petitioner insists that he was to be transferred to the SOCF in Lucasville; Leach told investigators Petitioner was on his way to Mansfield. (*Id*. at 271.) Petitioner fails to demonstrate, in support of his global claim that defense counsel failed to conduct any investigation or present any evidence to support their defense theory, that counsel performed

deficiently or to Petitioner's prejudice with respect to the decision not to have Petitioner testify during the culpability phase of the trial.

Courts assessing the reasonableness **[*88]** of counsel's strategic decisions must view those decisions through the lens of counsel's perspective at the time counsel made those decisions. And at the time Petitioner's defense counsel elected to pursue a trial strategy aimed at establishing their defense theory through effective cross-examination and limiting the damage the prosecution could inflict, defense counsel were without any indication that Petitioner's accomplices could (or would be willing to) provide beneficial information and were faced with statements by no fewer than thirty inmate-witnesses who directly implicated Petitioner in the stabbing of Damico Watkins. The few statements counsel had in their possession offering information beneficial to Petitioner contained just as much information that either undermined the helpful information or was otherwise harmful to Petitioner. Thus, the Court finds unpersuasive Petitioner's argument that trial counsel's failure to interview or call certain witnesses constituted a failure to investigate that prejudiced Petitioner by preventing Petitioner's jury from hearing exculpatory testimony. The Court further finds unpersuasive Petitioner's assertions that the trial court's postconviction **[*89]** decision rejecting the same allegations was unreasonable within the meaning of *28 U.S.C. § 2254(d)*.

Petitioner's assertion that defense counsel conducted insufficient evidence to support their mitigation theory also fails. Every family member who submitted a postconviction affidavit describing their February 1997 meeting with defense counsel stated unambiguously that Jon Doughty peppered them with questions about their family history. Through testimony by Petitioner's stepfather, John Untermoser; Petitioner's brother-in-law, Timothy Holdreith; Petitioner's younger half-sister, Lorrie Holdreith; Petitioner's younger sister, Denise Croston; psychologist Dr. Eberhard Eimer; and Petitioner himself in an unsworn statement, defense counsel cogently and thoroughly presented an explanation of, and examples from, Petitioner's difficult upbringing, as well as the manner in which the considerable amount of his life Petitioner spent in prison shaped or exasperated Petitioner's personality disorders and mental health conditions. A fair review of the mitigation transcript belies any credible allegation that defense counsel conducted little or no mitigation investigation.

Petitioner faults defense counsel for failing **[*90]** to investigate and present available evidence establishing not only the attack on juvenile inmate Doug Haggerty the evening preceding the incident but also that it was that attack that Petitioner and his Aryan Brotherhood accomplices sought to avenge when they stormed Adams A so Petitioner could fight Damico Watkins. Similarly, Petitioner asserts that counsel failed to present available evidence establishing that Watkins and his gang planned to attack Petitioner and the Aryan Brotherood before they (Petitioner and the Aryan Brotherhood) could avenge the assault on Haggerty. But counsel *did* present evidence establishing those points and did so within the framework of defense counsel's strategy—namely to establish the theory of defense through effective cross-examination while minimizing damage the prosecution could have inflicted. Petitioner's defense counsel explained during opening statements that a former cellmate of Petitioner's, Butch Haggerty, had asked Petitioner to watch after his son, Doug Haggerty, a 15-year-old juvenile inmate also housed at MaCI. (Tr. Vol. IV, at 470.) Defense counsel proceeded to explain that the plan for Petitioner and his Aryan Brotherhood accomplices **[*91]** to storm Adams A and scare Damico Watkins had stemmed from an attack the previous evening by Watkins and other black juvenile inmates against Doug Haggerty. (*Id.* at 471.)

During the prosecution's case in chief, defense counsel elicited testimony about the attack on Haggerty through cross-examination of juvenile inmate Alphonso Greer (*Id.* at 594), juvenile inmate

Andre Wright (Tr. Vol. V, at 633), Correction Officer Barb Sears (Tr. Vol. V, at 779), and Correction Officer John Vanover (*Id*. at 955). Through cross-examination of Walt Ashbridge, Administrative Assistant to the Warden, defense counsel elicited testimony about the relationship between Petitioner and Doug Haggerty. (Tr. Vol. V, at 687.) What the testimony that defense counsel elicited through cross-examination lacked in detail defense counsel compensated for during the defense case-in-chief through the direct testimony of Doug Haggerty. (Tr. Vol. VI, 983-91.) Haggerty testified at length about juvenile inmates Quincy and Watkins assaulting him (*Id*. at 984-85) and about Haggerty's father having asked Petitioner to watch over Haggerty at MaCI (*Id*. at 987). Notably, Haggerty also mentioned the juvenile inmates' threats to kill Petitioner (*Id*. at 985).[3]

Finally, Petitioner during **[*92]** his unsworn statement explained his promise to look after Doug Haggerty, the assault on Haggerty that led to the AB's plan to enter Adams A to scare Damico Watkins, and Petitioner's awareness that Watkins and a gang of ten to fifteen juvenile inmates intended to attack Petitioner and other Aryan Brotherhood members. (Tr. Vol. VII, at 1169-71.) For the reasons the Court discussed more fully above, the fact that counsel *could* have called additional witnesses to testify about the Haggerty incident does not mean that counsel *should* have called such witnesses, if doing so would have provided only minimal gain to the defense case while opening the door to additional evidence damaging to Petitioner's mitigation case. The trial court's decision rejecting this challenge to defense counsel's performance was not unreasonable. (App. Vol. V, at 297-98.)

[3] Providing context for those threats, various witnesses also testified at trial about the difficulties prison staff had controlling the juvenile inmates in Adams A. (Tr. Vol. IV, at 569 (C.O. Michael Browning testified that Adams A was usually monitored by two officers because the juvenile inmates there were harder to handle); Tr. Vol. VI, at 923 (Sergeant Raymond Campbell **[*93]** testified that the Adams A juveniles were rowdier than other inmates and were tough to control).)

Similarly, Petitioner argues that counsel's failure to investigate left counsel unprepared to refute the state's theory that the killing of Damico Watkins was racially motivated and intentional. The fact that counsel did *not* attempt to refute the state's theory is evidence to this Court that counsel *did* investigate. Although some evidence demonstrated that the targeting of Watkins stemmed solely from the attack on Doug Haggerty and not on any racial animus (App. Vol. IV, at 297 (June 21, 1996 statement of accomplice David Lovejoy to investigators)), also scattered about the pretrial discovery and trial record is evidence of the racial component underlying (in part) the tensions between the adult Aryan Brotherhood inmates and the juvenile inmates in Adams A. And as an indication that the killing of Watkins was intentional, the record that defense counsel reviewed also contains evidence indicating that the Aryan Brotherhood attackers actually targeted other specific juvenile inmates in addition to Watkins, but were thwarted when the key that they used to access Watkins' cell broke off in Watkins' cell door. **[*94]** Petitioner himself noted in his Petition, while recounting William Vandersommen's deposition, that "black gangs were going to attack the AB." (ECF No. 14-2, at Page ID # 213 ¶ 155 (citing Vandersommen deposition, Tr. Vol. IX, at 22-23; ECF No. 133-9, at Page ID # 8652-8653.).)

Included among the pretrial discovery that the state turned over to defense counsel was a letter from accomplice Jerry Bishop to Kathy Lowery, dated August 30, 1996, in which Bishop, referring to the incident, mentioned that he did not "have a choice, 10 niggers jump one of my friends and was going to jump me." (App. Vol. IV, at 47.) Juvenile inmate Brandon Hill told investigators immediately after the incident that "I heard them say, they said something to somebody, called him a nigger lover, and they said that's what happens to them." (*Id*. at 144.) Juvenile inmate (and Watkins' cellmate) Anthony Jewell told investigators that, during the incident, he could hear the adult male attackers shouting "nigger this and nigger that, you don't fuck with the AB, and all this stuff." (*Id*. at 150.)

Juvenile inmate David Kohls also told investigators that he heard the attackers yelling "stuff like uh, like nigger lovers...." (*Id*. at 163.) Correction Officer Roger Martin **[*95]** told investigators that, while assisting in securing the suspects' property, he heard Petitioner shout "'we showed you, niggers[.]'" (*Id*. at 303.)

Andre Wright testified at trial that Petitioner was yelling "get that nigger, calling them niggers, calling them nigger lovers and everything," as Petitioner chased Watkins around Adams A. (Tr. Vol. V, at 621.) Wright also testified that, after the attack, the Aryan Brotherhood attackers were yelling "we killed the nigger. We did what we had to." (*Id*. at 626.) Sidney Taylor testified that Petitioner "was calling somebody nigger lovers, but I don't know who he was talking about." (*Id*. at 647-48.) According to Deputy Warden Mark Saunders' testimony, accomplice David Lovejoy stated after the attack that the Aryan Brotherhood members did not want to cell with black inmates. (*Id*. at 656.) Correction Officer Timothy Follrod testified that after authorities had rounded up the Aryan Brotherhood attackers, Follrod could "distinctly remember" Petitioner "us[ing] the term nigger." (*Id*. at 767-68.) Correction Officer John Vanover testified that Petitioner, while being patted down after the attack, was yelling that he "came in there and killed than nigger[,]" that he had more to kill, and that if he did not **[*96]** take care of it his Aryan Brotherhood brothers would. (Tr. Vol. VI, at 946.) Doug Haggerty testified about tensions between blacks and whites in Adams A. (*Id*. at 984-86.) Petitioner himself said in his unsworn statement during the mitigation phase that he had told prison authorities he would not share a cell at MaCI with a black cellmate. (Tr. Vol. VII, at 1168.) The trial court's decision rejecting this allegation of ineffective assistance was reasonable. (App. Vol. V, at 297.)

The pretrial discovery that defense counsel reviewed also contained evidence that the Aryan Brotherhood attackers entered Adams A armed with a list of inmates to attack—evidence that undermines Petitioner's insistence that the plan was only for Petitioner to fight Damico Watkins and that gave rise to an inference that the killing of Watkins was intentional rather than a melee gone awry. Juvenile inmate Stephon Peters told investigators that the Aryan Brotherhood attackers tried to get into his cell—Adams A 130. (App. Vol. IV, at 293.) Juvenile inmates Todd Rutledge and Dion Mills separately told investigators that they also had witnessed the Aryan Brotherhood attackers try to enter Peters' cell. (*Id*. at 299.) Mills added that the attackers yelled to him that he was next. **[*97]** (*Id*.) Petitioner's cellmate, Elbert Leach, told investigators that on the evening preceding the incident, Petitioner had received a list of three cell locations, presumably to target. (*Id*. at 294.) Juvenile inmate Kenny Bolin told investigators that the Aryan Brotherhood attackers "called him a nigger lover and tried to get into his cell." (*Id*. at 300.) Juvenile inmate Jeremy Moore told investigators that he had heard that juvenile inmate John West had provided the Aryan Brotherhood inmates with a list of names. (*Id*. at 304-05.) Accomplice David Lovejoy told authorities on June 21, 1996 that the Aryan Brotherhood attackers had had a list with several names of juvenile inmates they intended to "get" but that one of the attackers subsequently ate the list. (*Id*. at 297.) Notably, Lovejoy also stated that there would have been more killings had the attackers not broken the key they were using to gain entry into the Adams A cells. (*Id*.) Lovejoy subsequently told authorities on September 27, 1996, that the Aryan Brotherhood attackers had had a list with eight names to target, that two juvenile inmates had provided the list, and that he (Lovejoy) never saw the list. (*Id*. at 302.) The foregoing suggests that counsel's failure to attempt to refute **[*98]** the prosecution's theory that the killing was intentional emanated not from counsel's failure to investigate but from counsel's awareness of evidence suggesting otherwise—evidence that counsel's silence kept out.

Petitioner also asserts that counsel's failure to investigate resulted in their failure to discover and

present evidence of the severe assaults that Petitioner suffered in prison and the manner in which those assaults gave rise to the Post-Traumatic Stress Disorder under which Petitioner labored and that exasperated in his mind the threat that Watkins and his gang posed to Petitioner's safety. Undermining Petitioner's assertion is the fact that defense counsel did manage to introduce testimony about the assaults that Petitioner suffered in prison, even if that testimony did not consist of prison medical records or other documents. Petitioner's sister Denise Croston testified that Petitioner had had his ankles broken while in prison but that Petitioner would not tell his family how it happened or who was responsible. (Tr. Vol. VII, at 1084-85.) She further testified that after Petitioner had had his throat "sliced" while in prison, his family understood that Petitioner would **[*99]** do anything he had to do in order to survive. (*Id*. at 1085.)

Psychologist Dr. Eberhard Eimer testified that, among other things, Petitioner was highly suspicious and capable of aggression (*Id*. at 1109); that Petitioner was easily provoked and constantly worried (*Id*.); that Petitioner was intensely fearful and always on guard (*Id*.); that Petitioner viewed the world as threatening (*Id*.); that pronounced fearfulness was a controlling feature of Petitioner's personality (*Id*.); and that Petitioner tested extremely high on post traumatic scales (*Id*. at 1110). Dr. Eimer referenced several near-death experiences that Petitioner had survived while in prison. Dr. Eimer also testified that Petitioner learned that in prison, when threatened, one kills or gets killed and that one must keep one's promises and threats. (*Id*. at 1113-15.) Dr. Eimer diagnosed Petitioner with Post Traumatic Stress Disorder and Paranoid Schizoid Personality with Antisocial Tendencies. (*Id*. at 1118.)

Petitioner stated during his unsworn statement that he had had his ankles broken but that he had never reported it (and cared for them himself) for fear of additional attacks. (*Id*. at 1161.) He explained that he was forced to fight in order to protect himself and his belongings. (*Id*.) **[*100]** He also detailed how his throat had been cut as a result of his confronting a friend who had jumped an inmate on crutches. (*Id*. at 1162.) As Petitioner explained:

> It wasn't long after [arriving at SOCF in Lucasville] that I got in an argument with a guy that was supposed to be my best friend. I got in an argument with him because he jumped on a guy that was on crutches on the yard. This happened in the morning. * * * So I pulled my friend aside, his name was Bobby, I said "why did you jump on that guy on crutches?" He said, "he owed me five packs of cigarettes." I said, "that's no reason to jump on him like that with crutches."
>
> He told me, he said, if I feel that way to stay the fuck out of his face. So that afternoon he cut my throat with a straight razor because he felt what I said he took that as a threat. When he come in with a straight razor, when I got hit, I was standing by the boxing ring. I turned around and looked at him. I seen he had a straight razor in his hand. I knew he always had one but I didn't think he would cut me with it.
>
> When I went after him to retaliate, I seen blood come out the side of my neck from my jugular vein. I got scared then. I had a towel on my shoulder, I kept **[*101]** on my shoulder because I was a rec therapist, and I wrapped the towel around my neck and I knew that I was bleeding out of my jugular vein.
>
> When I was walking off of the yard, some my friends seen that I was cut, but really in prison you don't have any friends. The only friends you have is your family. And as I was walking off the yard, guards tried to come help me. I just told them let me go, and I wanted to walk. I knew not to panic because I seen guys get stabbed, they panic and die, so I had to be as calm as possible.
>
> When I was walking up the hallway, my towel was soaked with blood. At that time I had to kick the crash gates and motion for the officer to let me through the crash gate. I showed him my neck. He opened the crash gate. I walked

> off by myself. This is maximum security. I walked by myself to the hospital. When I got to the hospital there was a nurse. Lucky for me she knew what to do. She clamped my vein until I went to the outside hospital and the doctor that was in there saved my life.

(*Id*. at 1162-64.)

Petitioner does not assert that his defense attorneys should have pursued a different mitigation strategy—only that they should have done more and should have done better. That does **[*102]** not satisfy the *Strickland* standard for establishing deficient performance. Moreover, in view of his failure to elaborate on what more or differently defense counsel should have done, Petitioner has failed to demonstrate that he was prejudiced by defense counsel's alleged mitigation-phase deficiencies. That is, in view of the evidence against Petitioner, the Court finds unpersuasive any suggestion that had defense counsel bolstered their mitigation case by presenting medical records and other materials documenting the assaults and illustrating their severity, there is a reasonable probability that Petitioner would have received a sentence less than death.

As for Petitioner's assertions that his defense counsel were ineffective for failing to present available evidence that Petitioner was not the Aryan Brotherhood leader at MaCI and that Petitioner was actually innocent of murdering Damico Watkins, the Court has already determined that pretrial discovery and the trial record strongly established that Petitioner was the AB leader at MaCI and that Petitioner was *not* actually innocent of murdering Watkins. Petitioner's defense counsel did not render deficient, prejudicial performance for **[*103]** not attempting to prove assertions that would have prodded the state to counter with a flood of evidence establishing the opposite and undermining Petitioner's chances of obtaining a sentence less than death.

The record contains sufficient evidence undermining Petitioner's assertion that his defense attorneys failed to adequately investigate or present a defense. Thus, neither the decision of the Ohio Supreme Court on direct appeal nor the decision of the state trial court in postconviction (and on Petitioner's April, 2000 motion for a new trial) rejecting Petitioner's claim contravened or unreasonably applied clearly established federal law or involved an unreasonable factual determination. The Court **DENIES** sub-part (A) of Petitioner's first ground for relief as without merit.

Pursuant to *Rule 11(a) of the Rules Governing Section 2254 Cases*:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant . . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by *28 U.S.C. § 2253(c)(2)*. If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under *Federal Rule of Appellate Procedure 22*. A motion to **[*104]** reconsider a denial does not extend the time to appeal.

Rule 11(a), Rules Governing Section 2254 Cases.

An appeal from the denial of a habeas corpus action may not proceed unless a circuit justice or judge issues a certificate of appealability. *28 U.S.C. § 2253(c)(1)*. To warrant a certificate of appealability, a petitioner must make a substantial showing that he was denied a constitutional right. *28 U.S.C. § 2253(c)(2)*; *see also Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)*; *Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073 (6th Cir. 1997)*. The petitioner need not demonstrate that the claim will prevail on the merits; the petitioner need only demonstrate that the issues he or she seeks to appeal are deserving of further proceedings or are debatable among jurists of reason. *Barefoot, 463 U.S. at 893 n.4*. The Supreme Court has explained that "[w]here a district court has rejected the

constitutional claims on the merits, the showing required to satisfy *28 U.S.C. § 2253(c)* is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*.

A district court should also apply this analysis when the district court has denied a claim on procedural grounds. *Id. at 483*; *see also Porterfield v. Bell, 258 F.3d 484, 486 (6th Cir. 2001)*. In the procedural default posture, a certificate of appealability is warranted when the petitioner demonstrates (1) that jurists of reason would find it debatable whether the petition **[*105]** states a valid claim and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack, 529 U.S. at 484*.

Against that backdrop, this Court concludes that this ineffective assistance of counsel claim satisfies the showing required by *28 U.S.C. § 2254(c)(2)*. The Court accordingly **Certifies for Appeal** the ineffective assistance of counsel claim set forth in sub-part (A) of Petitioner's first ground for relief.

Sub-Part (B)(2): Failure to conduct sufficient *voir dire* and life qualify the jury.

Petitioner argues in sub-part (B)(2) of his first ground for relief that his attorneys performed deficiently and to his prejudice during *voir dire* for failing to "life-qualify" potential jurors.[4]

(Petition, ECF No. 14-2, at ¶¶ 235-48; Memorandum in Support, ECF No. 93, at Page ID # 2194-2212.) The essence of Petitioner's claim is that "his attorneys were ineffective in failing to conduct a sufficient *voir dire* and life qualify his jury pursuant to *Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*." (ECF No. 93, at Page ID # 2194.) According to Petitioner , although the trial court examined the jurors individually on the issue of death qualification (*i.e.*, the jurors' ability to consider imposing a death sentence), neither the trial **[*106]** court nor defense counsel remotely examined the jurors on the issue of life qualification (*i.e.*, their ability to give effect to mitigation evidence and consider imposing a life sentence). Petitioner proceeds to assert that every prospective juror was death-qualified, that at least seventeen prospective jurors were not life-qualified, and that two jurors were selected for Petitioner's jury without having been asked a single life-qualifying question. (*Id*. at Page ID # 2200-2201.) Relying on *Morgan v. Illinois, 504 U.S. 719, 728, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*, Petitioner argues that if the *Due Process Clause* requires the removal of jurors who would refuse to vote for a death sentence under any circumstances, it also requires the removal of jurors who would refuse to vote for a life sentence under any circumstances. (*Id*. at Page ID # 2201.) Because "[t]he trial court gave the venire the *three* sentencing options in the event of a conviction and then available under Ohio law," Petitioner reasons, "[b]y only asking jurors if they could impose the death penalty, the court and counsel failed to ensure that they could, under the correct circumstances, impose a life sentence." (*Id*. at Page ID # 2201-2202.)

Beyond the failure to life-qualify his jury, Petitioner also assails almost every aspect of trial counsel's performance during *voir dire*. Petitioner complains that defense counsel failed to sufficiently define "mitigation" evidence to prospective jurors, on several occasions characterizing mitigation as "simply an excuse," evidence to engender "sympathy or empathy," and as a "reason for doing." (*Id*. at Page ID # 2202.) Petitioner asserts that defense counsel's presentation of the concept of mitigation in this manner telegraphed to the prospective jurors that Petitioner had engaged in

[4] Petitioner had argued in sub-part (B)(1) that his attorneys were ineffective during **[*107]** *voir dire* for failing to adequately explore the issue of jurors' exposure to pretrial publicity. This Court determined in its September 30, 2005 Opinion and Order that Petitioner had procedurally defaulted that claim. (ECF No. 39, at Page ID # 1528-1542.)

every act of which the state accused him, in spite of Petitioner's repeated and unwavering insistence to his attorneys that he did not stab Damico Watkins or intend for Watkins to be killed. Petitioner also asserts that defense counsel once provided an explanation that erroneously shifted the burden of proof as to the process of weighing aggravating circumstances **[*108]** and mitigating factors. Petitioner argues that the trial court evinced a lack of commitment to the *voir dire* process, describing it as a "little bit of a tedious process," and that defense counsel's *voir dire* performance "was consistent with a tone of annoyance[.]" (*Id*. at Page ID # 2203.) To that point, Petitioner notes that *voir dire* began on April 1, 1997 and was concluded the very next day.

Petitioner proceeds to list a series of jurors whom, according to Petitioner, the trial court and/or defense counsel improperly questioned during *voir dire*. (*Id*. at Page ID # 2204-2212.) For example, Petitioner complains that defense counsel did not sufficiently *voir dire* or attempt to exclude from Petitioner's jury a host of venire members—such as Carla Stover, Edward Banion, and Kathy Wolfe—who, according to Petitioner, gave answers suggesting a penchant for the death penalty. Petitioner also assails defense counsel's questions to prospective jurors about their belief in self-defense or defense of another, asserting that those defenses were unavailable to Petitioner under controlling law and unsupported by the evidence.

Respondent asserts that Petitioner cannot demonstrate error on the part **[*109]** of either the trial court or his defense attorneys for the failure to life-qualify the prospective jurors. Respondent explains that although *Morgan v. Illinois* allows for the trial court and/or defense attorneys to ask life-qualifying questions during *voir dire, Morgan* does not require it. Respondent further asserts that "[t]o the extent that the Ohio courts reviewed Petitioner's case, Petitioner has failed to demonstrate that the Ohio courts' decisions were unreasonable." (ECF No. 101, at Page ID # 2399-2440.)

Respondent also argues that Petitioner's other arguments challenging defense counsel's *voir dire* performance do not warrant habeas corpus relief. First, Respondent urges the Court to view counsel's challenged comments not in isolation, but as a whole and in the context of defense counsel's attempts to elicit jurors' views on when the death penalty is appropriate in a murder case. Respondent also dismisses Petitioner's questioning of defense counsel's decisions not to strike certain jurors as the very second-guessing that *Strickland* forbids.

As always, this Court's analysis of Petitioner's claim begins with any state court decision adjudicating Petitioner's claim on the merits. The **[*110]** threshold inquiry before the Court is not whether Petitioner's attorneys performed deficiently and to Petitioner's prejudice during *voir dire*, but whether the state court's decision rejecting that assertion contravened or unreasonably applied clearly established federal law or relied on a factual determination that was unreasonable in light of the evidence presented. Only if the Court answers one of those inquiries in the affirmative may the Court consider whether habeas corpus relief is warranted.

Petitioner presented the essence of this claim on direct appeal to the Ohio Supreme Court. In his first proposition of law, Petitioner argued that the trial court committed error by failing to life-qualify prospective jury members. (App. Vol. II, at 95-105.) Petitioner argued in his third proposition of law that his attorneys were ineffective for, among other things, failing during *voir dire* to ensure that prospective jurors were life-qualified, failing to ask prospective jurors about issues of race, failing to challenge for cause jurors who could not follow the law, and failing to properly define mitigation evidence. (*Id*. at 113-19.) The Ohio Supreme Court rejected Petitioner's claims as follows:

> Appellant contends that the **[*111]** trial court erred in failing to "life qualify" prospective jurors after they had been death qualified in accordance with *State v. Jenkins (1984), 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473*

N.E.2d 264, paragraph two of the syllabus. Appellant argues that, during voir dire, prospective jurors must be questioned *by the trial court* concerning any views on capital punishment that would prevent or substantially impair their ability to consider a life sentence, as opposed to the death penalty, should the case go to the penalty phase. Thus, appellant proposes that, in order to ensure basic fairness to both parties, the trial court must, *sua sponte*, life-qualify prospective jurors. For the following reasons we disagree.

Initially we note that appellant's trial counsel never objected to the jury selection process, nor did defense counsel object to the trial court's lack of "life qualification" questions. Thus, appellant has waived all but plain error. See Crim.R. 52(B). An alleged error "does not constitute a plain error * * * unless, but for the error, the outcome of the trial clearly would have been otherwise." State v. Long (1978), 53 Ohio St. 2d 91, 7 Ohio Op. 3d 178, 372 N.E.2d 804, paragraph two of the syllabus.

R.C. 2945.27 provides that "the judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications **[*112]** to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel." In State v. Bedford (1988), 39 Ohio St. 3d 122, 129, 529 N.E.2d 913, 920, we stated that the scope of voir dire is within the discretion of the trial court and it varies depending on the circumstances of each case.

Appellant's first proposition of law is based substantially on Morgan v. Illinois (1992), 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492, wherein the United States Supreme Court held that, on voir dire, upon defendant's request, the trial court must inquire into the prospective juror's views on capital punishment. Id. at 729-734, 112 S. Ct. at 2230-2233, 119 L. Ed. 2d at 503-506. The *Morgan* court, in so holding, reiterated its views, as set forth in Witherspoon v. Illinois (1968), 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776, Adams v. Texas (1980), 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581, Wainwright v. Witt (1985), 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841, and Ross v. Oklahoma (1988), 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80, that a capital defendant may challenge for cause any prospective juror who, regardless of evidence of aggravating and mitigating circumstances and in disregard to jury instructions, will automatically vote for the death penalty in every case. Morgan v. Illinois, 504 U.S. at 729, 112 S. Ct. at 2229, 119 L. Ed. 2d at 502-503.

Appellant concedes that *Morgan* requires only life qualification by the trial court upon the defendant's request. Appellant would like, however, this court to go a step further in cases involving capital offenses and mandate an additional requirement on the trial court of life qualifying prospective jurors. This we decline **[*113]** to do.

In State v. Allard (1996), 75 Ohio St. 3d 482, 493, 1996 Ohio 208, 663 N.E.2d 1277, 1288, we followed the proposition set forth in *Morgan*. Thus, in *Allard*, we expressed our view that when the trial court permits defense counsel wide latitude to inquire into each prospective juror's beliefs and opinions concerning the death penalty, and defense counsel exercises that right, there is no reversible error in the death qualification process used in jury selection. *Id.*

Appellant does not contend that the trial court rejected defense counsel requests to question prospective jurors regarding their views on capital punishment. In fact, defense counsel was given ample opportunity by the trial judge to do so. A review of the voir-dire examination in this case undermines appellant's contentions that the trial court's failure to life qualify

prospective jurors is somehow an uneven or unfair use of the voir-dire process. Of the jurors selected, appellant submits that two were not "life-qualified" by either the trial court or defense counsel. After review of their voir dire, we find that neither juror fits within the category of the "automatic death penalty juror" condemned in *Morgan*. In fact, both juror Suzanne Coffin and juror Richard Hirst expressed reservations about imposing **[*114]** the death penalty as a sentencing option. For instance, Coffin stated that voting for the death penalty "would never be an easy thing to arrive at and I would hope I would never have to make that judgment." Hirst stated that, because of his religion, he could not condone the death penalty. Hirst also indicated his belief that there should be just punishment for every crime but that he was not sure where he would stand on the imposition of capital punishment. Given these expressed misgivings and uncertainty over their ability to impose a death sentence, it would appear logical to assume that jurors Coffin and Hirst would not be opposed to imposing a life sentence.

Further, the United States Supreme Court in *Morgan* reiterated what the court had long recognized that "'as with any other trial situation where an adversary wishes to exclude a juror because of bias, then, *it is the adversary seeking exclusion who must demonstrate* through questioning, that the potential juror lacks impartiality. It is then the trial judge's to determine whether the challenge is proper.'" (Emphasis added.) *Morgan v. Illinois, 504 U.S. at 733, 112 S. Ct. at 2232, 119 L. Ed. 2d at 505*, citing *Wainwright v. Witt, 469 U.S. at 423, 105 S. Ct. at 852, 83 L. Ed. 2d at 851*.

Accordingly, we decline to impose any new requirements on trial courts during the jury selection **[*115]** process in capital cases, and, specifically, we hold that there is no requirement for a trial court to "life qualify" any prospective juror, absent a request by defense counsel, in a capital murder case. As appellant has failed to meet his burden under the plain error standard, we reject appellant's first proposition of law.

Stojetz, 84 Ohio St. 3d at 455-57.[5]

In subjecting the Ohio Supreme Court's decision to *§ 2254(d)* review, the Court notes that Petitioner does not even allege that the decision is unreasonable. That is understandable, given that it is not. The Ohio Supreme Court identified, discussed, and applied the correct clearly established federal law, in other words, *Morgan v. Illinois*, and that law stops short of establishing a duty on the part of defense counsel in a capital case to ensure that prospective **[*116]** jurors are "life-qualified."

In *Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)*, the Supreme Court held that a juror who in no case would vote to impose the death penalty, regardless of the trial court's instructions, is not an impartial juror and must be removed for cause. The Supreme Court reaffirmed that principle in the progeny cases of *Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)*, and *Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)*, where the Court emphasized the general principle that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Adams, 448 U.S. at 45*. In *Morgan v. Illinois*, the Supreme Court held that the petitioner in that case was "was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had

[5] With respect to Petitioner's allegation that his trial counsel were ineffective for failing to ensure that prospective jurors were life-qualified, the Ohio Supreme Court simply concluded that "[a]fter reviewing the record in its entirety and considering all claims of alleged ineffectiveness, we find that appellant has failed to establish ineffective assistance of counsel under the standards spelled out in *Strickland*." *Stojetz, 84 Ohio St. 3d at 457-58*.

predetermined the terminating issue of his trial, that being whether to impose the death penalty." *504 U.S. 719, 736, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*. In so holding, the Supreme Court recognized the importance of an adequate *voir dire* in identifying unqualified jurors.

"To ensure fairness to the petitioner," Petitioner reasons, "when the trial court determined that jurors could impose the death penalty, it also needed to ensure that jurors could consider the **[*117]** available life sentences." (ECF No. 93, at Page ID # 2201.) From that reasoning, Petitioner essentially argues that *Morgan v. Illinois* gives rise to a duty on the part of defense counsel to ensure that prospective jurors are "life-qualifed." Specifically, Petitioner asserts that "[b]ecause the trial court failed in its duty to provide the petitioner with a fair and impartial jury on the question of possible penalties, trial counsel had the duty to examine them to ensure they would not preclude consideration of a life sentence." (*Id*. at Page ID # 2202.) But *Morgan v. Illinois* stops short of establishing any such duty.

In *Stanford v. Parker*, the Sixth Circuit held that "*Morgan* does not mandate that life-qualifying questions be asked of potential jurors in every case." *266 F.3d 442, 454 (6th Cir. 2001)*. "Instead," the Sixth Circuit continued, "*Morgan* holds that a defendant has the right to life-qualify his jury upon request." *Id*. In so holding, the Sixth Circuit expressly rejected the petitioner's contention that his trial counsel's failure to request life-qualification of potential jurors amounted to ineffective assistance of counsel under *Strickland*. The Sixth Circuit began its analysis by reiterating that "[t]o demonstrate ineffective **[*118]** assistance under the performance prong, a 'defendant must overcome the presumption that, under the circumstances [at the time of counsel's conduct], the challenged action might be considered sound trial strategy.'" *Id*. (quoting *Strickland, 466 U.S. at 689*). In concluding that the petitioner had failed to overcome that presumption, the Sixth Circuit explained:

> By premising a defendant's right to life-qualify upon defense counsel's making a request to life-qualify, *Morgan* suggests that there are instances where defense counsel might choose not to ask life-qualifying questions as a matter of trial strategy. Pursuant to *Morgan*, failure to life-qualify a jury is not per se ineffective assistance of counsel.

Id.

Having established that the failure to life-qualify jurors does not constitute *per se* ineffective assistance, the Court further concludes that defense counsel were not ineffective in the instant case for failing to request life-qualification of the jury. Review of the individualized *voir dire* to assess each juror's ability to impose a death sentence does not reveal a basis for questioning the performance of defense counsel as Petitioner asserts. For example, Petitioner complains that after the trial court death-qualified **[*119]** juror Suzanne Coffin, neither the trial court nor defense counsel proceeded to life-qualify Ms. Coffin and that Ms. Coffin ultimately served on Petitioner's jury. Petitioner's criticism is odd, however, because review of the *voir dire* in its entirety reveals that defense counsel's questioning of Ms. Coffin elicited utterances of reluctance to impose the death penalty. When defense counsel asked Ms. Coffin her opinion about the death penalty, she responded, "[w]ell, it is something that none of us would ever wish on anyone." (Tr. Vol. II, at 62.) When defense counsel inquired whether Ms. Coffin could arrive at a sentencing verdict of death, she answered, "[i]t would never be an easy thing to arrive at and I would hope I would never have to make that judgment." (*Id*. at 63.) It tests the limits of credulity to suggest that defense counsel were ineffective for failing to life-qualify a juror who had already expressed misgivings about the death penalty or that Petitioner was prejudiced by that juror's presence on his jury.

Petitioner likewise complains about the failure of the trial court (and concomitantly defense counsel)

"to life qualify half of the jurors who sat in judgment of petitioner." (ECF no. 93, **[*120]** at Page ID # 2200.) A review of the *voir dire* in its entirety, however, reveals that defense counsel made an effort to explore with each juror whether there were any circumstances in a murder case under which he or she would not deem the death penalty warranted. With respect to juror Shilling, for example, defense counsel inquired about answers on Shilling's questionnaire indicating that there were circumstances under which Shilling would not deem a death sentence warranted and established that Shilling could sign one of the life-sentence verdicts. (Tr. Vol. II, at 159-161.) Defense counsel similarly established with juror Kowalik that she gave equal weight to each sentencing option, not favoring any one over another. (*Id*. at 148-49.)

Upon review of the individualized *voir dire*, this Court cannot find that defense counsel's performance with respect to the issue of "life-qualifying" prospective jurors fell below prevailing professional norms. Although that determination is dispositive of the issue, the Court further concludes that Petitioner has failed to demonstrate that he was prejudiced by defense counsel's performance in this regard. That is, Petitioner has failed to demonstrate a reasonable **[*121]** probability that defense counsel's failure to ask "life-qualifying" questions led to the impanelment of a death-prone jury or that defense counsel's asking additional "life-qualifying" questions would have changed the result of Petitioner's sentencing hearing.

On direct appeal, the Ohio Supreme Court concluded that neither the trial court nor defense counsel committed prejudicial error for the failure to "life-qualify" Petitioner's jury. (*Stojetz, 84 Ohio St. 3d at 457-58*; App. Vol. III, at 147-48.) In view of the foregoing, the Court cannot find that that the Ohio Supreme Court's decision contravened or unreasonably applied clearly established law or relied on unreasonable factual determinations.

Beyond the issue of life-qualification, Petitioner offers additional instances of ineffective assistance of counsel during *voir dire*. (ECF No. 93, at Page ID # 2202-2212.) First, Petitioner contends that the trial court set a dismissive tone toward *voir dire* when explaining to prospective jurors the "tedious process" of ascertaining each juror's position on the death penalty. (*Id*. at Page ID #2203 (quoting Tr. Vol. II, at 16).) Petitioner proceeds to assert that the fact that *voir dire* took only two days is proof that neither the trial court nor **[*122]** defense counsel sufficiently vetted Petitioner's jury. Petitioner also argues that defense counsel often explained the concept of mitigation evidence in terms that were inaccurate, misleading, damaging, or flatly incorrect. To that point, Petitioner argues, defense counsel failed to question prospective jurors about specific mitigating factors counsel intended to present while in turn questioning jurors about mitigating factors that were not relevant, and even damaging, to any claim of actual innocence. Questioning defense counsel's failure to challenge for cause certain jurors who evinced a propensity for the death penalty, Petitioner completes his claim by assailing defense counsel's *voir dire* of more than twenty different jurors.

The following statement announces the essence of Respondent's argument in opposition: "When examining the words and terms used by counsel," Respondent asserts, "it is important for this Court to consider the words and/or terms in their full context, as well as the response received from those words and terms." (ECF No. 101, at Page ID # 2441.) Respondent proceeds to explain why many of the words and phrases used by defense counsel during individualized ***[*123]*** *voir dire* and challenged by Petitioner here, when considered in their entire context, achieved the goal of ensuring that jurors could keep an open mind in their sentencing decision. (*Id*. at Page ID # 2440-2442.) With respect to Petitioner's criticism about the trial court's dismissive description to jurors about the process of death-qualifying, Respondent asserts that Petitioner provided no case law establishing that the trial court violated Petitioner's rights to a fair trial and impartial jury. Respondent next argues that

Petitioner's claim challenging counsel's decisions as to which jurors to strike constitutes the type of second-guessing that *Strickland* forbids. Finally, Respondent asserts that Petitioner failed to demonstrate that any juror that defense counsel passed for cause indicated an inability or unwillingness to follow the law.

Petitioner presented these allegations to the Ohio Supreme Court on direct appeal. (App. Vol. II, at 116-119.) The Ohio Supreme Court rejected them on the merits, albeit without any discussion. *Stojetz, 84 Ohio St. 3d at 457-58*. This Court owes the Ohio Supreme Court's decision no less deference. *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 784, 178 L. Ed. 2d 624 (2011)* ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must **[*124]** be met by showing there was no reasonable basis for the state court to deny relief."); *see also Werth v. Bell, 692 F.3d 486, 493 (6th Cir. 2012)* (clarifying that when a habeas petitioner presents a federal constitutional claim to the state court, there exists a rebuttable presumption that an unexplained state-court decision rejecting the claim was on the merits). Thus, the inquiry before this Court is whether there was any reasonable basis for the Ohio Supreme Court to have rejected the instant ineffective assistance of counsel claim. There was.

The deference that *Strickland* requires reviewing courts to show a competent attorney's decisions and performance constitutes a reasonable basis for the Ohio Supreme Court's decision rejecting Petitioner's claim that his trial attorneys provided ineffective assistance during *voir dire*. Having reviewed the *voir dire* transcript, this Court agrees with Respondent that overall, trial counsel's questions to prospective jurors during individualized *voir dire* were gauged to ascertain jurors' capacities to consider one of the life-sentence options and/or to maintain an open mind. Because Petitioner has not pointed to any juror who indicated an inability to follow the law or otherwise shown that his **[*125]** jury was inclined to impose death or misunderstood the concept of mitigation, Petitioner cannot overcome the presumption that trial counsel's *voir dire* performance was a matter of trial strategy. Because the Court cannot conclude that Petitioner's trial counsel provided ineffective assistance during *voir dire*, the Court also cannot conclude that there was no reasonable basis for the Ohio Supreme Court's decision rejecting the same claim. Further, because the Court has rejected the ineffective assistance of trial counsel claims that Petitioner set forth in paragraphs 235-248 of his Petition (ECF No. 14-2), the allegations that Petitioner set forth in paragraphs 352-356 of his Petition are procedurally defaulted in accordance with this Court's February 10, 2006 Opinion and Order. (ECF No. 43, at Page ID # 1750-1751.) The Court **DENIES** sub-part (B)(2) of Petitioner's first ground for relief as without merit.

The Court concludes that this ineffective assistance of counsel claim satisfies the showing required by *28 U.S.C. § 2254(c)(2)*. The Court accordingly **Certifies for Appeal** sub-part (B)(2) of Petitioner's first ground for relief.

Sub-Part (E): Failure to Challenge Improper Jury Instructions.

Petitioner next **[*126]** argues that his attorneys performed deficiently and to his prejudice by failing to challenge improper jury instructions. (Petition, ECF No. 14-2, at Page ID # 226-227, ¶¶ 260-67.) Respondent counters that Petitioner's claim does not warrant habeas corpus relief because the Ohio Supreme Court's decision rejecting Petitioner's claim on direct appeal did not contravene or unreasonably apply clearly established federal law. (ECF No. 101, at Page ID # 2443-2452.) Petitioner's raises four distinct challenges. The Court will address each challenge in turn.

(1) Trial counsel failed to object to an improper guilt phase instruction that permitted the finding of guilt in a non-unanimous fashion and the assessment of an improper aggravating circumstance (considering and weighing both the

principle offender and aider and abettor findings). (ECF No. 93, at Page ID #2212 (citing Petition, ECF No. 14-2, at ¶¶ 260, 263.)

Petitioner contends here that his attorneys should have objected to the trial court's failure to instruct the jury that it had to unanimously and beyond a reasonable doubt determine whether Petitioner was guilty under the theory that he was the actual killer *or* that he was an accomplice. **[*127]** The jury's freedom to consider both theories, Petitioner reasons, allowed the jury to return a non-unanimous verdict on an essential element of the aggravated murder charge.

According to Respondent, the challenged instruction was not improper and Petitioner's defense counsel were not ineffective in failing to object to it. (ECF No. 101, at Page ID # 2443-2447.) Respondent argues first that Petitioner's claim fails because Petitioner premises it entirely on the following supposed error of state law—that Ohio law entitled Petitioner to instructions and verdict forms identifying whether Petitioner had acted (1) with prior calculation and design *or* (2) as the principal offender. (*Id*. at Page ID # 2443-2444.) Even assuming the instant alleged state law error rises to the level of a federal constitutional error by depriving Petitioner of fundamental unfairness, Respondent argues, Petitioner is still not entitled to relief. Specifically, Respondent asserts:

> The Ohio Supreme Court addressed the merits of Petitioner's claims, and concluded that there was no error because the aggravating circumstance that he faced — that he killed Watkins while he was an inmate at a detention facility — did not **[*128]** require that the jury differentiate between a principal offender and one who acts with prior calculation and design.

(*Id*. at Page ID # 2444.) Respondent proceeds to argue that the United States Supreme Court has never gone so far as to require a jury to make specific findings about every fact underlying a verdict, but merely to issue decisions on each essential element of the crime.

The Ohio Supreme Court considered and rejected Petitioner's claim both on procedural grounds and on the merits. Specifically, the court rejected Petitioner's challenge to the jury instruction at issue and summarily rejected the claim that Petitioner's attorneys were ineffective for failing to object to the instruction. As the Supreme Court explained:

> In proposition of law four, appellant claims that the trial court erred in failing to specifically instruct the jury that it must find by unanimous verdict that the appellant was either the principal offender or, if not the principal offender, that appellant was an aider and abettor. We note that appellant failed to object to the instruction and thus has waived all but plain error. Appellant asserts that, pursuant to *State v. Johnson (1989), 46 Ohio St.3d 96, 104, 545 N.E.2d 636, 644*, if a single count of the indictment can be **[*129]** divided into two or more distinct conceptual groupings, the jury must be specifically instructed that it must unanimously conclude that the defendant committed acts falling within one particular grouping in order to reach a guilty verdict. Our response to appellant's argument is threefold.
>
> First, in *Johnson* we indicated that a specific instruction is necessary when there exists the possibility of a "patchwork" or less than unanimous verdict. *Id. at 105, 545 N.E.2d at 645*. *Johnson* involved an *R.C. 2929.04(A)(7)* specification, which requires a finding of either principal offender or prior calculation and design before death can be imposed. In contrast, the specification at issue here, *R.C. 2929.04(A)(4)*, requires only that the murder was perpetrated by appellant while he was a prisoner in a detention facility. *R.C. 2929.04(A)(4)* makes no distinction between principal offender and aider and abettor.
>
> Second, appellant could be convicted of aggravated murder under *R.C. 2903.01(A)* as a principal offender, or as an aider and abettor, pursuant to *R.C. 2923.03(A)*. *R.C. 2923.03(F)*

> also provides that appellant could be punished as an aider and abettor as if he were the principal offender.
>
> Our third response centers on appellant's additional contention that the failure of a specific instruction deprived him of his right to **[*130]** a reliable sentencing hearing. Appellant contends that such failure prevented defense counsel from asserting, and the jury from considering, the mitigating factor in *R.C. 2929.04(B)(6)*, which permits the jury to consider a defendant's aider and abettor status. However, we find no error, since the evidence was substantial that appellant was a principal offender. There was substantial testimony that the shank in appellant's possession caused two of Watkins' six fatal wounds. We have previously stated that "principal offender" means the "actual" killer and not the "sole" offender. As there can be more than one actual killer, there can thus be more than one principal offender. *State v. Keene (1998), 81 Ohio St. 3d 646, 655, 1998 Ohio 342, 693 N.E.2d 246, 256*. Accordingly, we find that appellant has not met his burden under the plain error standard and we reject his fourth proposition of law.

Stojetz, 84 Ohio St. 3d at 458-59.

The Court is not persuaded that Petitioner's trial attorneys were ineffective under *Strickland* for failing to object when the trial court's instruction omitted any requirement that the jury find unanimously whether Petitioner was guilty as the principal offender or as an aider and abettor. Thus, the Court cannot find that the Ohio Supreme Court's decision rejecting the jury instruction challenge **[*131]** and summarily rejecting Petitioner's claim of ineffective assistance of counsel contravened or unreasonably applied clearly established federal law.

Petitioner's challenge centers on the following culpability-phase instruction:

> You may find the defendant guilty of aggravated murder whether he participated as a principal offender or aider and abettor if he specifically intended to kill and you are satisfied beyond a reasonable of his guilt. If you find that the state produced evidence which convinces you beyond a reasonable doubt of each and every element of aggravated murder whether you find the defendant a principal offender or aider and abettor, return a verdict of guilty to the charge of aggravated murder.

(ECF No. 93, at Page ID # 2214 (quoting Tr. Vol. VII, at 1036).) Petitioner argues that his trial attorneys should have objected to this instruction and insisted that the trial court give an instruction requiring the jury to find unanimously either that Petitioner was the principal offender or an aider and abettor. But neither state law nor federal law imposed such a requirement. Thus, failing to object was not something only an incompetent attorney would do. Petitioner has not cited, **[*132]** and the Court is not aware of, any Ohio authority requiring the type of instruction Petitioner asserts his defense counsel should have requested.

Petitioner's claim relies in large part on a line of cases beginning with *Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, and *Ring v. Arizona, 536 U.S. 584, 603-09, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*, essentially establishing that a jury, rather than the judge, must find the existence of an aggravating circumstance that makes the accused death-eligible. That was not the state of the law at the time of Petitioner's trial. Viewing the actions of Petitioner's trial attorneys from their perspective at the time of Petitioner's trial, the Court cannot conclude that counsel were on notice to argue for an instruction requiring the jury to find unanimously whether Petitioner was guilty of aggravated murder either as the principal offender or as an aider and abettor.[6]

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[6] Even assuming *Apprendi* and *Ring* were applicable, the Court is not persuaded that Petitioner could demonstrate deficient performance or prejudice. In *Cunningham v. Hudson, No. 3:06CV0167, 2010 U.S. Dist. LEXIS 129636, 2010 WL 5092705 (N.D. Ohio Dec. 7, 2010)*, a

The law as it existed at the time of Petitioner's trial required proof beyond a reasonable doubt of every essential element of the crimes and specifications charged. *See, e.g.*, *In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)*. The jury instructions in the instant case furthered that well-established law. The very jury instruction that Petitioner challenges *expressly* required the jury to find that the State had produced evidence convincing the jury "beyond a reasonable doubt of each and every element of aggravated murder . . . ." (Tr. Vol. VII, at 1036.) Petitioner does not challenge the trial court's giving the complicity instruction. Under that theory of culpability—*Ohio Revised Code Ann. § 2923.03(A)*—neither state law nor federal law require the jury determination that Petitioner argues trial counsel should have requested via a jury instruction. In the instant case, once **[*134]** complicity culpability came into play, the designation of an accused as a principal offender or an aider and abettor was not an essential element of either the aggravated murder offense or the capital specification with which Petitioner was charged.

Petitioner intimates that the jury instruction at issue somehow relieved the jury of its duty to find that Petitioner possessed the requisite mental state. The record belies that suggestion. The jury instructions clearly and on multiple occasions required the jury to find that Petitioner purposely caused the death of Damico Watkins. Six pages into the jury charge, the trial court stated: "To find the Defendant guilty of aggravated murder, you must find beyond a reasonable doubt and without regard to punishment that on or about April 25, 1996, and in Madison County, Ohio, the Defendant *purposely* caused the death of Damico Watkins with prior calculation and design." (Tr. Vol. VII, at 1032 (emphasis added).) After defining the terms "purpose" and "prior calculation and design," the trial court proceeded to instruct the jury that Petitioner could be held accountable for the charged criminal conduct as a principal offender or as an aider and **[*135]** abettor. In so doing, the trial court explicitly stated that both theories required the jury to find the requisite mental state. (*Id*. at 1035.) The very instruction that Petitioner challenges (or argues that defense counsel should have objected to) expressly required the jury to find that Petitioner "specifically intended" to kill Damico Watkins. (*Id*. at 1036.)

For the foregoing reasons, the Court concludes that counsel did not provide ineffective assistance for failing to object to the trial court's instruction that did not require the jury to find unanimously whether Petitioner was guilty of aggravated murder as a principal offender or an aider and abettor. When the Ohio Supreme Court rejected Petitioner's challenge to the jury instruction, it did so reasonably.

(2) Trial counsel failed to object to reasonable doubt instruction provided to the jury at the guilt phase. (ECF No. 93, at Page ID # 2216 (citing Petition, ECF No. 14-2, at ¶ 262.)

In this sub-part, Petitioner faults defense counsel for failing to object to the trial court's culpability-phase instruction defining "reasonable doubt." He argued in his Petition that the trial court's usage of the phrase "willing to act and rely" did not provide sufficient **[*136]** guidance to the jury because it is too lenient. Petitioner further challenged the trial court's usage of the phrase "firmly convinced," asserting that that phrase conveys the lesser "clear and convincing" standard rather than the more stringent "reasonable doubt" standard. In sum, Petitioner argued that the jury convicted him using a standard below that required by the *Due Process Clause*.

In his Memorandum in Support, however, Petitioner all but concedes defeat. First, he

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district court rejected a petitioner's claim that his death sentence violated *Apprendi* and *Ring* because the jury did not determine his role in the offense, his mental state, and his relative culpability. Specifically, **[*133]** the court concluded that "[t]he jury returned a unanimous verdict finding that the State sufficiently proved the aggravating circumstance which they had previously found him to be guilty of outweighed the mitigating factors for both aggravated murders[,]" that the trial judge considered the jury's recommendation as prescribed by Ohio law, and that the trial judge did not increase the maximum sentence. *2010 U.S. Dist. LEXIS 129636, [WL] at *38*.

incorporates by reference his discussion of Ground Four, Sub-Part (1)(A). (ECF No. 93, at Page ID # 2216.) That discussion begins with the announcement that "Petitioner will not belabor this argument and recognizes that the Sixth Circuit has reported authority contrary to Petitioner's arguments." (*Id*. at Page ID # 2252.) Petitioner proceeds to argue, however, that *§ 2254(d)* does not constrain this Court's review of his claim because the Ohio Supreme Court, in rejecting Petitioner's claim, relied on state authority that pre-dated the clearly established precedent of *Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990)*. Petitioner argues in the alternative that the Ohio Supreme Court's decision rejecting his claim contravened or unreasonably applied *Cage* and *Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954)*.

Respondent asserts that Petitioner's claim is **[*137]** without merit because the Ohio Supreme Court summarily rejected Petitioner's challenge and because the Sixth Circuit has rejected such challenges to Ohio's reasonable doubt instruction. (ECF No. 101, at Page ID # 2447 (citing *Scott v. Mitchell, 209 F.3d 854, 883-84 (6th Cir. 2000)*).)

Petitioner presented his challenge to the "reasonable doubt" instruction to the Ohio Supreme Court in his seventeenth proposition of law and his claims of ineffective assistance of counsel in his third proposition of law. The Ohio Supreme Court rejected both claims—the former with a modicum of reasoning and the latter summarily. With respect to Petitioner's challenge to the jury instructions explaining reasonable doubt, the Ohio Supreme Court concluded as follows:

> Appellant claims that the trial court erred in its "reasonable doubt" instructions at both the trial and sentencing phases. With respect to the trial phase instruction, the court has repeatedly upheld the definition of "reasonable doubt" set forth in *R.C. 2901.05*. See *State v. Jenkins, 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264*, paragraph eight of the syllabus, and *State v. Frazier (1995), 73 Ohio St.3d 323, 330, 1995 Ohio 235, 652 N.E.2d 1000, 1008*. Regarding the penalty-phase jury instruction, appellant concedes that claims similar to those he raises here have been previously considered and denied by this court. Accordingly, proposition of law seventeen **[*138]** is rejected. *State v. Poindexter (1988), 36 Ohio St.3d 1, 520 N.E.2d 568*, syllabus.

Stojetz, 84 Ohio St. 3d at 467.

The Court is not persuaded that Petitioner's trial counsel rendered ineffective assistance in failing to object to the trial court's "reasonable doubt" instruction. The Court does not disagree with, much less find unreasonable, the Ohio Supreme Court's decision rejecting both Petitioner's challenge to the jury instruction and Petitioner's related claim of ineffective assistance for failing to object. The Sixth Circuit has repeatedly approved the giving of jury instructions based on Ohio's statutory definition of reasonable doubt at both phases of a capital trial. *White v. Mitchell, 431 F.3d 517, 534 (6th Cir. 2005)*; *Buell v. Mitchell, 274 F.3d 337, 366 (6th Cir. 2001)*; *Scott v. Mitchell, 209 F.3d 854, 884 (6th Cir. 2000)*; *Byrd v. Collins, 209 F.3d 486, 527 (6th Cir. 2000)*; *Thomas v. Arn, 704 F.2d 865, 870 (6th Cir. 1982)*.

(3) Trial counsel failed to object to an improper guilt phase instruction that presumed purpose from an intent to kill. (ECF No. 93, at Page ID #2216 (citing Petition, ECF No. 14-2, at ¶ 262).)

Petitioner here contends that trial counsel were ineffective for failing to object to the trial court's "hodge-podge" instructions defining the essential element of "purpose." (ECF No. 93, at Page ID # 2217.) Specifically, Petitioner complains that his "jury was instructed that purpose to kill was specific intent, that purposely means intentionally and not accidentally, that purpose and intent mean the **[*139]** same thing, and that purpose may be inferred from the use of a weapon." (*Id*.) Petitioner reasons that the misleading instructions relieved the

State of its constitutional obligation to prove each essential element of the charge of aggravated murder beyond a reasonable doubt and that trial counsel accordingly were ineffective for failing to object.

Respondent notes that the Ohio Supreme Court rejected Petitioner's claim on procedural grounds and that the Sixth Circuit has rejected an identical challenge. (ECF No. 101, at Page ID # 2448 (citing *Mitzel v. Tate, 267 F.3d 524, 535-36 (6th Cir. 2001)*).) Respondent then argues that the actual jury instruction belies Petitioner's challenge because the instructions made clear that the State bore the burden of proving that Petitioner intended to kill Watkins and did not create any mandatory presumptions. (*Id*. at Page ID # 2448-2449.) Petitioner's jury, Respondent explains, could have "treat[ed] Stojetz's use of a shank to stab Damico Watkins as evidence that he intended to kill Watkins, or they could [have] chose[n] *not* to make this inference." (*Id*. at Page ID # 2449 (emphasis in original).) Thus, Respondent concludes, the Ohio Supreme Court's decision rejecting this challenge was reasonable.

On direct appeal, Petitioner **[*140]** raised numerous claims of ineffective assistance of counsel, all of which claims the Ohio Supreme Court summarily denied. The Ohio Supreme Court denied Petitioner's various challenges to the culpability-phase jury instructions as follows:

> In proposition of law twelve, appellant questions the trial court's guilt phase jury instructions. Specifically, appellant argues that the trial court's jury instructions created a mandatory rebuttable presumption of appellant's purpose or intent to kill. Appellant further claims that the instructions undermined the *mens rea* element of aggravated murder by interjecting the civil standard of foreseeability. See *State v. Burchfield (1993), 66 Ohio St.3d 261, 263, 1993 Ohio 44, 611 N.E.2d 819, 820-821*. Last, appellant argues that the trial court's guilt phase instructions impermissibly shifted the burden of proof to him.
>
> Appellant failed to raise these issues in the trial court and, therefore, each claim has been waived absent plain error. The court has previously addressed similar arguments concerning the trial court's use of the foreseeability standard in murder-case jury instructions, and we conclude here that the trial court's instructions in this instance do not rise to the level of reversible error. See *State v. Phillips (1995), 74 Ohio St.3d 72, 100, 1995 Ohio 171, 656 N.E.2d 643, 668*. As to appellant's remaining **[*141]** contentions under this proposition, having considered the trial court's instructions to the jury in their entirety, we find no error prejudicial to the appellant. Accordingly, we reject appellant's twelfth proposition of law.

Stojetz, 84 Ohio St. 3d at 465-66.

The Court is not persuaded that Petitioner's defense counsel were ineffective for failing to object to the trial court's instructions as to the *mens rea* element of the aggravated murder charge. The jury instructions as a whole correctly described the elements of purposefulness and specific intent. A reasonable juror would have understood from the totality of the jury instructions that in order to find Petitioner guilty of aggravated murder, the juror would have to find that Petitioner specifically intended to cause the death of Damico Watkins. Similar challenges asserting that instructions on purpose and specific intent had the effect of lessening or relieving the State's burden of proving the *mens rea* element of an aggravated murder charge have fallen short where, as here, the jury instructions as a whole accurately describe the requisite mental state. *See* *Campbell v. Coyle, 260 F.3d 531, 557 (6th Cir. 2001)* (finding no ineffective assistance from trial counsel's failure to object where jury instructions as a **[*142]** whole correctly described elements of purposefulness, specific intent, and causation); *see also* *Hanna v. Ishee, 694 F.3d 596, 621-22 (6th Cir. 2012)*

(finding no prejudice from improper causation instruction where instructions, read overall, properly instructed the jury as to specific intent); *Byrd v. Collins, 209 F.3d 486, 527 (6th Cir. 2000)* (same). In *Stallings v. Bagley, 561 F. Supp. 2d 821 (N.D. Ohio 2008)*, the district court rejected a challenge to the trial court's instruction on presuming purpose from accused's use of a deadly weapon. The court reasoned that the challenged instructions did not relieve the State of its burden of proving the requisite mental state because the trial court indicated that the jury *could* find purpose based on the accused's use of a deadly weapon but that the jury was not *required* to. *Id. at 856-57*. The Court reiterates that in its view, the culpability-phase jury instructions as a whole unmistakably conveyed to the jury the requisite mental state for the crime of aggravated murder. (Tr. Vol. VII, at 1026-44.)

(4) Trial counsel failed to object to a unanimity requirement as to the existence of mitigation. (ECF No. 93, at Page ID # 2221 (citing Petition, ECF No. 14-2, at ¶ 263).)

According to Petitioner, "[t]he trial court improperly instructed Petitioner's jurors that they could not give effect to the mitigation — consider **[*143]** a life sentence — until they had *first* acquitted, unanimously, Petitioner of the potential death sentence." (ECF No. 93, at Page ID # 2221.) Petitioner argues that trial counsel should have objected to the following penalty-phase instruction:

> You are going to have three verdict forms with you when you retire for your deliberations. If you find that the aggravating circumstance outweighs beyond a reasonable doubt mitigating factors, you must return a verdict by which you recommend death. If that is your verdict, all twelve jurors must sign the verdict in ink and that concludes your deliberations.
>
> If you find the state failed to prove that the aggravating circumstance outweighs beyond a reasonable doubt the mitigating factors or if you are unable to unanimously agree that the aggravating circumstance outweighs beyond a reasonable doubt the mitigating factors, then you must proceed to consider whether to recommend the defendant be sentenced to life imprisonment with parole eligibility with serving 20 full years of imprisonment or to life imprisonment with parole eligibility after serving 30 full years of imprisonment. Such sentence shall be based on your discretion after considering of **[*144]** [sic] the aggravating circumstance and mitigating factors. Your verdict on an appropriate life sentence must be unanimous and must be signed by all twelve jurors in ink.

(Tr. Vol. VII, at 1193-94.) Petitioner asserts that this instruction limited the jurors' ability to consider and give effect to mitigation evidence in violation of well-established Supreme Court precedent such as *Lockett v. Ohio, 438 U.S. 586, 607-08, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)* (state may not preclude sentencer from considering relevant mitigating evidence), *Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)* (sentencer may not refuse to consider relevant mitigating evidence), and *Penry v. Lynaugh, 492 U.S. 302, 322, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (jury instructions must allow jurors to consider and give effect to relevant mitigating evidence).

Respondent argues that Petitioner is erroneous in characterizing the challenged instruction as an "acquittal first" instruction and that the Sixth Circuit has rejected similar challenges. (ECF No. 101, at Page ID # 2449 (citing *Hartman v. Bagley, 492 F.3d 347, 362 (6th Cir. 2007)*).) The essence of Respondent's argument is that Ohio has a system of weighing aggravating circumstances against mitigating factors and that the instruction that Petitioner challenges accurately conveyed Ohio's system to the jury without any requirement that jurors make determinations in any prescribed order. (ECF No. 101, at Page ID **[*145]** # 2449-2451.) For that reason, Respondent concludes, Petitioner's

trial counsel were not ineffective for failing to object to these instructions.

Petitioner presented this claim of ineffective assistance of counsel, but not the underlying jury instruction challenge itself, to the Ohio Supreme Court on direct appeal. The Ohio Supreme Court rejected all of Petitioner's ineffective assistance claims with little discussion. The issue for this Court to determine is whether the Ohio Supreme Court's decision contravened clearly established federal law. The Court concludes it did not.

Under controlling law, an "acquittal-first" instruction is one that improperly requires a jury to first unanimously reject the death penalty—to unanimously find that that the aggravating circumstance(s) did not outweigh the mitigating factor(s)—before it can consider the life sentence options. *Hartman v. Bagley, 492 F.3d at 363* (citing *Davis v. Mitchell, 318 F.3d 682, 689 (6th Cir. 2003)*). Further, although Ohio law requires the jury's ultimate sentencing verdict to be unanimous, requiring the jury to be unanimous on the existence of a mitigating factor or on the determination of whether the aggravating circumstance(s) outweighs the mitigating factor(s) violates federal constitutional law. *Id. at 363-64* (noting **[*146]** that the Sixth Circuit had previously condemned instructions where there was a reasonable likelihood that the jury would believe its determination that the aggravating circumstance(s) did not outweigh the mitigating factor(s) had to be unanimous). Thus, the Sixth Circuit has condemned instructions that either require a jury to unanimously reject death or find the existence of a mitigating factor or create enough ambiguity that gives rise to a reasonable risk that jurors will believe that they have to be unanimous on rejecting death or on the existence of a mitigating factor. *See Davis v. Mitchell, 318 F.3d at 689-90* (granting habeas corpus relief on penalty phase instructions that would have caused a reasonable jury to apply an unconstitutional standard of unanimity at all stages of the deliberative process); *Mapes v. Coyle, 171 F.3d 408, 416-17 (6th Cir. 1999)* (finding erroneous jury instructions that required the jury to unanimously reject the death penalty before considering the life sentence options).

The Court is not persuaded that the instructions set forth above either constituted an improper "acquittal-first" instruction or gave rise to a reasonable likelihood that Petitioner's jury would believe that it had to be unanimous in any determination that the aggravating **[*147]** circumstance did not outweigh the mitigating factors. That being so, Petitioner's defense counsel did not perform deficiently or to Petitioner's prejudice in failing to object.

Any possible risk that the jury might have believed its determination ruling out death had to be unanimous was alleviated by the following phrase unambiguously stating otherwise:

> If you find the state failed to prove that the aggravating circumstance outweighs beyond a reasonable doubt the mitigating factors *or if you are unable to unanimously agree that the aggravating circumstance outweighs beyond a reasonable doubt the mitigating factors*, then you must proceed to consider whether to recommend the defendant be sentenced to life imprisonment with parole eligibility with serving 20 full years of imprisonment or to life imprisonment with parole eligibility after serving 30 full years of imprisonment. Such sentence shall be based on your discretion after considering of [*sic*] the aggravating circumstance and mitigating factors.

(Tr. Vol. VII, at 1193 (emphasis added).) *Compare Hartman, 492 F.3d at 364-65* (approving instructions that correctly and explicitly stated that anything short of unanimous agreement on whether the aggravating circumstances **[*148]** outweighed the mitigating factors required the jury to determine which life sentence to impose), *and Scott v. Mitchell, 209 F.3d 854, 876-77 (6th Cir. 2000)* (approving instructions that required unanimity only as to overall weighing process and not as to the existence of mitigating factors), *with Davis, 318*

F.3d at 698-90, *and* *Mapes, 171 F.3d at 416-17*. That being so, the penalty-phase jury instructions that Petitioner challenges were sound and counsel were not ineffective for failing to object to them.

The Court finds without merit Petitioner's claim that his trial attorneys performed unreasonably and to his prejudice for failing to object to allegedly improper jury instructions. Thus, the Court **DENIES** as without merit sub-part (E) of Petitioner's first ground for relief. Further, this Court issued a September 30, 2005 Opinion and Order finding that the jury instructions underlying the instant claims of ineffective assistance of counsel appeared procedurally defaulted but reserving its decision whether ineffective assistance of counsel might serve as cause and prejudice to excuse any default. (ECF No. 39, at Page ID # 1598-1615.) This Court's determination that counsel were not ineffective resolves that pending issue. Accordingly, the Court **DENIES** as procedurally defaulted the portions **[*149]** of Petitioner's fourth ground for relief set forth above. (*Id*.)

The Court concludes that this ineffective assistance of counsel claim satisfies the showing required by *28 U.S.C. § 2253(c)(2)*—but *not* as to Petitioner's allegation challenging counsel's failure to object to the instruction(s) defining reasonable doubt. In view of the settled nature of that claim in the Sixth Circuit, it is not debatable among jurists of reason whether Petitioner's trial counsel performed unreasonably and to his prejudice in failing to objection to the instruction(s). Except as set forth above, the Court accordingly **Certifies for Appeal** sub-part (E) of Petitioner's first ground for relief.

Sub-Part (F): Failure to Object to Prosecutorial Misconduct.

Petitioner next argues that his attorneys performed deficiently and to his prejudice in failing to object to several instances of prosecutorial misconduct. (Petition, ECF No. 14-2, at Page ID # 227-228, ¶¶ 268-80.)[7]

Incorporating those claims that set forth the underlying instances of alleged prosecutorial misconduct, Petitioner argues that his attorneys were ineffective for failing to object to:

- The prosecutor making improper arguments on victim impact evidence, appealing to the emotions **[*150]** and passions rather than reason, and making giving improper opening and closing arguments. (ECF No. 14-2, at ¶ 270 (incorporating ground nine, sub-part (C)).)

- The prosecutor making improper arguments about Petitioner's siblings and other people, thereby depriving Petitioner of individualized sentencing. (*Id*. at ¶ 272 (incorporating ground nine, sub-part (D)).)

- The prosecutor giving an improper characterization and definition of mitigation, which prevented the jury from giving effect to mitigation evidence and deprived Petitioner of individualized sentencing. (*Id*. at ¶ 273 (incorporating ground nine, sub-part (D)).)

- The prosecutor improperly shifting the burden of proof to Petitioner in mitigation. (*Id*. at ¶ 274 (incorporating ground nine, sub-part (D)).)

- The prosecutor exercising peremptory challenges in a discriminatory manner to exclude women from Petitioner's jury. (*Id*. at ¶ 275 (incorporating ground nine, sub-part (A)).)

In his Memorandum in Support, Petitioner expands upon his arguments. (ECF No. 93, at Page ID # 2228-2242.) **[*151]** Petitioner begins by detailing the case law governing review of claims of prosecutorial misconduct, as well as Sixth Circuit case law establishing that the failure to object to prosecutorial misconduct can amount to ineffective assistance of counsel. (*Id*. at Page ID # 2229.)

[7] The Court concluded in its September 30, 2005 Opinion and Order that paragraphs 269 and 271 were barred by procedural default. (ECF No. 39, at Page ID # 1570.)

Petitioner argues that his defense counsel should have objected to the prosecutor's reference during culpability-phase closing arguments to victim-impact evidence. Petitioner points to the following remarks:

> We know one thing for sure, that around 11:45, 11:50 on April 25, 1996, Damico Watkins was alive. He was 17 years old, he was from Cincinnati, Ohio. He was not perfect. He was in prison and he was in one of the units that children, young men from around the State of Ohio who have been tried as adults are placed. *But in the end he wasn't that much different from you or me. He had people that loved him, he had people who he loved, he had dreams, desires, I am sure he wanted to get out of prison and go about his life. He wanted to live....*

(*Id*. at Page ID # 2230 (emphasis added) (quoting Tr. Vol. VII, at 1002-03).) Petitioner asserts that such victim-impact evidence had no place in the culpability phase and that **[*152]** the references were improper, misleading, excessive, and prejudicial. Petitioner also argues that because the Ohio Supreme Court's decision rejecting this (un-objected to) claim of prosecutorial misconduct as not rising to plain error did not apply correct controlling law, the "AEDPA does not constrain this Court's review." (*Id*. at Page ID # 2231.)

Petitioner also challenges as ineffective defense counsel's failure to object to the prosecutor's penalty-phase closing arguments that improperly compared Petitioner to his siblings, improperly defined mitigation, and improperly shifted the burden of proof to Petitioner. (*Id*. at Page ID # 2232-2238.)[8]

[8] Petitioner notes that he raised in his ninth ground for relief the prosecutorial misconduct claims underlying this instance of alleged ineffectiveness and that this Court reserved judgment on whether ineffective assistance satisfied the cause and prejudice exception to excuse the default of the prosecutorial misconduct claims. (ECF No. 93, at Page ID # 2232.) The Court's resolution of the instant claim of ineffective assistance of counsel will accordingly dispose of that unresolved issue.

First, Petitioner challenges the following closing remarks that the prosecutor made during penalty-phase closing arguments:

> There are millions of people floating around the United States that have a tough childhood. You have seen his sisters, basically brought up in the same environment. They appeared to be okay to me. Well-dressed, well-spoken, loved their brother, concerned about their brother. So it couldn't have been that tough that they turned out okay.

(*Id*. at Page ID # 2233 (quoting Tr. Vol. VII, at 1177-78).) Petitioner argues that the **[*153]** improper comparison, as well as the prosecutor's interjecting of personal beliefs, compromised the individualized sentencing determination to which Petitioner was constitutionally entitled.

Petitioner also complains that defense counsel should have objected to the following remarks mischaracterizing and demeaning the concept of mitigation evidence:

> • Does receiving a bump on your head warrant someone murdering you? TR 1176.
>
> • [D]oes not give them an excuse, that does not give them a reason to end up here in court convicted of murdering somebody . . . . TR 1178.
>
> • Doesn't give us a reason for what was done . . . . TR1179.
>
> • [D]oes not give anyone the excuse to murder someone . . . . TR 1180.
>
> • [A]bsolutely no reason to kill Damico **[*154]** Watkins . . . . TR 1180.
>
> • There are absolutely no reasons that would justify what he did . . . . TR 1181.

(ECF No. 93, at Page ID # 2234.) Asserting that mitigating factors validly demonstrate why a specific defendant deserves a sentence less than death, Petitioner argues that the above remarks improperly suggested that the jury make its sentencing determination on the basis of Petitioner's blame or culpability.

Petitioner also challenges defense counsel's failure

to object to the prosecutor's improper shifting of the burden of proof to Petitioner:

> • The key question that you are to consider in this phase is does the aggravating circumstance outweigh the mitigating factors that we have heard today or do the mitigating factors outweigh the aggravating circumstance. TR 1174.
>
> • So you must assess what you heard today and determine if it outweighs the mitigating or aggravating circumstance . . . . [A]nd that's not a mitigating factor that outweighs the aggravating circumstance . . . . [A]nd in no way do they rise above or outweigh the aggravating circumstance for which you have already found him guilty . . . . [I]f you review the law, and you each have to review the law separately and together as a group, **[*155]** you will find that the things they have talked about today do not outweigh or supersede the aggravating circumstance and therefore you must recommend the death penalty. TR 1179, 1181.

(ECF No. 93, at Page ID # 2235.) Noting that courts have condemned these types of burden-shifting arguments, Petitioner asserts that these improper remarks clouded the jury's determination of Petitioner's sentence. Petitioner argues that he suffered prejudice as a result of counsel's failure to object to these instances of prosecutorial misconduct because, had counsel objected, the trial court would have sustained the objection and given curative instructions. "Without the prejudicial arguments," Petitioner reasons, "there is a strong likelihood that at a minimum, at least one juror would not have voted for death in light of the inconsistent testimony and inadequate scientific evidence establishing the petitioner as one of the shooters [*sic*]." (*Id*. at Page ID # 2236.) Petitioner further asserts that because the Ohio Supreme Court found that the remarks were improper but not prejudicial, the AEDPA does not constrain this Court's review of Petitioner's claim. Petitioner emphasizes that the prosecutor's remarks **[*156]** were extensive, pervasive, and misled the jury about a critical issue of the sentencing-phase weighing process. Petitioner also stresses that the evidence establishing that he possessed a knife and was one of the stabbers was weak.

Finally, Petitioner contends that trial counsel should have objected to the prosecution's discriminatory use of peremptory challenges to strike women.[9]

Petitioner contends that "[t]he prosecutors systematically excluded women from the jury panel" because they exercised four of their six peremptory challenges against women. (*Id*. at Page ID # 2239.) "At this point," Petitioner asserts, "trial counsel should have challenged the removals on the basis of *J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)*." (*Id*.) It is immaterial, Petitioner continues, that women replaced women after the strikes because pursuant to *J.E.B.*, "[t]he improper pretextual strike of a single juror requires that petitioner's conviction be vacated." (*Id*. at Page ID # 2240.) Petitioner explains that the prosecution repeatedly asked female jurors whether they were capable of hearing graphic testimony or viewing video of the scene without ever posing such questions to male jurors. Petitioner next suggests that because Respondent in his Return of Writ **[*157]** offered race-neutral explanations for each of the peremptory challenges that the prosecution used against women, the preliminary question of whether Petitioner made a *prima facie* showing of discrimination becomes moot. (*Id*. at Page ID # 2241.)

Respondent begins by recounting the Ohio Supreme Court's decision addressing and rejecting the claims of prosecutorial misconduct underlying Petitioner's ineffective assistance allegation. (ECF

[9] Petitioner notes that he raised in his ninth ground for relief the prosecutorial misconduct claims underlying this instance of alleged ineffectiveness and that this Court reserved judgment on whether ineffective assistance satisfied the cause and prejudice exception to excuse the default of the prosecutorial misconduct claims. (ECF No. 93, at Page ID # 2238.) The Court's resolution of the instant claim of ineffective assistance of counsel will accordingly dispose of that unresolved issue.

No. 101, at Page ID # 2452-2454.) Like Petitioner, Respondent next sets forth the authority governing claims of prosecutorial misconduct (even though the claim before the Court is an ineffective assistance claim, not a prosecutorial misconduct claim). With respect to Petitioner's **[*158]** contention that defense counsel should have objected to the prosecution's arguing victim impact evidence, Respondent notes that the challenged comments consisted of thirteen lines of a fourteen-page closing argument. Respondent also emphasizes that the challenged comments consisted of *arguments*, not *evidence*, and that the trial court so advised the jury immediately prior to the prosecutor delivering his closing arguments. Respondent disputes that the challenged comments rendered Petitioner's trial fundamentally unfair because the prosecutor described victim Damico Watkins in general terms. Finally, Respondent notes that it is within sound trial strategy for defense counsel not to object to such a minimal acknowledgment of the victim.

With respect to defense counsel's failure to object to the prosecutor's mitigation-phase closing argument, Respondent first asserts that Petitioner misquoted the portion of the argument at issue. (ECF No. 101, at Page ID # 2456-2457 (quoting Tr. Vol. VII, at 1177-78).) Respondent argues that the prosecutor's remark about many people having "tough childhoods" without ending up in prison was a proper response to defense counsel's argument that Petitioner's **[*159]** difficult upbringing led him to prison. Respondent also challenges the authority upon which Petitioner relies for support of his claims. (ECF No. 101, at Page ID # 2457-2458.)

Respondent proceeds to argue that Petitioner's defense counsel were not ineffective for failing to object to the prosecution's alleged belittling and demeaning of mitigation evidence. Urging the Court to consider the prosecution's comments in their full context, Respondent insists that the prosecutor merely argued that the mitigation evidence was entitled to little weight and did not outweigh the aggravating circumstances. (*Id.* at Page ID # 2458.) To Petitioner's argument that defense counsel had a duty to object to the prosecution's "burden shifting," Respondent replies first that such remarks are appropriate during the sentencing phase of a capital case because of the balancing requirement inherent in the sentencing decision. Respondent further argues that even assuming the remarks were improper, they did not render the sentencing hearing fundamentally unfair insofar as the remarks did not rise to the level of misconduct warranting reversal or habeas corpus relief. (*Id.* at Page ID # 2458-2459.)

The Court begins **[*160]** by clarifying the precise issue before it. The claim before the Court is *not* whether the prosecution committed misconduct as alleged above, *but* whether Petitioner's defense counsel performed unreasonably and to his prejudice in failing to object to the alleged instances of prosecutorial misconduct set forth above. The case law governing that determination is not *Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*, and its progeny of cases addressing prosecutorial misconduct, but *Strickland v. Washington*. In *Schauer v. McKee, 401 F. App'x 97 (6th Cir. 2010)*, the Sixth Circuit explored this distinction as follows:

> Even if we assume that the prosecution's remarks were improper, the pertinent question is whether counsel's failure to object was both objectively unreasonable and prejudicial. While Schauer claims that "defense counsel's failure to object was constitutionally deficient performance," (Appellee's Br. 28), the state posits that this too was strategy because "defense counsel may not have wanted to draw attention to the prosecutor's remarks," (Appellant's Br. 50). "[N]ot drawing attention to [a] statement may be perfectly sound from a tactical standpoint." *United States v. Caver, 470 F.3d 220, 244 (6th Cir. 2006)*. To breach the unreasonableness threshold, "defense counsel must so consistently fail to use

> objections, despite numerous and **[*161]** clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice." *Lundgren v. Mitchell, 440 F.3d 754, 774-75 (6th Cir. 2006)*. Conversely, "any single failure to object [to closing arguments] usually cannot be said to have been error." *Id. at 774*; *see also Smith v. Bradshaw, 591 F.3d 517, 522 (6th Cir. 2010)* (finding that defense counsel's failure to object to one instance of alleged prosecutorial misconduct was not deficient). Together, these precepts suggest that Schauer's defense counsel's failure to object to this aspect of the prosecution's closing argument falls within the broad range of reasonable trial conduct under *Strickland*. We therefore deny Schauer's ineffective assistance of counsel claim.

Id. at 101.

Although it is inevitable that the Court, in determining whether defense counsel rendered ineffective assistance for failing to object to alleged instances of prosecutorial misconduct, will examine whether the challenged conduct rose to the level of misconduct, this Court's review of the prosecution's conduct is only somewhat informed by the case law governing review of prosecutorial misconduct. Thus, the parties' prolonged attention to the standard of review governing claims of prosecutorial misconduct, including Petitioner's **[*162]** arguments for why *§ 2254(d)* does not constrain this Court's review, somewhat misses the mark. To be clear, the claim before the Court is whether defense counsel acted deficiently and to Petitioner's prejudice in failing to object to alleged instances of prosecutorial misconduct. The Ohio Supreme Court rejected that claim on the merits, albeit without discussion, *Stojetz, 84 Ohio St. 3d, at 457-58*, obliging this Court to determine whether that adjudication was reasonable.

Notwithstanding the foregoing, the Court takes note of the principles governing review of claimed prosecutorial misconduct solely to emphasize how steep the hurdle is for establishing a meritorious claim of prosecutorial misconduct. A reviewing court typically first determines whether prosecutorial misconduct occurred and, if so, whether the misconduct was prejudicial. In so doing, the reviewing court should consider the challenged remarks within the context of the entire trial to determine whether any improper remarks were prejudicial. *Cristini v. McKee, 526 F.3d 888, 901 (6th Cir. 2008)*. In the Sixth Circuit, if a court finds that the challenged conduct was improper, the court must determine whether the misconduct was so flagrant as to deny the Petitioner a fundamentally fair trial. *See, e.g.*, *Slagle v. Bagley, 457 F.3d 501, 516 (6th Cir. 2006)*; *see also Bates v. Bell, 402 F.3d 635, 641 (6th Cir. 2005)* (citations **[*163]** omitted). It bears noting, with respect to prosecutorial misconduct claims, that even misconduct that was improper or universally condemned does not warrant habeas corpus relief unless the misconduct was so flagrant and egregious as to deny a petitioner a fundamentally fair trial. *Donnelly, 416 U.S. at 643-44*. To that point, "[t]he relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction (or death sentence) a denial of due process." *Darden v. Wainwright 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)* (citation and internal quotation marks omitted). Although it is well settled that prosecutors cannot offer personal opinions as to the credibility of witnesses, the guilt of the accused, or facts not in evidence, prosecutors do enjoy wide latitude to "argue the record, highlight any inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence." *Cristini, 526 F.3d at 901*.

With those principles in mind, the Court turns to Petitioner's claim of ineffective assistance. As noted above, the Sixth Circuit has held that the failure to object to prosecutorial misconduct can constitute ineffective assistance. *Girts v. Yanai, 501 F.3d 743, 757 (6th Cir. 2007)* (counsel ineffective for failing to object to comments about the petitioner's failure to testify **[*164]** that were

improper, repetitive, and highly prejudicial); *Washington v. Hofbauer, 228 F.3d 689, 702 (6th Cir. 2000)* ("counsel's failure to object to prosecutorial misconduct constitutes defective performance when that failure is due to clear inexperience or lack of knowledge of controlling law, rather than reasonable trial strategy.") As the district court in *Sondey v. White, No. 05-71831, 2009 U.S. Dist. LEXIS 114730, 2009 WL 4800413, at *25 (E.D. Mich. Dec. 9, 2009)*, observed, a defense attorney's failure to object to alleged prosecutorial misconduct does not constitute ineffectiveness where the omission was tactical, where the challenged behavior was not misconduct, or where any misconduct did not prejudice the petitioner. The district court explained:

> Petitioner next contends that counsel was ineffective for failing to object to prosecutorial misconduct and faulty jury instructions he identifies in his second and third habeas claims. With respect to the prosecutorial misconduct claims, petitioner cannot establish either that counsel was deficient or that he was prejudiced by counsel's failure to object. Counsel testified at the evidentiary hearing that he made a deliberate choice not to object, so as not to antagonize the jury or highlight the inappropriate comments. *Cf. Hardamon v. United States, 319 F.3d 943, 949 (7th Cir. 2003)* ("A competent trial strategy frequently is to mitigate damaging evidence **[*165]** by allowing it to come in without drawing additional attention to it, such as an objection would.") Further, as discussed above, petitioner's prosecutorial misconduct claims are without merit because the prosecutor's actions were either not improper or not prejudicial. To the extent the prosecutor's actions were not improper, counsel was not deficient in failing to raise a meritless objection. *See Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1995)*; *Burnett v. Collins, 982 F.2d 922, 929 (5th Cir. 1993)*. To the extent that the prosecutor's actions were improper but not sufficiently egregious to deprive petitioner of a fair trial, petitioner cannot show that he was prejudiced by counsel's performance. *See White v. Withrow, No. 00-CV-74231, 2001 U.S. Dist. LEXIS 11777, 2001 WL 902624, at *12 (E.D. Mich. June 22, 2001)* (Rosen, J.) (citing *United States v. Nwankwo, 2 F.Supp.2d 765, 770 (D.Md. 1998)* (no prejudice from counsel's failure to object to prosecutorial misconduct where prosecutor's comments did not deprive petitioner of a fair trial); *Rich v. Curtis, No. 99-CV-73363, 2000 U.S. Dist. LEXIS 17238, 2000 WL 1772628, at *8 (E.D. Mich. Oct. 24, 2000)* (Friedman, J.) (same).

Id.

Cases in which counsel's failure to object to prosecutorial misconduct rose to the level of ineffective assistance are cases where "*severe* prosecutorial misconduct" occurred. *Wilson v. Bell, 368 F. App'x 627, 636 (6th Cir. 2010)* (emphasis added). This is not such a case. The instances of prosecutorial misconduct about which Petitioner complains were not so numerous and clear that any competent attorney would have objected. The prosecutor's culpability-phase **[*166]** references to the victim (Tr. Vol. VII, at 1002-03)—such as to his age, his desire to get out of prison and to live, and the likelihood that he had people he loved and people who loved him—constituted a minimal portion of the entire culpability-phase closing arguments. The comments were more general than specific, more mild than brash, and did not involve prolonged dwelling on the character or feelings of Damico Watkins. The prosecutor's penalty-phase arguments ostensibly comparing Petitioner to his siblings and others from "tough" childhoods who did *not* end up in prison or murdering anyone were so benign and minimal, when viewed against the entire penalty-phase closing arguments, as to create any substantial risk of infringing upon Petitioner's right to an individualized sentencing determination. (*Id.* at 1177-78.) Similarly, any penalty-phase remarks mischaracterizing the concept of mitigation evidence were scattered, innocuous, and sufficiently remedied by defense counsel's own

closing arguments, as well as the jury instructions. Finally, to the extent that the prosecution improperly shifted the sentencing-determination burden of proof to Petitioner, those comments were more isolated than pervasive **[*167]** and more inadvertent than designed to mislead. They are also mitigated by the fact that the trial court accurately instructed the jury about the sentencing-phase burden of proof. It bears mentioning that counsel may reasonably decide not to object to questionable comments so as not to focus the jury's attention on otherwise isolated remarks and/or to avoid antagonizing the jury with repetitive objections.

The Sixth Circuit reached a similar result in *Wilson v. Bell*—distinguishing between counsel's failure to object to *questionable* prosecutorial misconduct and counsel's failure to object to "*severe* prosecutorial misconduct." *368 F. App'x at 636* (emphasis added). The Sixth Circuit stated:

> [W]e have explained that an ineffective assistance of counsel claim based on trial counsel's failure to object to prosecutorial misconduct "hinges on whether the prosecutor's misconduct was plain enough for a minimally competent counsel to have objected." *Washington v. Hofbauer, 228 F.3d 689, 698 (6th Cir. 2000)*.
>
> In *Washington*, a case relied upon by the district court, this court found the prosecutor engaged in severe misconduct through the pervasive use of "bad character" evidence in closing argument and rebuttal and the misrepresentation of the facts in evidence in such a way as **[*168]** to mislead the jury regarding the credibility of the minor victim. The failure to object to this clear misconduct could not be justified as legitimate trial strategy and fell below an objective standard of reasonably competent assistance. Further, given that there was no evidence outside the testimony of the victim, there was a reasonable probability that but for the failure to object and request curative instructions the result would have been different. This court held that the state court's application of *Strickland* was not simply incorrect, but was objectively unreasonable. *See also Hodge v. Hurley, 426 F.3d 368, 385 (6th Cir. 2005)* (holding that "failure to object to any aspect of the prosecutor's egregiously improper closing argument was objectively unreasonable" where prosecutor called the defendant a liar, stated the victim and her family were "absolutely believable," misrepresented the doctor's testimony concerning the physical evidence, and made derogatory remarks and arguments based on "bad character").
>
> We find that the district court's reliance on *Washington* and *Hodge* was misplaced as both cases involved much more severe prosecutorial misconduct. Here, although defense counsel had grounds to object to the prosecutor's statement **[*169]** in rebuttal, the failure to object to this isolated instance of vouching was not objectively unreasonable. Nor is there a reasonable probability that but for the failure to object in this case and obtain a curative instruction, the result of the proceedings would have been different. Further, we conclude that the state court's rejection of this claim of ineffective assistance of counsel was not an objectively unreasonable application of *Strickland*.

Wilson, 368 F. App'x at 636. The prosecutorial conduct to which Petitioner argues his defense counsel should have objected did not remotely rise to the level of "severe" prosecutorial misconduct. That being so, Petitioner cannot overcome the presumption that defense counsel's failure to object to the challenged conduct was a matter of sound trial strategy. Nor can Petitioner demonstrate that he suffered any prejudice.

With respect to Petitioner's claim that his attorneys were ineffective for failing to object to the prosecution's discriminatory use of peremptory challenges to strike women from the jury, Petitioner

fails to demonstrate either deficient performance or prejudice. Although this Court previously agreed that this claim of ineffective assistance was properly **[*170]** before it (ECF No. 39, at Page ID # 1627), the Court notes that Petitioner does not appear to have included *this* allegation of ineffective assistance among his other allegations of trial counsel's failure to object to prosecutorial misconduct. Moreover, the Court previously noted (and Petitioner conceded) that Petitioner also never presented to the state courts *this* underlying instance of alleged prosecutorial misconduct—discriminatory use of peremptory challenges to strike female jurors. (*Id*. at Page ID # 1625-1628.) Petitioner's failure to raise either claim has resulted in a record from which Petitioner cannot establish either the deficient performance or prejudice components of the two-part *Strickland* test. Having reviewed the *voir dire* transcript, the Court is not persuaded that Petitioner's defense counsel performed deficiently or to Petitioner's prejudice for failing to object when the prosecutor exercised four of its six peremptory challenges to strike women (Celia Browning, Mrs. Thornsberry, Mrs. Cantrell, and Mrs. Osborn). Nothing about the prosecution's striking those prospective jurors strikes this Court as so glaringly objectionable that any minimally competent attorney **[*171]** would have objected. For example, Mrs. Thornsberry indicated in her juror questionnaire that she would dislike having to make the decision of whether to impose the death penalty, and further stated during individualized *voir dire* that it would bother her to have to consider imposition of the death penalty and that she did not know whether she could sign a verdict recommending the death sentence. (Tr. Vol. II, at 110-18.) Mrs. Cantrell likewise expressed mixed feelings about the death penalty. (*Id*. at 226-33.) In sum, Petitioner has not sustained his burden of demonstrating either deficient performance or prejudice stemming from defense counsel's failure to object to the prosecution's exercise of its peremptory challenges.

The Court finds without merit Petitioner's claim that his trial attorneys performed unreasonably and to his prejudice for failing to object to alleged prosecutorial misconduct. Thus, the Court **DENIES** as without merit sub-part (F) of Petitioner's first ground for relief. Further, this Court issued a September 30, 2005 Opinion and Order finding that the alleged instances of prosecutorial misconduct underlying the instant claims of ineffective assistance of counsel appeared procedurally **[*172]** defaulted but reserving its decision whether ineffective assistance of counsel might serve as cause and prejudice to excuse any default. (ECF No. 39.) This Court's determination that counsel were not ineffective resolves that pending issue. Accordingly, the Court **DENIES** as procedurally defaulted the portions of Petitioner's ninth ground for relief set forth above. (*Id*.)

The Court concludes that this ineffective assistance of counsel claim satisfies the showing required by *28 U.S.C. § 2253(c)(2)*—but *not* as to Petitioner's allegation challenging counsel's failure to object to the prosecution's allegedly discriminatory exercise of peremptory challenges to strike female prospective jurors. In view of the total lack of evidence supporting such an allegation, it is not debatable among jurists of reason whether Petitioner's trial counsel performed unreasonably and to his prejudice in failing to objection to that alleged misconduct. Except as set forth above, the Court accordingly **Certifies for Appeal** sub-part (F) of Petitioner's first ground for relief.

Sub-Part (J): Failure to Object to Improper Victim Impact Evidence.

Petitioner argues that his trial attorneys performed deficiently and to his prejudice in failing **[*173]** to object to the trial court's consideration of victim impact evidence. (Petition, ECF No. 14-2, at Page ID # 232 ¶¶ 312-14.) In the Petition, Petitioner sets forth his presents his arguments by incorporating the portion of his Petition where Petitioner raises the underlying claim—the trial court's admission and consideration of victim impact evidence. (Petition, ECF No. 14-16, at Page ID # 117-119 ¶¶

815-35.) Specifically, Petitioner notes that after the jury rendered its sentencing verdict recommending a death sentence, the trial court permitted the victim's grandmother to make a statement, during which she expressed her family's loss, declined to show Petitioner mercy, and denounced Petitioner's unsworn statement apologizing for Damico Watkins' death. (*Id*. at Page ID # 117 ¶¶ 818-20.) Petitioner argues that his trial attorneys should have objected because Ohio law prohibits the introduction of victim impact evidence during either the mitigation or sentencing phases of a capital trial. Petitioner insists that the trial court relied on the victim impact evidence when it weighed the aggravating circumstance against the mitigating factors in determining whether to accept the jury's **[*174]** sentencing verdict recommending that Petitioner be sentenced to death.

In his Memorandum in Support, Petitioner explains why controlling federal law supports his claim that the victim impact evidence was improper and that defense counsel should have objected to it. (ECF No. 93, at Page ID # 2242-2245.) Discussing *Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*, and *Van Hook v. Anderson, 535 F.3d 458, 468 (6th Cir. 2008)*, Petitioner insists that the Constitution prohibits the introduction of any opinions of the victim's family urging a particular sentence. Petitioner further reiterates that the trial court's sentencing entry confirms that the trial court considered the victim impact evidence in deciding to accept the jury's recommendation and sentence Petitioner to death. The language to which Petitioner points states as follows: "'the victim's representative made a statement on behalf of the victim and his family after the verdict of death was accepted.'" (ECF No. 93, at Page ID # 2243 (quoting App. Vol. II, at 319).) Petitioner notes that the Sixth Circuit in *Van Hook* found ineffective assistance stemming from trial counsel's failure to object to a victim impact statement contained in a sentencing report. *535 F.3d at 468*.

Respondent emphasizes in his Merits Brief that the victim's grandmother made her statement out of **[*175]** the hearing of the jury and after the jury had already rendered its sentencing verdict. (ECF No. 101, at Page ID # 2460.) Respondent further notes that the Ohio Supreme Court rejected both the underlying claim (challenging the admission of the victim impact evidence) and the ineffective assistance claim, albeit the latter summarily. Respondent insists that "nothing in the record supports Petitioner's claims that the court considered the statement or gave [] any weight to the statement in sentencing Petitioner to death." (*Id*. at Page ID # 2460-2461 (emphasis in original).) In view of Petitioner's concession that courts are presumed to follow the law, Respondent continues, "it is unreasonable to conclude that the trial court gave any consideration to the grandmother's statement." (*Id*. at Page ID # 2461.) Finally, Respondent denounces Petitioner's reliance on *Van Hook v. Anderson, 535 F.3d 458*, asserting that the Sixth Circuit's December 18, 2008 order accepting the case for *en banc* review vacated the decision. (*Id*.)

Because the Ohio Supreme Court rejected Petitioner's claim of ineffective assistance, albeit without discussion, the issue before the Court is whether the Ohio Supreme Court's decision contravened or unreasonably **[*176]** applied *Strickland*. In making that determination, this Court also takes into consideration the Ohio Supreme Court's decision rejecting the underlying claim challenging the admission of the statement of Damico Watkins' grandmother. The Ohio Supreme Court stated as follows:

> Appellant claims that the trial court considered an improper expression of opinion by the victim's grandmother as to whether appellant deserved the death penalty. Appellant points to language in the judgment entry imposing the death sentence and argues that the trial court impermissibly relied on the victim-impact statement. We disagree. A review of the transcript and sentencing opinion reveals no indication whatsoever that the trial court relied

> on the victim-impact statement in rendering the sentence of death. Absent an affirmative showing to the contrary, this court will presume that the trial judge considered only the relevant, material, and competent evidence in arriving at a judgment. *State v. Dennis (1997), 79 Ohio St.3d 421, 433, 1997 Ohio 372, 683 N.E.2d 1096, 1107*. The mere reference to the victim-impact statement in the trial court's judgment entry, without more, does not amount to reversible error. We reject appellant's proposition of law.

Stojetz, 84 Ohio St. 3d at 466-67.

Upon review of the record, this Court wholly agrees **[*177]** with the Ohio Supreme Court's decision. Respondent is correct that Mrs. Watkins gave her statement *after* the jury had rendered its sentencing verdict *and* exited the court room. The Ohio Supreme Court reasonably determined that nothing from the trial court's sentencing entry suggests that Mrs. Watkins' statement factored at all into the trial court's sentencing decision. Contrary to Petitioner's assertion, the trial court's written sentencing Decision and Entry, signed on April 17, 1997 and filed on April 18, 1997, contained *no* reference to Mrs. Watkins' statement. (App. Vol. I, at 271-82.) The trial court's only reference to the statement—"The victim's representative made a statement on behalf of the victim and his family after the verdict of death was accepted"—appeared in an April 18, 1997 entry memorializing the sentencing events that occurred on April 17 and April 18, 1997. (*Id*. at 284.) The trial court's reference was unremarkable and does not remotely suggest that the trial court considered Mrs. Watkins' statement in determining that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt and accepting the jury's recommendation. The Court is not persuaded that admission of Mrs. **[*178]** Watkins' statement was improper or prejudicial. That being so, trial counsel did not perform unreasonably or to Petitioner's prejudice in failing to object to Mrs. Watkins' statement and the Ohio Supreme Court reasonably rejected both the claim challenging admission of the statement and Petitioner's claim of ineffective assistance. The Court **DENIES** as without merit sub-part (J) of Petitioner's first ground for relief.

The Court cannot find that this claim of ineffective assistance of counsel satisfies the showing required by *28 U.S.C. § 2253(c)(2)*. Because the record is devoid of any evidence suggesting that the trial court considered the statement of the victim's grandmother, reasonable jurists could not find debatable or wrong this Court's decision concluding that Petitioner's trial counsel were not ineffective in failing to object to the admission of the statement.

Sub-Part (K): Cumulative Impact of Ineffective Assistance.

Lastly, Petitioner argues that "[e]ven if the above identified errors individually do not warrant relief, the cumulative impact of counsels' deficiencies warrant relief." (Petition, ECF No. 14-2, at Page ID # 232 ¶ 315.) In his Memorandum in Support, Petitioner adds that "[i]n determining whether **[*179]** confidence in the outcome is undermined because one juror may have decided an issue differently, the resulting prejudice from counsel's errors must be considered collectively, not item-by-item." (ECF No. 93, at Page ID # 2245.) Respondent asserts that Petitioner's claim is without merit because Petitioner's trial counsel provided constitutionally effective representation. (ECF No. 101, at Page ID # 2461-2462.) The Court agrees with Respondent.

The concept of "cumulative error" recognizes that errors that might not be so prejudicial as to warrant relief when considered alone may, when considered cumulatively, result in a trial that is fundamentally unfair. *See, e.g., Gillard v. Mitchell, 445 F.3d 883, 898 (6th Cir. 2006)*; *Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983)*. Some courts have applied that concept in the context of multiple alleged instances of ineffective assistance. *See, e.g., Spears v. Mullin,*

343 F.3d 1215, 1251 (10th Cir. 2003); *Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995)* (recognizing that prejudice may result from the cumulative impact of multiple deficiencies). Assuming for purposes of this discussion that cumulative-error applies to alleged instances of ineffective assistance of counsel, Petitioner's claim still fails. As the Tenth Circuit observed in *Spears*, "[b]ecause the sum of various zeroes remains zero, the claimed prejudicial effect of [] trial attorneys' cumulative **[*180]** errors does not warrant habeas relief." *343 F.3d at 1251*. This Court found no deficiencies on the part of Petitioner's defense counsel; thus, there is no prejudice to cumulate. The Court **DENIES** as without merit sub-part (K) of Petitioner's first ground for relief.

The Court cannot conclude that this claim of cumulative impact from counsel's alleged errors satisfies the showing required by *28 U.S.C. § 2253(c)(2)*. Because the law supporting such claims is tenuous and the Court has certified almost all of Petitioner's claims of ineffective assistance of trial counsel, the Court cannot find that Petitioner's cumulative impact claim is deserving of further consideration on appeal.

Ground Two: Actual Innocence of Aggravated Murder and/or the Death Penalty.

In his second ground for relief, Petitioner argues that he is actually innocent of aggravated murder and/or innocent of the death penalty. (Petition, ECF No. 14-2, at Page ID # 234-235 ¶¶ 320-30.) Incorporating many of the arguments that he advanced in support of his claim challenging counsel's purported failure to investigate and present a defense, Petitioner asserts that had the jury heard the evidence that counsel failed to uncover and present, the jury would have determined **[*181]** that Petitioner lacked specific intent to cause the death of Damico Watkins and that Watkins' death did not result from any prior calculation and design. Petitioner points to the fact that, ostensibly with the benefit of evidence that Petitioner's jury never heard, accomplice Jerry Bishop, identified as having stabbed Watkins, was acquitted of aggravated murder and convicted only of murder and James Bowling, the admitted leader and planner of the attack, was convicted of aggravated murder but sentenced to life. Petitioner notes that the *Eighth* and *Fourteenth Amendments* prohibit the execution of a person who does not meet the stringent standards for death eligibility.

In the Return of Writ, Respondent begins by noting that "[n]o United States Supreme Court case has ever established that a 'free standing' claim of actual innocence constitutes a valid constitutional claim." (ECF No. 21, at Page ID # 396.) Respondent concedes, however, that dicta in *Herrera v. Collins, 506 U.S. 390, 419, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)*, and *Schlup v. Delo, 513 U.S. 298, 314, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*, appear to leave open the possibility of recognizing such a claim under appropriate circumstances—for example, where a condemned's actual innocence would render his or her execution "constitutionally intolerable." (ECF No. 21, at Page ID # 397.) Respondent proceeds **[*182]** to note that although the Supreme Court has never enunciated a standard for establishing a constitutional claim of actual innocence, the Supreme Court has cautioned that any such standard would be "extraordinarily high." Parsing *Herrera* and *Schlup*, Respondent asserts that any cognizable claim of actual innocence would have to be tied to reliable evidence not presented at trial that unquestionably establishes the accused's innocence. (*Id.*) Respondent further asserts that such a claim would have to assert *actual* innocence as opposed to *legal* innocence and that the new facts purporting to demonstrate actual innocence would have to raise a level of doubt about the accused's guilt sufficient to undermine confidence in the outcome of the trial proceeding. (*Id.* at Page ID # 398.) Respondent then argues that the "new evidence" that Petitioner presented during his state postconviction proceedings fell far short of establishing actual innocence and that the state trial court's decision

rejecting Petitioner's claim—addressed along with Petitioner's claim of ineffective assistance for the failure to investigate and present a defense—did not contravene or unreasonably apply federal law.

In his Memorandum **[*183]** in Support, Petitioner begins by asserting that because the state trial court in postconviction did not address the merits of Petitioner's claim of actual innocence, the AEDPA does not constrain this Court's review of the claim. (ECF No. 93, at Page ID # 2246.) Petitioner next asserts that *Schlup* imposes a less strict standard for establishing actual innocence than *Herrera* and that a reviewing court need examine *Herrera* only if the court is first satisfied that the actual innocence claim meets the *Schlup* standard. (*Id*. at Page ID # 2246-2247.) Petitioner asserts he can satisfy both. Petitioner fails to elaborate further but, in the interests of caution, this Court will assume that Petitioner incorporates the arguments that he presented in support of his claim that his attorneys were ineffective for failing to conduct an adequate investigation and present a meaningful defense based on Petitioner's actual innocence.

Respondent begins his Merits Brief arguments by recounting verbatim the Ohio Supreme Court's findings of fact. (ECF No. 101, at Page ID # 2421-2423 (quoting *Stojetz, 84 Ohio St. 3d at 452-54*).) Respondent also notes that the decision that the state trial court issued in postconviction rejecting Petitioner's **[*184]** claim of actual innocence is equally deserving of deference under the AEDPA. Respondent proceeds to explain that the Ohio courts rejected many of the assertions upon which Petitioner relies in support of his assertion that he is actually innocent of aggravated murder and/or the death penalty. Specifically, Respondent asserts, the Ohio courts determined that Petitioner was the leader of the Aryan Brotherhood at MaCI; that Petitioner was armed at the outset of the attack; that Petitioner actually stabbed and murdered Damico Watkins; and that Petitioner confessed to the murder. (*Id*. at Page ID # 2424-2426.) Respondent argues that "[b]ecause Petitioner's claim of 'actual innocence' is based on conflicting testimony, this Court must defer to the triers of fact with respect to issues of conflicting testimony, weight of the evidence, and the credibility of the witnesses." (*Id*. at Page ID # 2426-2427.) Respondent further asserts that Petitioner failed to rebut the findings of fact that the Ohio courts made, thereby failing to overcome the presumption of correctness to which those findings are entitled pursuant to *28 U.S.C. § 2254(e)(1)*.

Respondent is correct that Petitioner presented this claim to the state courts during **[*185]** postconviction and that the trial court rejected it on the merits, albeit in connection with Petitioner's claim that his attorneys were ineffective for failing to conduct an adequate investigation and present a meaningful defense. The inquiry before the Court, accordingly, is whether the state trial court's decision contravened or unreasonably applied clearly established federal law as determined by the Supreme Court. The latter appears to present an insurmountable hurdle to Petitioner, as clearly established federal law establishes that a freestanding claim of actual innocence does not present a constitutional claim cognizable in federal habeas corpus. Even assuming a claim of freestanding actual innocence sounded in habeas corpus, Petitioner falls short of satisfying the extraordinarily high standard. That being so, the Court cannot find that the state trial court's decision rejecting the claim was incorrect, much less unreasonable.

To be clear, to date, the United States Supreme Court has never recognized a claim of actual innocence as a valid claim in habeas corpus. When most recently pressed to answer the question whether habeas corpus recognizes a freestanding claim of actual **[*186]** innocence, the Supreme Court expressly declined to resolve the issue. *House v. Bell, 547 U.S. 518, 555, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006)*. Both parties acknowledge that the closest the Supreme Court has come to recognizing such a claim was in dicta in *Herrera v. Collins*:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas corpus relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

506 U.S. at 417. The Court is not persuaded that Petitioner could satisfy this "extraordinarily high" threshold showing even assuming a freestanding claim of actual innocence were cognizable in habeas corpus.

House is instructive in this regard. In *House*, the Supreme Court held that the petitioner had satisfied *Schlup*'s stringent miscarriage of justice/actual **[*187]** innocence standard for permitting habeas corpus review of otherwise procedurally defaulted claims. In so doing, the Court recognized that *Schlup v. Delo* was a recognition that the principles of comity and federalism underlying the cause-and-prejudice requirement for permitting habeas review of defaulted claims must yield to the imperative of correcting a fundamental injustice. *House, 547 U.S. at 536*. *Schlup* thus created an actual innocence gateway to review of otherwise defaulted claims where, in light of new evidence, "'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Id. at 536-37* (quoting *Schlup, 513 U.S. at 327*). The Supreme Court in *House* stressed that although the *Schlup* standard does not require absolute certainty as to the petitioner's guilt or innocence, it is nonetheless "extraordinarily high." *House, 547 U.S. at 538*.

After cautioning that *Schlup*'s actual innocence gateway would apply in only the extraordinarily rarest of cases, the Supreme Court concluded that the petitioner in *House*—through the introduction of new DNA evidence, bloodstain evidence, and substantial proof suggesting an alternative suspect—had satisfied the standard. *House, 547 U.S. at 540-54*. The Supreme Court explained that although close, **[*188]** "this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Id. at 554*.

The foregoing bears belaboring for the following reason: in declining to resolve the issue of whether there existed in addition to an actual innocence gateway to review of defaulted claims a freestanding claim of actual innocence, the Supreme Court opined that whatever the standard would be for establishing such a claim, the petitioner in *House* had *not* satisfied it. The Supreme Court explained:

> We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure, House has cast considerable doubt on his guilt—doubt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high." *506 U.S., at 417, 113 S.Ct. 853*. The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the **[*189]** gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

House, 547 U.S. at 555. If the petitioner in *House*

could satisfy *Schlup* but not the more stringent standard at which *Herrera* only hinted, Petitioner herein certainly cannot.

Review of the *House* decision reveals that the new evidence casting considerable doubt on the petitioner's guilt was substantial. The evidence upon which Petitioner in the instant case relies in support of his claim that he is actually innocent of aggravated murder and/or innocent of the death penalty pales by comparison. For the reasons the Court discussed above in rejecting Petitioner's claim that his attorneys were ineffective for failing to investigate and present a defense, the Court concludes that Petitioner satisfies neither the *Schlup* standard for obtaining review of otherwise defaulted claims nor the hinted-at *Herrera* standard for satisfying any hypothetical freestanding claim of actual innocence. This Court identified the myriad ways that the new evidence upon which Petitioner relied in support **[*190]** of both his ineffective assistance claim and his assertion of actual innocence were riddled with internal inconsistencies, as well as inconsistencies with trial evidence, lacking indicia of reliability, and significantly implicated Petitioner in leading the assault and actually stabbing Watkins. Such evidence could not possibly satisfy *Schlup* or *Herrera/House. See, e.g.,* *Chavis-Tucker v. Hudson, 348 F. App'x 125, 137 (6th Cir. 2009)* (finding new evidence insufficient to demonstrate even gateway actual innocence where the new evidence "at most presents 'a classic swearing match' between evidence produced at trial and post-trial affidavits that lack any indicia of reliability." (quoting *Bosley v. Cain, 409 F.3d 657, 665 (5th Cir. 2005))*.

The Court **DENIES** as without merit Petitioner's second ground for relief. First, the Supreme Court has never held that there exists a freestanding claim of actual innocence. Second, even assuming the existence of such a claim, Petitioner falls short of satisfying the extraordinarily high standard at which the Supreme Court hinted in *Herrera* and *House*. The state trial court's decision in postconviction rejecting Petitioner's claim of actual innocence did not contravene or unreasonably apply clearly established federal law as determined by the Supreme Court.

The Court **[*191]** is inclined to conclude that this actual innocence claim satisfies the standard required by *28 U.S.C. § 2253(c)(2)* for a certificate of appealability. Although the Court recognizes that the law supporting any such claim is dubious, the Court is of the view that the law is worthy of continued examination. Further, although this Court determined that the evidence supporting Petitioner's claim is riddled with problems, the Court is satisfied that the voluminous and fact-intensive nature of that evidence would permit jurists of reason to find the claim debatable. The Court accordingly **Certifies for Appeal** Petitioner's second ground for relief.

Ground Three: Inadequate Voir Dire/Juror Bias.

In his third ground for relief, Petitioner raises numerous allegations in support of a general claim that the *voir dire* that Petitioner's defense counsel conducted was inadequate to ensure that Petitioner had a fair jury. (Petition, ECF No. 14-4, ¶¶ 331-86.) The procedural history concerning this claim is torturous. This Court concluded in a February 10, 2006 Opinion and Order that Petitioner had procedurally defaulted the vast majority of his third ground for relief. (ECF No. 43.) In so doing, the Court reserved judgment on **[*192]** whether habeas review might nonetheless be available if Petitioner satisfied either the cause-and-prejudice or miscarriage of justice/actual innocence exceptions permitting federal review of otherwise defaulted claims. (*Id*. at Page ID # 1746, 1752, 1758, 1762.) The Court has determined in the instant order that Petitioner satisfies neither exception. The vast majority of Petitioner's third ground for relief thus remains defaulted and ineligible for federal review.

The limited portion of Petitioner's third ground for relief that survives, paragraphs 357-365 (ECF No.

43, at Page ID # 1754), is Petitioner's contention that because of inadequate general *voir dire*, Petitioner's jury was comprised not only of jurors whose views about matters of race and the Aryan Brotherhood had not been explored, but also of jurors who suffered one or more additional deficiencies. (ECF No. 93, at Page ID # 2248-2250.) The Court essentially considered and rejected the latter of these alleged deficiencies in denying Petitioner's claim(s) of ineffective assistance of counsel. The Court sees no need to revisit those issues here.

There remains one discreet issue from Petitioner's third ground for relief—paragraph **[*193]** 358(D)—that this Court in its February 10, 2006 Opinion and Order found to be properly before the Court for review on the merits (ECF No. 43, at Page ID # 1755-1756) and that the Court has not yet addressed in the instant order: Petitioner's claim that his trial attorneys ineffectively failed to question prospective jurors about their knowledge of and/or opinions about issues of race and Petitioner's role the Aryan Brotherhood. (ECF No. 93, at Page ID # 2250-2252.) Petitioner explains:

> Petitioner was a purported leader of the Aryan Brotherhood at the Madison Correctional Institution and allegedly killed a black inmate. (Tr. 679). Trial counsel knew the state would pursue Petitioner's involvement with the Aryan Brotherhood ("AB") at trial. Yet, trial counsel did not ask a single juror whether he or she could impartially decide Petitioner's case despite his ties to the AB. Trial counsel did not ask if the mere fact that Petitioner was a member of the AB charged with killing a black inmate would affect the jurors' decision on guilt or innocence or on sentencing.

(*Id*. at Page ID # 2251.) Petitioner argues that trial counsel had a duty to inquire about the impact of race and racism issues **[*194]** and that the Supreme Court has recognized the importance of addressing such issues when the facts of the case so dictate. Petitioner asserts that his was such a case.

Respondent essentially argues that Petitioner fails to cite any cases in which counsel were found ineffective for failing to *voir dire* prospective jurors on matters of race. (ECF No. 101, at Page ID # 2463.) Respondent also asserts that it was within counsel's sound discretion whether to inquire about race or Petitioner's role in the Aryan Brotherhood. (*Id*. at Page ID # 2463-2464.)

Because the Ohio Supreme Court rejected this allegation of ineffective assistance on the merits, albeit without discussion, the threshold issue for this Court to determine is whether the Ohio Supreme Court's decision contravened or unreasonably applied clearly established federal law as determined by the Supreme Court—in other words, *Strickland v. Washington* and its progeny. The Court answers that inquiry in the negative.

Petitioner's claim fails because the record is devoid of *any* evidence or even suggestion that Petitioner's jury contained one or more jurors who were biased concerning issues of race and/or Petitioner's membership in the Aryan **[*195]** Brotherhood. This Court will not presume bias as to the issues of race and the Aryan Brotherhood simply because counsel did not *voir dire* prospective jurors about those issues. *See, e.g.*, *Stanford v. Parker, 266 F.3d 442, 455 (6th Cir. 2001)* ("nothing in the record indicates that counsel's failure to ask life-qualifying questions led to the impanelment of a partial jury.") Absent a credible showing that one or more jurors were biased, Petitioner cannot demonstrate that he was prejudiced by his counsel's failure to question prospective jurors about issues of race and the Aryan Brotherhood.

Although the foregoing is dispositive of Petitioner's ineffective assistance claim, Petitioner also fails to overcome the presumption that counsel's failure to question prospective jurors about issues of race and the Aryan Brotherhood was not a matter of trial strategy. *See* *Keith v. Mitchell, 455 F.3d 662, 676 (6th Cir. 2006)* (no deficient performance where counsel's actions during entirety of *voir dire* appeared to have been part of a consistent and

reasonable strategy); *Stanford, 266 F.3d at 454* ("Stanford presents no evidence to counteract our presumption that his counsel's failure to ask life-qualifying questions during general voir dire constituted trial strategy."); *Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001)* ("Counsel is also accorded particular deference when conducting **[*196]** *voir dire*. An attorney's actions during *voir dire* are considered to be matters of trial strategy."). In the instant case, Petitioner's counsel appeared to pursue a consistent and reasonable strategy during individualized and general *voir dire* focused on discerning the jurors' ability and willingness to consider a sentence less than death and to understand and follow the law on such matters as the state's burden of proof, the concept of reasonable doubt, and an accused's right not to testify—issues critical to the defense's case. Counsel may very well have decided as a matter of strategy *not* to draw undue attention to issues of race and prejudice.

For the foregoing reasons, the Court concludes that the Ohio Supreme Court's decision rejecting this allegation of ineffective assistance did not run afoul of *§ 2254(d)* and that Petitioner has failed to demonstrate either ineffective assistance or jury bias. The Court accordingly **DENIES** as without merit paragraphs 357-365 of Petitioner's third ground for relief. The Court **DENIES** the remainder of Petitioner's third ground for relief as procedurally defaulted.

In view of this Court's certifying Petitioner's other *voir dire*-related claims of ineffective **[*197]** assistance of trial counsel, as well as the complicated nature of this Court's decision concluding that Petitioner defaulted most of his third ground for relief, the Court concludes that this inadequate *voir dire*/juror bias claim *and* this Court's February 10, 2006 procedural default decision (ECF No. 43) satisfy the showing required by *28 U.S.C. § 2253(c)(2)*

Ground Four, Sub-Part (1)(A): Constitutionally Infirm "Reasonable Doubt" Instruction.

Petitioner argues here that the trial court's instruction defining "reasonable doubt" was constitutionally insufficient. (Petition, ECF No. 14-5, at ¶¶ 389-95; Memorandum in Support, ECF No. 93, at Page ID # 2252-2253.) This Court has already considered and rejected Petitioner's claim in determining that trial counsel were not ineffective for failing to object to the trial court's reasonable doubt instruction. The Sixth Circuit has repeatedly approved the giving of jury instructions based on Ohio's statutory definition of reasonable doubt at both phases of a capital trial. *White v. Mitchell, 431 F.3d 517, 534 (6th Cir. 2005)*; *Buell v. Mitchell, 274 F.3d 337, 366 (6th Cir. 2001)*; *Scott v. Mitchell, 209 F.3d 854, 884 (6th Cir. 2000)*; *Byrd v. Collins, 209 F.3d 486, 527 (6th Cir. 2000)*; *Thomas v. Arn, 704 F.2d 865, 870 (6th Cir. 1982)*. The Court accordingly **DENIES** as without merit sub-part (1)(A) of Petitioner's fourth ground for relief.[10]

The Court cannot conclude that this jury instruction challenge satisfies the showing required by *28 U.S.C. § 2253(c)(2)* for a certificate of appealability. In view of the settled nature of the law governing such challenges, reasonable jurists could not find debatable whether the trial court's "reasonable doubt" instruction was constitutionally deficient.

Ground Five, Sub-Part (B): Denial of Access to Grand Jury Proceedings.

Petitioner argues in sub-part (B) of his fifth ground for relief that the trial court denied Petitioner access

[10] In its September 30, 2005 Opinion and Order, this Court concluded that the remainder **[*198]** of Petitioner's fourth ground for relief was barred by procedural default, subject to reconsideration should Petitioner satisfy either the cause-and-prejudice or actual innocence exceptions. (ECF No. 39, at Page ID # 1594-1612.) The Court has determined in the instant order that Petitioner has satisfied neither exception. The Court's initial procedural default determination therefore stands.

to the grand jury proceedings in violation of Petitioner's rights under the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments*. (Petition, ECF No. 14-6, at ¶¶ 451-56; Memorandum in Support, ECF No. 93, at Page ID # 2253-2254.) Petitioner argues that without those materials, he was denied the opportunity to determine whether the grand **[*199]** jury found that there were two possible theories of Petitioner's culpability. "If the grand jury rejected the state's dual liability theory," Petitioner reasons, "the state should not have been able to rely on that theory at trial." (ECF No. 14-6, at ¶ 453.) Petitioner further argues that if the grand jury heard evidence supporting one theory over the other, then that evidence was exculpatory impeachment and/or mitigation evidence as to the rejected theory to which Petitioner was entitled in order to mount a defense. Petitioner thus asserts that the state's failure to disclose the grand jury materials violated *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, and its progeny.[11]

In his Merits Brief, Respondent begins his argument by reiterating that the Ohio Supreme Court rejected Petitioner's claim on direct appeal. (ECF No. 101, at Page ID # 2464-2465.) Respondent proceeds to explain why *Brady* and its progeny do not vest an accused with broad discovery power or **[*200]** create a general constitutional right to discovery in a criminal case. Asserting that *Brady* protects fairness, Respondent argues that because Petitioner received comprehensive and does not contend that the state withheld evidence, Petitioner has not shown a specific need for the grand jury transcripts. To that point, Respondent reminds that a habeas corpus petitioner is not entitled to discovery as a matter of course; rather, the petitioner must offer some evidence beyond mere speculation in support of his or her underlying claim. Respondent contends that Petitioner cannot satisfy that showing, insofar as grand jury proceedings are not transcribed and Petitioner's request accordingly would not yield the information that Petitioner seeks—in other words, whether the grand jury determined that there were two different theories of Petitioner's culpability. (*Id*. at Page ID # 2468-2469.)

The Court begins its analysis with the Ohio Supreme Court's decision rejecting Petitioner's claim on direct appeal because the threshold issue before the Court is whether the state court's decision contravened or unreasonably applied clearly established federal law. The Ohio Supreme Court ruled as follows: **[*201]**

> Appellant argues that the trial court erred in denying him access to the grand jury testimony in his case. While not being entirely clear, appellant appears to be making several overlapping arguments regarding *Crim.R. 16(B)(1)(a)* and *Crim.R. 6(E)*. Appellant asserts that because his five co-conspirators are "co-defendants" he is entitled to their grand jury testimony, if any, pursuant to *Crim.R. 16(B)(1)(a)(iii)*. Additionally, appellant claims that he had a particularized need, pursuant to *State v. Greer (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982*, and presumably *Crim.R. 6(E)*, for the grand jury testimony in order to determine whether any of his five "co-defendants" testified before the grand jury. Finally, appellant argues that the trial court erred in failing to conduct an *in camera* inspection of the grand jury testimony to ensure compliance with *Crim.R. 16*. For the following reasons we find appellant's fifth proposition of law not well taken.
>
> *Crim.R. 16(B)(1)(a)* provides that "[u]pon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect * * *.
> " * * *
> "(iii) Recorded testimony of the defendant or co-defendant before a grand jury."

[11] In his Memorandum in Support, Petitioner reiterates the arguments he presents in his Petition and requests leave to conduct discovery. In so doing, he requests the grand jury transcripts from his indictment as well those of his codefendants. (ECF No. 93, at Page ID # 2254.)

In *State v. Wickline (1990), 50 Ohio St.3d 114, 118, 552 N.E.2d 913, 918*, we defined "co-defendant" for purposes of *Crim.R. 16(B)(1)(a)(iii)* **[*202]** as "'[m]ore than one defendant being sued in the same litigation; or, more than one person charged *in the same complaint or indictment* with the same crime.'" (Emphasis added; quoting Black's Law Dictionary [5 Ed. 1979] at 233.) Appellant was the only person charged in the indictment in the instant matter with causing the death of Watkins. Therefore, appellant's co-conspirators in the death of the victim were not co-defendants and thus mandatory disclosure of grand jury testimony under *Crim.R. 16(B)(1)(a)(iii)* is inapplicable.

As to appellant's argument regarding a particularized need, the applicable law is set forth in *State v. Greer, supra.* In *Greer*, at paragraph one of the syllabus, this court held that "[d]isclosure of grand jury testimony, *other than that of the defendant and co-defendant*, is controlled by *Crim.R. 6(D)*, not by *Crim.R. 16(B)(1)(g)*, and release of any such testimony for use prior to or during trial is within the discretion of the trial court." (Emphasis added.) The court further held that secrecy of grand jury proceedings is to be maintained unless "the ends of justice require it [disclosure] and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need **[*203]** for secrecy." *Id.* at paragraph two of the syllabus.

We find that appellant failed to establish a particularized need for the grand jury testimony of his five co-conspirators. Appellant's claim of a particularized need is replete with speculation and innuendo. See *State v. Webb (1994), 70 Ohio St.3d 325, 337, 1994 Ohio 425, 638 N.E.2d 1023, 1034*. For instance, appellant asserts that the co-conspirators were not called as state witnesses in order "to keep their exculpatory or impeachment testimony from [appellant] on cross-examination." As appellant has failed to demonstrate that the trial court abused its discretion when it denied his motion for grand jury testimony, we reject appellant's fifth proposition of law. See *State v. Maurer (1984), 15 Ohio St.3d 239, 250, 15 OBR 379, 389, 473 N.E.2d 768, 780-781*.

Stojetz, 84 Ohio St. 3d, at 459-60.

The Court is not persuaded that the Ohio Supreme Court's decision was incorrect, much less unreasonable. The Sixth Circuit in the habeas corpus case of *Ross v. Pineda* recently balanced the protection that *Brady v. Maryland* guarantees against the need for maintaining the secrecy of grand jury proceedings. The Sixth Circuit explained as follows:

1. Brady and its progeny

In the seminal case of *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the **[*204]** evidence is material either to guilt or to punishment...." *373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)*. Under *Brady*, a defendant must show "(1) suppression by the prosecution after a request by the defense, (2) the evidence's favorable character for the defense, and (3) the materiality of the evidence." *Moore v. Illinois, 408 U.S. 786, 794, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972)*. *Brady* imposes a duty to disclose exculpatory evidence "even though there had been no request by the accused." *Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)* (citing *United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)*). Impeachment evidence is also encompassed within the *Brady* rule because a jury's reliance on the credibility of a witness can be decisive in determining the guilt or innocence of the accused. *See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87*

L.Ed.2d 481 (1985).

A defendant's right to exculpatory evidence must, however, be reconciled with the "long-established policy that maintains the secrecy of the grand jury proceedings in federal courts." *Dennis v. United States, 384 U.S. 855, 869, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966)*. Grand jury proceedings, though traditionally cloaked in secrecy, can be used to impeach a witness's testimony. *Id. at 869, 86 S.Ct. 1840*. Trial courts can reveal grand jury testimony, or relevant portions thereof, if a defendant shows a "particularized need" to impeach a witness, to refresh his recollection, or to test his credibility. *Id. at 870, 86 S.Ct. 1840*.

Applying *Brady* and *Dennis*, we find no violation of clearly established Supreme Court precedent. Ross argues that he is **[*205]** entitled to the grand jury testimony to show inconsistencies in the victims' trial testimony. Speculating that the grand jury testimony contained impeachment evidence, he claims that not divulging the transcripts prejudiced the outcome of his trial. His suspicions were aroused when the bill of particulars included accusations of anal penetration or attempted anal penetration. From here, Ross leaps to the conclusion that the bill of particulars is "only explicable" if the victims testified about anal sex before the grand jury. If such accusations were made before the grand jury, Ross argues that it was "manifestly unfair" to prevent him from using the testimony to cross-examine the victims.

Ross's conclusion is flawed. The bill of particulars states that Ross engaged in sexual behavior that "include[d], but was not limited to, oral sex being performed on the victim, the victim performing oral sex on the defendant *and/or* anal sex performed on the victim." This wording, according to the state court, suggested that anal sex was "a possible form of sexual conduct." But the evidence adduced at trial did not establish this offense, nor did the trial court instruct the jury on anal rape. As the court **[*206]** of appeals accurately observed, because the probability that anal rape had been mentioned in the grand jury was slim, Ross did not demonstrate a particularized need for disclosure and was not deprived of a fair trial.

2. Materiality under Brady

Given the improbability that the grand jury testimony contained impeachment evidence, Ross fails to demonstrate materiality under *Brady* and thus cannot sustain his high burden of proving that the state court's conclusion was "unreasonable" or "contrary" to, clearly established federal law. Evidence is material if there is a reasonable probability that had the evidence been revealed, the result of the proceeding would have been different. *Bagley, 473 U.S. at 678, 105 S.Ct. 3375*. But "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs, 427 U.S. at 109-10, 96 S.Ct. 2392*. Furthermore, a constitutional violation under *Brady* occurs only where a prosecutor's "omission is of sufficient significance to result in the denial of defendant's right to a fair trial," or "undermines confidence in the outcome of the trial." *Bagley, 473 U.S. at 676, 679, 105 S.Ct. 3375*. In determining materiality, "[t]he question is not whether the defendant **[*207]** would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler, 527 U.S. at 289-90, 119 S.Ct. 1936* (quoting *Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)*) (internal quotation and citations omitted). When the omission is evaluated in the context of the entire record, we conclude that Ross fails

to satisfy the materiality requirement under these standards.

Neither Ross nor this Court can declare with certainty whether the grand jury testimony in this case contained favorable impeachment evidence, as the trial court did not conduct an *in camera* review, or give Ross an opportunity to inspect the transcripts. Perhaps the testimony would have revealed an inconsistency; however, the "mere possibility" that undisclosed evidence may have assisted the defense does not rise to the level of materiality as contemplated by the Supreme Court. *Agurs, 427 U.S. at 109-10, 96 S.Ct. 2392*. There are several reasons to believe the grand jury testimony did not contain impeachment evidence. We agree with the Ohio Court of Appeals that both the parties and the court expended a substantial amount of time and effort during the trial considering Ross's inferences that B.B. and D.D. had made prior **[*208]** statements about anal contact with Ross. In the end, allegations of anal rape likely came from statements made by third parties and not from the victims. Indeed, neither B.B. nor D.D. testified at trial that Ross engaged in anal contact. The evidence shows that B.B.'s mother was concerned about the *possibility* that Ross had attempted anal penetration. However, she stated unambiguously that B.B. denied penile-anal contact with Ross. Therefore, even if Ross had access to the transcripts, it is likely that the testimony he sought contained little, if any, impeachment value.

Furthermore, Ross was not prejudiced because even if the testimony had been revealed, the result of the proceeding would not have been different. Had the grand jury testimony contained allegations of anal penetration, B.B. and D.D.'s in-court testimony regarding oral rape would have been sufficient to support Ross's conviction. Allegations of anal penetration, whether alleged or not, do not necessarily cast doubt on Ross's guilt with respect to the oral rape charges. Contrary to Ross's argument that the grand jury testimony would have "undercut the prosecution's evidence against him," there is nothing to suggest that **[*209]** Ross was prejudiced by the trial court's refusal to provide access to the transcript.

In short, given that Ross has failed to establish materiality under *Brady*, he was not entitled to disclosure of the grand jury transcripts. Accordingly, the state court's decision was not "unreasonable" or "contrary" to Supreme Court precedent.

549 F. App'x 444, 455-57 (6th Cir. 2013.)

The *Ross v. Pineda* decision demonstrates why Petitioner's instant claim fails. Petitioner's suggestion that the grand juries that returned indictments against him, as well as against his five accomplices, heard evidence favoring one theory of culpability over the other amounts to pure speculation. The Court is not unsympathetic to Petitioner's plight. Requiring a petitioner to explain what evidence he has never seen will show in order to gain access to the evidence appears absurd on its face. The "particularized need" requirement exists, however, in recognition of the well-established need for maintaining the secrecy of grand jury proceedings; speculation does not satisfy the "particularized need" standard. The petitioner in Ross offered something beyond speculation—perceived ambiguities in the wording of the bill of particulars suggesting possible **[*210]** inconsistencies in the victims' statements—in support of his supposition that grand jury testimony might have contained information impeaching his accusers and even that fell short of constituting a particularized need for access to the grand jury testimony.

In the instant case, Petitioner can point to nothing in support of his belief that the indictment that resulted from Petitioner's grand jury, or the case that the state prosecuted at trial, strayed from whatever evidence the grand jury heard. Moreover,

Petitioner's unsupported speculation that the prosecution presented a dual liability theory at trial that was inconsistent with evidence that the grand jury heard runs afoul of the presumption of regularity that attaches to grand jury proceedings. *Cf.* *United States v. Lovecchio, 561 F. Supp. 221, 232 (D.C.Pa. 1983)* ("Defendant appears to suggest that his 'beliefs' about problems with evidence presented to the grand jury is sufficient [to establish a 'particularized need']. To the contrary, were we to follow defendant's rationale, we would ignore both the presumption of regularity which attaches to grand jury proceedings, *see* *Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)*, and the judicial disposition that the secrecy of these proceedings should not be disturbed absent a showing of impropriety.") **[*211]**

Beyond the foregoing, Petitioner cannot demonstrate that he suffered prejudice from the denial of access to grand jury testimony because it is not reasonably probable that the outcome of his trial or mitigation hearing would have been different had Petitioner had access to the grand jury testimony. In view of the substantial pretrial discovery that the state provided Petitioner, as well as the evidence adduced at trial, the Court finds it highly improbable that Petitioner's grand jury or those that indicted his accomplices heard evidence that supported only one theory of liability or favored one theory above the other. Further, this Court is confident in characterizing as substantial the state's trial-phase evidence against Petitioner—not just in support of accomplice liability but particularly in support of a theory that Petitioner was directly involved in planning and leading the assault, as well as of actually murdering Damico Watkins.

In view of the foregoing, it would be incredulous to characterize the Ohio Supreme Court's decision rejecting Petitioner's claim as unreasonable. The Court accordingly **DENIES** as without merit sub-part (B) of Petitioner's fifth ground for relief.[12]

The Court cannot conclude that this claim satisfies the showing required by *28 U.S.C. § 2253(c)(2)* for a certificate of appealability. Put simply, Petitioner's claim challenging the denial of his access to grand jury materials finds no support in the facts or case law.

Ground Six: Jury's Exposure to Suppressed Evidence Through Inaccurate News Article.

Petitioner argues in his sixth ground for relief that during trial, Petitioner's jury was exposed to suppressed evidence that the media inaccurately characterized as a confession of personal responsibility by Petitioner. (Petition, ECF No. 14-7, at ¶¶ 457-82.) Petitioner explains that four days before the trial court submitted Petitioner's case to the jury, the trial court conducted an open hearing **[*213]** on Petitioner's motion to suppress statements. In an unsealed order, the trial court suppressed the following:

> The Petitioner, while being transported from his arraignment back to jail, was alleged to have stated to Corrections Officer John Vanover, "You know, I was never in much trouble." Vanover responded, "Other than murder." Petitioner is alleged to have then said to Vanover, "All we did was kill an inmate. Why are we going up before the death penalty for killing an inmate?"

(*Id.* at ¶460.) Several days later, Petitioner continues, an article in *The Madison Times* highlighted and misquoted the statements attributed to Petitioner. Specifically, Petitioner explains, the

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[12] For **[*212]** the same reasons that Petitioner fails to satisfy the "particularized need" standard for gaining access to grand jury testimony, Petitioner also fails to satisfy the "good cause" standard for conducting habeas corpus discovery. The Court reiterates that it is not unsympathetic to the paradox of being required to show what Petitioner intends to discover from materials in order to gain access to those very materials. That said, Petitioner has offered nothing beyond speculation, and that is insufficient to satisfy "good cause" to conduct discovery.

article attributed to Petitioner the statement, "*All I did was kill another inmate*." (*Id*. at ¶ 465 (emphasis added).) Although several of Petitioner's siblings immediately brought the matter to defense counsel's attention, defense counsel refused to request a mistrial (and allegedly disparaged Petitioner's siblings in the process). Petitioner appears to fault both the trial court and his defense counsel for failing to take steps to ensure that the jury was not exposed to the suppressed information or to ascertain after-the-fact **[*214]** to what extent the jury had been exposed to and/or prejudiced by the contents of the news article(s). In his Memorandum in Support, Petitioner reiterates and expands upon his arguments, and additionally requests leave to conduct discovery in support of his claim. (ECF No. 93, at Page ID # 2255-2257.)

In his Merits Brief, Respondent begins by explaining that although the trial court in postconviction rejected Petitioner's claim on the procedural ground of *res judicata*, it alternatively rejected the claim on the merits. Recounting that decision verbatim, Respondent then asserts that Petitioner's claim is without merit because he failed to demonstrate that any of the jurors were aware of the April 7, 1997 newspaper article. To that point, Respondent emphasizes that "prior to being excused on the afternoon that the suppression hearing was scheduled, the jurors were warned not to look at any newspaper articles or review any media coverage. (ECF No. 101, at Page ID # 2470 (emphasis in original).) Respondent further argues that in addition to having no discernible reason for inquiring into whether any jurors had seen the article in question, defense counsel may have had at least one important **[*215]** reason not to: "the very act of inquiring into whether the jurors had seen the April 7 article might have made jurors suspicious that there was something important that they did not know about." (*Id*. at Page ID # 2470-2471.) Respondent concludes that Petitioner's claim "fails regardless of whether it is viewed as a claim of ineffective assistance of counsel or as a due process violation." (*Id*. at Page ID # 2471.) Respondent also asserts that for the same reasons the claim fails, any request to conduct discovery or for an evidentiary hearing also fails.

The threshold issue for the Court to determine is whether the state court's decision rejecting Petitioner's claim was unreasonable pursuant to *28 U.S.C. § 2254(d)*. The trial court in postconviction was the last state court to issue a reasoned decision addressing Petitioner's claim. The trial court touched upon the claim as follows:

> Defendant claims he was denied the effective assistance of counsel because they failed to conduct a voir dire examination to determine whether any jurors had read a Madison Press article contained in the April 7, 1997, edition. On the second page of the article, the paper reported that defendant's statement to C.O. Vanover, "All **[*216]** I did was kill another inmate" was suppressed.
>
> The jurors were admonished to insulate themselves from any outside knowledge. A jury is presumed to follow instructions of law, and that presumption controls here.
>
> There were newspaper articles in the Madison Press each day of trial. Each article outlined the evidence from each preceding day. The evidence presented in the courtroom overwhelmingly established defendant's guilt. The evidence presented to the public in newspaper articles reiterated the factual evidence presented to the jury which established defendant's guilt. Defendant's multiple post-custody admissions of guilt appeared in the April 7th article.
>
> Had some o[r] all of the jurors read the article, it would have had no impact on the jury deliberations. They heard live and in open court his admissions that he killed Watkins, intended to kill more and he did it because he wanted transferred from M.C.I.
>
> The Court finds that counsels' performance was not, in the context of the trial evidence and the nature of the article, in any manner deficient. If it were, it probably did not change the results of

> the trial. Moreover, under the doctrine of res judicata, defendant is barred from relitigating **[*217]** in these proceedings the issue of trial publicity that could and should have been litigated during direct appeal.

(App. Vol. V, at 292-93.)

The trial court's decision, expressly rejecting the claim of ineffective assistance and implicitly any due process claim, does not strike this Court as unreasonable. In short, Petitioner has failed to present any factual basis for his claim. The Sixth Circuit has admonished trial courts not to presume prejudice from pre-trial or mid-trial publicity absent evidence that the jury was actually exposed to the publicity. That is especially so where, as in Petitioner's case, the trial court expressly admonished the jury not to read or watch any news coverage about the trial.

In *United States v. Metzger, 778 F.2d 1195 (6th Cir. 1985)*, the Sixth Circuit in a federal criminal case rejected the defendant's claim that the trial court erred in failing to *voir dire* the jury about exposure to mid-trial publicity. The Sixth Circuit explained:

> [T]his court has adopted the position that "[w]here a jury has been clearly admonished not to read newspaper accounts of the trial in which they are serving as jurors, it is not to be presumed that they violated that admonition." *Rizzo v. United States, 304 F.2d 810, 815 (8th Cir.), cert. denied sub nom., Nafie v. United States, 371 U.S. 890, 83 S.Ct. 188, 9 L.Ed.2d 123 (1962), quoted in United States v. Giacalone, 574 F.2d 328, 335 (6 th Cir. 1978)*. Thus, even when material presented by the news **[*218]** media is prejudicial to the defendant, absent a showing that the jury violated the admonishment, a conviction will not be reversed.

Id. at 1209.

As in *Metzger*, the trial court in Petitioner's case repeatedly admonished the jury not to read or view any news coverage about Petitioner's trial. (Tr. Vol. IV, at 606; Tr. Vol. V, at 792; Tr. Vol. VI, at 992; Tr. Vol. VII, at 1052.) As in *Metzger*, Petitioner can point to no evidence demonstrating or even suggesting that any member of his jury was exposed to the April 7, 1997 article attributing to Petitioner an admission of personal responsibility. As in *Metzger*, this Court will not presume that any member of Petitioner's jury ignored the trial court's admonishment or was even inadvertently exposed to the article in question. The Court accordingly is not persuaded that the trial court deprived Petitioner of due process or a fair trial in failing to ensure that Petitioner's jury was not exposed to the April 7, 1997 newspaper article.

For the same reasons, the Court cannot find that Petitioner's trial counsel performed unreasonably or to Petitioner's prejudice in failing to ask the trial court to *voir dire* Petitioner's jury about the newspaper article. **[*219]** First, defense counsel had no reason to believe or assume that Petitioner's jury had been exposed to the article. Second, as Respondent points out, defense counsel had every reason *not* to draw the jury's attention to the article in question. That being so, there is no basis to conclude that Petitioner suffered any prejudice as a result of his defense counsel's failure to ask the trial court to *voir dire* the jury about the article.

The trial court's decision in postconviction rejecting Petitioner's claim was not unreasonable within the meaning of *28 U.S.C. § 2254(d)*. This Court **DENIES** as without merit Petitioner's sixth ground for relief.

The Court cannot conclude that Petitioner's claim alleging the exposure of his jury to a prejudicial newspaper article satisfies the showing required by *28 U.S.C. § 2253(c)(2)*. The record contains no facts suggesting that Petitioner's jury was exposed to newspaper article in question. Further, the record does reflect that the trial court admonished the jury not to read or watch any news coverage about Petitioner's trial.

Ground Seven: Admission of Irrelevant, Inadmissible, Inflammatory Evidence.

In his seventh ground for relief, Petitioner challenges the trial court's playing of a video tape **[*220]** of the crime scene, admission of identification evidence of the "shank" that Petitioner allegedly used, and admission of purportedly improper testimony by inmate Andre Wright. (Petition, ECF No. 14-8, at ¶¶ 483-518.) In response to Respondent's argument that Petitioner's claims challenge evidentiary rulings that are not cognizable in habeas corpus, Petitioner insists that he "is not complaining of evidentiary rulings made by a trial court but challenges his attorneys for their failures to object to improper evidence." (ECF No. 93, at Page ID # 2258.)

With respect to the video tape depicting the crime scene, Petitioner explains that a correction officer created the video during the incident and that it began at the decedent's cell in Adams A and then traced the purported path of the decedent and the trail of his assailants. Petitioner complains not only that the portrayal of the purported path of the victim was based upon speculation of the investigators who arrived at the scene after the fact, but also that the video contained a prolonged depiction of the decedent's body lying prone in a large pool of his own blood. (*Id*. at ¶¶ 488-90.) As noted above, Petitioner also complains about **[*221]** his counsel's failure to object to the admission and playing of the video tape.

Petitioner then challenges the admission of evidence linking him to a particular shank (state's exhibit 3), and to his counsel's failure to object thereto. The essence of Petitioner's argument is that the state offered evidence linking Petitioner to possession (from the outset) of the largest of the shanks wielded by the assailants, as well as circumstantial evidence purporting to establish that that shank caused several of the six or seven wounds that were fatal. Petitioner complains that there existed a wealth of evidence—consisting of inmate-witness statements, statements by Petitioner's accomplices, and Petitioner's own testimony—establishing that Petitioner took possession of state's exhibit 3 only after accomplice William Vandersommen had stabbed the victim in his cell, which prompted Petitioner to grab the shank away from Vandersommen. Petitioner maintains that he then proceeded to the front door of Adams A, never chasing the victim, and remained at the front door until he and his accomplices passed their shanks out of Adams A and surrendered to authorities. Petitioner asserts that this critical evidence **[*222]** misidentifying him as having wielded state's exhibit 3 during the entirety of the incident went unchallenged by Petitioner's defense counsel.

Finally, Petitioner challenges the admission of certain testimony by inmate-witness Andre Wright. Specifically, Petitioner complains that Wright was permitted to speculate as to what occurred out of his view after he observed Petitioner and others enter Watkins' cell using keys Petitioner had taken from a corrections officer: "I guess they stuck him (Watkins) a couple of times while inside the cell, and Mico made it out." (ECF No. 93, at Page ID # 2262 (quoting Tr. Vol. V, at 617).) Petitioner continues that Wright was also permitted to speculate that Petitioner had entered Adams A with an intent to kill and that Watkins was scared and not able to think. "Despite the obvious scripting of a witness's testimony to conform to the elements of the crime," Petitioner concludes, "the attorneys for the petitioner sat silent throughout the testimony of Andre Wright, allowing this inadmissible and speculative testimony to be entered into the record as substantive evidence against their client." (ECF No. 93, at Page ID # 2262-2263.)

In arguing that Petitioner's **[*223]** claim is without merit, Respondent does, as Petitioner notes, address the claim primarily as an admission-of-evidence challenge, not an ineffective assistance of counsel challenge. (ECF No. 101, at Page ID # 2471-2474.) That is understandable, in view of the fact that nowhere in Petitioner's own labeling of the claim

did Petitioner mention his attorneys, the phrase "ineffective assistance," or either component of *Strickland*. (ECF No. 14-8, at Page ID # 43.) Although the claim contains scattered references to the failure of Petitioner's counsel to object to certain pieces of evidence and the manner in which counsel's omission in that regard contributed to Petitioner's conviction and death sentence, no reasonable person reviewing the claim would naturally interpret it as one primarily challenging counsel's performance as opposed to the admission of certain evidence. In any event, the Ohio Supreme Court considered and rejected both components of Petitioner's claim—one challenging the admission of certain evidence and the other challenging counsel's failure to object to the evidence. This Court accordingly begins its analysis with the Ohio Supreme Court's decision.

In his omnibus claim **[*224]** of ineffective assistance, Petitioner included challenges that counsel failed to object to the admission of certain evidence linking him to the shank identified as state's exhibit 3, as well as to the admission of the testimony of inmate-witness Andre Wright. (App. Vol. II, at 119-20.) It does not appear, however, that Petitioner challenged counsel's failure to object to the admission of the crime scene video tape. That is understandable in view of the fact that Petitioner himself notes twice in his Petition where counsel *did* raise objections to the video tape. (ECF No. 14-4, at ¶¶ 492, 493.) The Ohio Supreme Court rejected Petitioner's claims of ineffective assistance, without discussion but having applied *Strickland. Stojetz, 84 Ohio St. 3d at 457-58*. This Court reviews that decision through the prism of the deference dictated by *28 U.S.C. § 2254(d)*.

The Ohio Supreme Court also considered and rejected Petitioner's claim arguing "that the prosecutor improperly 'coached' a witness to identify a certain exhibit as the murder weapon." *Stojetz, 84 Ohio St. 3d at 461*. The Ohio Supreme Court rejected the claim as follows:

> At trial, corrections officer Browning testified that after appellant and five other inmates entered the Adams A unit of Madison Correctional, appellant held a shank knife to his throat and forced him **[*225]** to surrender the keys to the jail cells. Browning further testified that he was able to view the shank that appellant held to his throat. The prosecutor then directed Browning to walk over to a table in the courtroom where six shank knives were displayed as State's Exhibits 2 through 7. The prosecutor then asked Browning whether he recognized any of those knives as the knife appellant held in his hand as appellant entered the Adams A unit. Browning replied: "Yes." The prosecutor then asked: "Could you point it out to us, please? State's exhibit 3?" Browning answered: "Yes." The prosecutor further inquired: "Is there [*sic*] the knife he held to your throat?" Browning again responded: "Yes." At that point the state concluded its direct examination of Browning.
>
> Appellant asserts that the above passages from the transcript indicate that prior to identifying the exhibit, Browning's attention was improperly directed by the prosecutor to State's Exhibit 3. According to appellant, this incident had prejudicial implications that reached beyond Browning's testimony because the trial court failed to order a separation of witnesses during appellant's trial. Stated another way, appellant asserts **[*226]** that the prosecutor essentially informed subsequent witnesses which shank to identify as the weapon in appellant's possession.
>
> Appellant failed to object to the prosecutor's line of questioning. The issue is thus waived except for plain error.
>
> Contrary to appellant's assertions, the transcript passages at issue are subject to more than one interpretation. Appellant argues that the prosecutor suggested or coached Browning as to which shank to identify as belonging to appellant. However, the transcript could also be reasonably interpreted to mean that the witness pointed to the shank marked State's Exhibit 3

and the prosecutor merely verbalized the choice made by Browning to verify that it was indeed his choice. Unfortunately, the record does not reflect that Browning was pointing to or indicating a particular shank. In any event, several other witnesses gave a description of the knife in question and testified that this particular shank, State's Exhibit 3, was in fact in the possession of appellant.

Although appellant argues that Browning's identification of appellant's weapon somehow tainted identifications made by subsequent witnesses due to the lack of any separation of witnesses, appellant **[*227]** fails to demonstrate that the subsequent witnesses were in fact in the courtroom during Browning's testimony. We find that appellant has failed to demonstrate that but for the alleged error, the outcome of his trial clearly would have been otherwise. Accordingly, we find no plain error here.

Stojetz, 84 Ohio St. 3d at 461-62.

The Ohio Supreme Court also considered and rejected Petitioner's claim "that the trial court admitted improper testimony of inmate Andre Wright during the trial phase." *Stojetz, 84 Ohio St. 3d at 462*. The Ohio Supreme Court held as follows:

Appellant submits that Wright's testimony contained improper speculation and, beyond that, Wright's testimony concerning the mindset of the victim and the intent of the accused constituted improper testimony by a lay witness.

Appellant again failed to object to the prosecutor's line of questioning. Therefore, the issue is waived except for plain error.

Appellant asserts that Wright improperly speculated about events that transpired in Watkins's cell when Wright stated that "I guess they stuck him [Watkins] a couple times while inside the cell * * *." We disagree. Wright testified that he immediately observed blood on Watkins as Watkins escaped from his cell. State's Exhibit 18 indicates a trail **[*228]** of blood that begins directly outside Watkins's cell. Wright subsequently witnessed appellant pursuing Watkins throughout the Adams A compound and repeatedly stabbing Watkins. It was hardly speculation for Wright to conclude that appellant stabbed Watkins inside the cell. In any event, as the state points out, since Watkins was stabbed forty times, Wright's testimony, even if improper, was not outcome-determinative.

Appellant further contends that Wright's testimony regarding Watkins's mindset was improper testimony by a lay witness. Evid. R. 701 states that "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those * * * which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." Wright's statement did not constitute improper testimony by a lay witness. Wright's statement that Watkins was "scared" and "not able to think" was rationally based on Wright's perception of events transpiring before him, specifically watching Watkins running for his life while being attacked, and was therefore helpful in explaining Wright's perceptions. **[*229]**

Wright also testified that appellant "came in with intention to kill." Defense counsel did not object to this statement. Appellant now claims that this testimony was "improper." However, Wright's statement concerning appellant's intent at the time of the murder, even if improper, does not rise to the level of plain error. Wright's statement clearly did not affect the outcome of the trial. The evidence of appellant's intent to kill was established by overwhelming evidence at trial.

Stojetz, 84 Ohio St. 3d at 462-63.

The closest that Petitioner came to challenging the admissibility of the crime scene video tape was a claim asserting that Petitioner was denied a fair trial when the trial court permitted the jury to replay the crime scene video during its trial-phase deliberations and when the trial court failed to instruct jurors not to place undue emphasis on the tape during their deliberations. *Stojetz, 84 Ohio St. 3d at 466*. In rejecting that claim, the Ohio Supreme Court touched upon not only the admissibility of the videotape in general but also some of the specific objections that Petitioner raises herein. Specifically, the Ohio Supreme Court held as follows:

> Ohio courts follow the majority rule that permits the replay of a videotape exhibit during **[*230]** jury deliberations. *State v. Loza (1994), 71 Ohio St. 3d 61, 79, 1994 Ohio 409, 641 N.E.2d 1082, 1103*. Appellant's claims of prejudicial effect are not supported by the record. The appellant was not pictured on the videotape. Moreover, the trial court admitted the videotape into evidence only on the stipulation that the last scene (the victim lying in a pool of blood) be edited to reflect only what was shown to the jury in the courtroom. Specifically, the trial court instructed that this scene be edited to a few seconds' view of the victim. No objection was made either to the trial court's admittance of the videotape or to the jury's request to replay the videotape during its deliberations. Since the videotape was properly admitted into evidence, and the trial court took precautions to limit any potential prejudicial effect, we find no reversible error in the jury's second viewing of the videotape. See *State v. Clark (1988), 38 Ohio St.3d 252, 257, 527 N.E.2d 844, 851*.

Stojetz, 84 Ohio St. 3d at 466.

Respondent asserts that Petitioner's claim is without merit because claims challenging the admission of evidence do not warrant relief in habeas corpus absent a showing of fundamental unfairness and Petitioner herein "does not allege []or demonstrate that the evidence denied him [] his right to a fair trial." (ECF No. **[*231]** 101, at Page ID # 2473-2474.)

With respect to the challenged evidence set forth above, to the extent the Ohio Supreme Court rejected Petitioner's claims that the trial court erred in admitting the evidence and that defense counsel were ineffective for failing to object to the evidence, this Court accords that decision *28 U.S.C. § 2254(d)* deference. That is so even where the Ohio Supreme Court reviewed a claim only for plain error. *See Fleming v. Metrish, 556 F.3d 520, 531-33 (6th Cir. 2009)* (according AEDPA deference to state court's decision reviewing for plain error); *see also Kittka v. Franks, 539 F. App'x 668, 672 (6th Cir. 2013)*; *Bond v. McQuiggan, 506 F. App'x 493, 498 n.2 (6th Cir. 2013)*.

Notwithstanding Petitioner's effort in his Memorandum in Support to distance himself from any claim challenging the admission of the evidence in question and to rebrand his claim as one challenging counsel's failure to object to the evidence, part of Petitioner's claim does in fact allege that the trial court violated Petitioner's right to due process by admitting the evidence in question. It is well settled that federal habeas corpus review of state court evidentiary rulings is limited to determining whether the challenged ruling resulted in a fundamentally unfair trial. *See, e.g., Bey v. Bagley, 500 F.3d 514, 519 (6th Cir. 2013)*; *Bugh v. Mitchell, 329 F.3d 496, 512 (6th Cir. 2003)*. The Sixth Circuit has stressed that "[e]rrors by a state court in the admission of evidence are not cognizable **[*232]** in habeas proceedings unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Kelly v. Withrow, 25 F.3d 363, 370 (6th Cir. 1994)*; *see also Coleman v. Mitchell, 244 F.3d 533, 542 (6th Cir. 2001)* ("A state court evidentiary ruling will be reviewed by a federal habeas court only if it were so fundamentally unfair as to violate the petitioner's due process rights."). This high

standard, combined with the deference this Court owes to any state court adjudication rejecting the claim, saddles Petitioner with an extraordinarily difficult burden to meet. *Cf.* *Schoenberger v. Russell, 290 F.3d 831, 836 (6th Cir. 2002)* ("Given the stringent standards of AEDPA and our general reluctance to second-guess state court evidentiary rulings in a habeas proceeding, we cannot say that the admission of this evidence [demonstrating prior incidents of alcohol abuse and domestic violence] violated petitioner's due process rights."). Petitioner falls far short of meeting his burden.

The Court is not persuaded that any of the evidence at issue was so objectionable that its admission deprived Petitioner of a fundamentally fair trial, that the trial court erred in admitting it, or that defense counsel were ineffective for not objecting to it. The videotape of the crime scene—which consisted of **[*233]** what little of the incident "live" then-Sergeant Tom Swyers was able to capture through a window into Adams A (Tr. Vol. IV, at 491-94), followed by OSHP Trooper Alan Wheeler's re-tracing of the blood trail (Tr. Vol. V, at 694-96)—was relevant and probative to corroborate numerous witnesses' testimony about how incident unfolded. To the extent Petitioner complains that the videotape unfairly consisted of the videographer's selected areas of interest, the record contained other testimony documenting the path that Watkins took around Adams A as his assailants chased and stabbed him, including that of OSHP Criminalist Jeffrey Turnau explaining how he "systematically" re-traced the trail of blood (Tr. Vol. V, at 741.) The Court is of the view that admission of the video tape had only limited impact in terms of prejudice, especially considering that the trial court had it edited to remove the most objectionable aspect, prolonged depiction of Watkins lying dead in a pool of his own blood (Tr. Vol. VI, at 959).

The testimony linking Petitioner to the shank labeled state's exhibit 3 is not problematic. The Court agrees with the Ohio Supreme Court that the trial transcript does not *establish* **[*234]** that the prosecution "coached" C.O. Browning to identify state's exhibit 3 as the knife that Petitioner held to Browning's throat while demanding Browning's keys. With respect to Petitioner's argument that many witnesses' statements to investigators did *not* place that shank in Petitioner's hand, this Court has already determined that multiple witnesses testified that Petitioner wielded the longest of the shanks (state's exhibit 3) from the outset of the incident. (Tr. Vol. V, at 636, 654, 765-66, 785-86, 774; Tr. Vol. VI, at 921-22.) Petitioner has produced no evidence establishing, and reason belies, that any or all of those witnesses' recollections were "tainted" by C.O. Browning's original identification of state's exhibit 3 as the knife that Petitioner wielded, due to defense counsel's failure to move for the separation of witnesses. Moreover, evidence discredits the witnesses who Petitioner identified during state postconviction proceedings and who Petitioner insists could have established that he took possession of state's exhibit 3 only after grabbing it from accomplice Vandersommen as Watkins fled his cell.

Finally, the Court is not persuaded that the portions of Andre Wright's **[*235]** testimony that Petitioner challenges were so improper that their admission irreparably infected Petitioner's trial. Petitioner complains specifically about Wright's (1) testimony speculating that the assailants "stuck" Watkins a few times in his cell; (2) testimony surmising that Watkins was scared and unable to think; and (3) testimony opining that the assailants entered Adams A with the intention to kill. The Court is of the view that the challenged testimony was too isolated to have undermined the fairness of Petitioner's trial or sentencing, especially considering the other substantial evidence against Petitioner and unfavorable testimony detailing Watkins' ordeal. Wright's testimony "speculating" that the assailants stabbed Watkins in his cell was reasonable and not remotely prejudicial in view of the numerous witnesses who testified to seeing Watkins flee his cell already bleeding. (Tr. Vol. IV, at 589; Tr. Vol. V, at 643.)

Wright's testimony surmising that Watkins was scared and unable to think was fairly benign considering other testimony depicting Watkins' ordeal far more graphically. For instance, Alfonso Greer testified to hearing Watkins, as the already-bleeding Watkins **[*236]** was fleeing his assailants, say "I didn't do it, it wasn't me." (Tr. Vol. IV, at 589.) Wright himself testified without objection that Watkins was begging for his life while the attackers repeatedly stabbed him. (Tr. Vol. V, at 619.) Inmate Sidney Taylor described a bleeding Watkins running by Taylor's cell, yelling that he did not do it. (*Id*. 643-45.) Taylor also described Petitioner chasing and stabbing Watkins and being right there when Watkins collapsed. (*Id*. at 646-47.) Deputy Warden Mark Saunders used the phrase "bloodletting disturbance" to describe the scene when he arrived. (*Id*. at 655.) During Petitioner's own defense case-in-chief, C.O. Terry Shaw described seeing Watkins take his last breaths "like a chill, quiver." (Tr. Vol. VI, at 979-80.)

Wright's testimony opining that the attackers entered Adams A with an intention to kill was of limited impact considering other properly admitted evidence giving rise to a reasonable inference that the men entered Adams A not to fight Watkins but with an intention to kill—such as testimony that the attackers attempted to go after additional juvenile inmates (Tr. Vol. V, at 625, 648; Tr. Vol. VI, at 927) and testimony describing Petitioner's after-the-fact statements **[*237]** to the effect of "we told you this was going to happen." (Tr. Vol. V, at 626, 656, 765; Tr. Vol. VI, at 933.)

Returning to the Ohio Supreme Court's decision rejecting Petitioner's claims, it is difficult to characterize as unreasonable a decision that in laudable detail examined the context of C.O. Browning's testimony identifying state's exhibit 3 as the shank that Petitioner wielded, including possible interpretations of the testimony. The Ohio Supreme Court's decision also noted the absence of evidence demonstrating that other witnesses who subsequently identified state's exhibit 3 were present during, and therefore tainted by, Browning's testimony. Further, the Ohio Supreme Court recognized the plethora of testimony supporting Andre Wright's "speculation" that the attackers stabbed Watkins in his cell and explained the reasonableness of Wright's opinion as to the mindset of Watkins as the events transpired right before Wright's eyes. Finally, the Ohio Supreme Court's decision pointed out the other overwhelming evidence giving rise to the inference that the attackers entered Adams A with an intention to kill and observed that the crime scene video did not depict Petitioner and contained **[*238]** only a few seconds' view of the decedent at the end. The Court is no more persuaded than the Ohio Supreme Court was that any of the evidence at issue was so objectionable that the its admission deprived Petitioner of a fundamentally fair trial, that the trial court erred in admitting it, or that defense counsel were ineffective for not objecting to it.

For the foregoing reasons, the Court **DENIES** as without merit Petitioner's seventh ground for relief. The Court concludes, however, that Petitioner's claim satisfies the showing required by *28 U.S.C. § 2253(c)(2)*. The Court accordingly **Certifies for Appeal** Petitioner's seventh ground for relief.

Ground Eight: Improper Diminishing of Jury's Responsibility for Death Verdict.

Petitioner argues in his eighth ground for relief that the trial court's sentencing-phase jury instructions improperly diminished the jurors' sense of responsibility for issuing any verdict recommending the death penalty in violation of *Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)*. (Petition, ECF No. 14-9, at ¶¶ 519-34.) In *Caldwell*, Petitioner notes, the Supreme Court held: "[i]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining **[*239]** the appropriateness of the defendant's death rests elsewhere." *Caldwell, 472*

U.S. at 328-29. Petitioner explains that the trial court's sentencing-phase "jury instructions urged the jurors to view themselves as taking only an initial step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." (Petition, ECF No. 14-9, at ¶ 528.) "These results are particularly acute," Petitioner continues, "because jurors were also told their life decision is binding." (*Id*. at ¶ 529 (emphasis in original).)

In his Memorandum in Support, Petitioner briefly reiterates *Caldwell*'s holding, as well as his arguments for how the trial court's instructions in his case ran afoul of *Caldwell*, but then concedes "that the Sixth Circuit has rejected *Caldwell* claims in previous cases." (ECF No. 93, at Page ID # 2264.)

Respondent recognizes that *Caldwell* is controlling but insists that no violation of *Caldwell* occurred because "[i]nstructing the jury that their decision is a recommendation is an accurate state of Ohio law." (Return of Writ, ECF No. 21, at Page ID # 492.) "For this reason," Respondent explains, "the Sixth Circuit has repeatedly rejected **[*240]** *Caldwell* challenges in Ohio death penalty cases." (*Id*. at Page ID # 493.)

The Ohio Supreme Court rejected Petitioner's claim on the merits, so this Court's analysis begins with that decision. In his thirteenth proposition of law on direct appeal, Petitioner argued that "[a] capital defendant's right to a reliable or nonarbitrary death sentence under the *Eighth* and *Fourteenth Amendments* is violated when the sentencing jury's responsibility for its verdict is attenuated by the trial court's instructions." (App. Vol. II, at 202.)

> The Ohio Supreme Court rejected the claim as follows: The matter raised by appellant in proposition of law thirteen has been addressed and rejected in a number of our prior cases. See, *e.g.*, *State v. Woodard (1993), 68 Ohio St.3d 70, 77, 1993 Ohio 241, 623 N.E.2d 75, 80-81*, and *State v. Raglin (1998), 83 Ohio St.3d 253, 260, 1998 Ohio 110, 699 N.E.2d 482, 489*.

Stojetz, 84 Ohio St. 3d at 466.

As Respondent asserts and Petitioner all but concedes, Sixth Circuit law forecloses relief on *Caldwell* claims such as that presented here. The annals of Sixth Circuit case law are replete with decisions rejecting claims that the use of the word "recommend" in penalty-phase jury instructions runs afoul of *Caldwell*. *See, e.g.*, *Durr v. Mitchell, 487 F.3d 423, 447 (6th Cir. 2007)*; *Buell v. Mitchell, 274 F.3d 337, 352-53 (6th Cir. 2001)*; *Coleman v. Mitchell, 268 F.3d 417, 435-36 (6th Cir. 2001)*; *Greer v. Mitchell, 264 F.3d 663, 687 (6th Cir. 2001)*; *Mapes v. Coyle, 171 F.3d 408, 415 (6th Cir. 1999)*.

Further, the record does not support a *Caldwell* claim in this case, as the Court is not persuaded that the jury's sense of responsibility for returning a death sentence was diminished, **[*241]** undermined, or lessened. Petitioner complains about the following portion of the trial court's penalty-phase jury charge:

> If you recommend a sentence of death, then I am required to make an independent review to determine whether the aggravating circumstance outweighs beyond a reasonable doubt evidence presented in mitigation. If I so find, then I must impose a sentence of death. If I independently find that the state failed to prove that the aggravating circumstance outweighed mitigating factors, then I must impose an appropriate life imprisonment sentence.

(Tr. Vol. VII, at 1187.) Petitioner asserts that the trial court then worsened the purported *Caldwell* violation by instructing the jury that if it recommended a life imprisonment option, the trial court was "required to accept" it. (*Id*.) The trial court next gave Petitioner's jury the following instruction:

> I used the word recommend. You express your

> verdict of sentence by making a recommendation of penalty based upon your findings of fact and your application of the law consistent with my instructions to you although your verdict is a recommendation. *The fact that it is a recommendation in no way serves to diminish the importance* ***[*242]*** *and seriousness of your task*. Simply put, you should recommend an appropriate sentence as though your recommendation *will in fact be carried out*.

(Tr. Vol. VII, at 1187-88 (emphasis added).) Petitioner argues that the trial court's "attempt to ameliorate this error" was insufficient because "the damage was already done." (ECF No. 14-9, at ¶ 524.) The Court disagrees. The trial court in this case went above and beyond its duty and took admirable care to ensure that the jury's sense of responsibility for imposing a death sentence was not diminished by the fact that the jury's sentencing verdict was, by law, a "recommendation."

The Ohio Supreme Court's decision rejecting Petitioner's claim was patently reasonable. The Court accordingly **DENIES** as without merit Petitioner's eighth ground for relief.

The Court cannot conclude that Petitioner's claim satisfies the showing required by *28 U.S.C. § 2253(c)(2)*. Petitioner's claim is all but foreclosed by Sixth Circuit case law and finds no factual support in the trial record.

Ground Nine: Prosecutorial Misconduct.

Petitioner raises numerous claims of prosecutorial misconduct in his ninth ground for relief. Only sub-parts (B) and (C) are properly before the Court for review **[*243]** on the merits. Petitioner argues in sub-part (B) that the prosecutor during his trial-phase closing arguments misrepresented the testimony of C.O. Barb Sears by attributing to her testimony that she never gave. Petitioner alleges the following:

> The prosecutor argued that Barb Sears testified as follows:
>
> C.O. Barb Sears heard him say, "We told Administration that this would happen." And in yelling back into inmates inside the Adams A, "You're next, you pussy-lipped bitches, you're gonna be next to die."

(Petition, ECF No. 14-10, at ¶ 556 (quoting Tr. Vol. VII, at 1008).) Petitioner complains that Sears' testimony contains no reference to "the Administration" and that Sears did not use the term "die." Petitioner asserts that the prosecutor's misrepresentation of Sears' testimony had the effect of demonstrating on Petitioner's part not only prior calculation and design but also an implicit admission of guilt.

In sub-part (C), Petitioner accuses the prosecutor of referencing victim-impact evidence during trial-phase closing arguments. (ECF No. 14-10, at ¶¶ 562-66.) The Court considered and rejected this claim above in addressing Petitioner's claim that his attorneys were ineffective for failing **[*244]** to object to this alleged instance of prosecutorial misconduct.

Respondent concedes that the prosecutor's use of the word "die" in his recitation of Sears' testimony "was not an exact quote." (ECF No. 101, at Page ID # 2476.) "However," Respondent continues, "it certainly got to the gist of Petitioner's statements." (*Id.*) Respondent explains that "[a]ccording to Ms. Sears, Petitioner yelled at one juvenile inmate that 'we're not done yet[,]' that the juvenile was 'the next one on the list' and 'was going down.'" (*Id.*) Respondent thus argues that the prosecution's misquoting of C.O. Sears constituted a reasonable inference as to what Petitioner meant when he was yelling to juvenile inmates immediately after surrendering. To that point, Respondent asserts that "the Sixth Circuit has held that prosecutors in Ohio death penalty cases are permitted leeway in making arguments." (*Id.* at Page ID # 2477 (citing *Byrd v. Collins, 209 F.3d 486, 535-36 (6th Cir. 2000)*; and *Greer v. Mitchell, 264 F.3d 663, 683 (6th Cir. 2001))*.) Respondent further argues that "[i]n assessing the prosecutor's statement, it is necessary

to remember that Barbara Sears was one of a lengthy list of prison personnel who heard Petitioner make threats and incriminating statements while he was being led away from Adams A." (ECF No. 101, at **[*245]** Page ID # 2477.) The Court agrees.

Petitioner raised this allegation on direct appeal (App. Vol. II, at 181-82), but the Ohio Supreme Court rejected it without discussion. That is, the Ohio Supreme Court acknowledged that Petitioner had raised numerous instances of prosecutorial misconduct but explicitly addressed only one of them—Petitioner's allegation that the prosecutor had improperly shifted the burden of proof during penalty-phase closing arguments *Stojetz, 84 Ohio St. 3d at 464-65*. The Ohio Supreme Court then concluded "that none of appellant's arguments, taken singularly or together, rises to the level of plain error." *Id.*

This Court first identifies the law and principles governing Petitioner's claim. It is well settled that "[t]o grant habeas relief based on prosecutorial misconduct that does not violate a specific guarantee under the *Bill of Rights*, the misconduct must be so egregious as to deny the Petitioner due process." *Lorraine v. Coyle, 291 F.3d 416, 439 (6th Cir. 2002)* (citing *Donnelly v. DeChristoforo, 416 U.S. 637, 643-45, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*). Thus, a reviewing court must first determine whether prosecutorial misconduct occurred and, if so, whether the misconduct was prejudicial. In so doing, the reviewing court should consider the challenged remarks within the context of the entire trial to determine whether any improper remarks were prejudicial. *Cristini v. McKee, 526 F.3d 888, 901 (6th Cir. 2008)*. In the **[*246]** Sixth Circuit, if a court finds that the challenged conduct was improper, the court must determine whether the misconduct was so flagrant as to deny the Petitioner a fundamentally fair trial. *See, e.g., Slagle v. Bagley, 457 F.3d 501, 516 (6th Cir. 2006)*. A court makes that determination by considering the following four factors:

> (1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant.

Bates v. Bell, 402 F.3d 635, 641 (6th Cir. 2005) (citations omitted).

It bears reminding, with respect to prosecutorial misconduct claims, that the "[p]etitioner's burden on habeas review is quite a substantial one." *Byrd v. Collins, 209 F.3d 486, 529 (6th Cir. 2000*.) Thus, even misconduct that was improper or universally condemned does not warrant habeas corpus relief unless the misconduct was so flagrant and egregious as to deny the petitioner a fundamentally fair trial. *Donnelly, 416 U.S. at 643-44*. To that point, "[t]he relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction (or death sentence) a denial of due process." *Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)* (citation and internal quotation marks omitted). Although **[*247]** it is well settled that prosecutors cannot offer personal opinions as to the credibility of witnesses, the guilt of the accused, or facts not in evidence, prosecutors do enjoy wide latitude to "argue the record, highlight any inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence." *Cristini, 526 F.3d at 901*.

Against that backdrop, the Court turns to the precise issue before it—not whether Petitioner has demonstrated a meritorious claim of prosecutorial misconduct, but whether the Ohio Supreme Court's decision rejecting Petitioner's claim of prosecutorial misconduct contravened or unreasonably applied clearly established federal law or involved an unreasonable determination of the facts. *See, e.g., Frazier v. Huffman, 343 F.3d 780, 793 (6th Cir. 2003)* (holding that although the Court might have found meritorious a claim of prosecutorial

misconduct were it reviewing that claim in the first instance, habeas corpus relief was not warranted because the state court's decision rejecting the same claim was not unreasonable). The Court answers that inquiry in the negative.

First, it is indisputable that the prosecutor took dubious liberties when recounting C.O. Barb Sears' testimony, embellishing it in a way that was **[*248]** unfavorable to Petitioner. Regarding the statements that Sears heard Petitioner make as she escorted him to a detention site, Sears testified: "Mr. Stojetz said that it wasn't over, he wasn't through, he wasn't finished, that there was — they had beat up one of the brothers the night before and they was doing to pay for it because it wasn't going to go undone." (Tr. Vol. V, at 779.) Sears also testified that "[Petitioner] made the statement that he was going to get the boy that was hollering out the window at him, he said that he was going to get him, that he was the next one on the list, he was going down." (*Id*. at 780.) Sears also testified that Petitioner "said, he made the statement, 'we're not — I'm not through yet you pussy-lipped, son of a bitch, nigger. I will get you.'" (*Id*.) Sears did not, as Petitioner argues, use the word "die." Nor did Sears attribute to Petitioner any statements to the effect of "we told the Administration this would happen."

The Court is not persuaded, however, that the prosecutor's actions so infected Petitioner's trial or sentencing with unfairness as to make the resulting verdict or death sentence unreliable. For one thing, the Court is not *entirely* convinced **[*249]** that the prosecutor's misrepresentation of Sears' testimony was deliberate malfeasance as opposed to innocent paraphrasing. The prosecutor did not purport to be quoting Sears' testimony verbatim. Further, even if Petitioner did not use the word "die" in the statements that Sears attributed to him, Petitioner was unmistakably conveying a threat to kill or seriously harm the juvenile inmates at whom he was yelling.

Ultimately dispositive of Petitioner's claim is the fact that the Court is not persuaded that the misquote prejudiced Petitioner, much less infected his trial with fundamental unfairness. Beyond Sears, the prosecution also presented no fewer than five witnesses who testified to hearing Petitioner immediately after the incident say something to the effect of "[w]e told you this would happen" and no fewer than three witnesses who testified to hearing Petitioner shout harsh threats toward juvenile inmates in Adams A immediately after Petitioner surrendered. Deputy Warden Mark Saunders testified without objection that he heard Petitioner say that "[w]e took care of things because you wouldn't." (Tr. Vol. V, at 656.) C.O. Timothy Follrod testified without objection to hearing Petitioner **[*250]** say that "this is what you wanted, this is what you wanted, you know, pertaining to, I guess, what they did." (*Id*. at 765.) Sergeant Martha Crabtree testified without objection as follows:

> Q. What was Mr. Stojetz saying?
>
> A. They were saying that, you know, they want to go back to Lucasville; and they said, "we're going to do what we got to do." Then they went back in. Then they came back out and they say, "we got what we want, we killed two," and they went back in.
>
> Q. Was inmate Stojetz the one saying these things?
>
> A. Yes, sir.

(*Id*. at 773.) C.O. Michael Douds testified without objection that he heard Petitioner say, while Douds was standing over accomplice Lovejoy, "I told you it was going to happen." (Tr. Vol. VI, at 933.) Finally, C.O. John Vanover testified without objection to hearing Petitioner say "[s]omething about this will definitely get me my ride out." (*Id*. at 953.) In view of the foregoing, the Court cannot find that Petitioner suffered any prejudice from the prosecution's errantly recounting that C.O. Sears testified that Petitioner told authorities this was going to happen.

Nor is the Court persuaded that Petitioner suffered prejudice when the prosecutor erroneously stated that C.O. Sears had testified to hearing **[*251]** Petitioner use the word "die." C.O. Terry Campbell

testified without objection that he heard Petitioner yell "[s]omething to the fact that there's more coming, there's a buss [*sic*] — supposed to be a buss load [*sic*] of us coming up later on." (*Id*. at 907.) C.O. Fred Chesser testified without objection to hearing Petitioner yell to juvenile inmates in Adams A that "you all are lucky that we broke that key." (*Id*. at 927.) Chesser explained that he understood that statement to mean that because the attackers had broken the cell key, "they couldn't gain access to any cells with the key they broke." (*Id*.) Finally, C.O. John Vanover testified without objection as follows:

> Yes, sir, he was yelling to inmates that were still locked in their cells in Adams A and some of them had yelled out to him he was a murderer, et cetera. While he was laying on the ground and I was pat searching him, he started yelling back that: yes, you came in there and killed that nigger. That he had more to kill even after lock down after they came off the lock down, that he was going to kill three more and then later on he yelled at them if he didn't get to take care of it his Aryan Brothers would take care of it, this would teach them not to fuck **[*252]** with the AB and he had yelled to some that were yelling back at him that you weren't yelling at me when I was in there killing that nigger, you were all punk bitches, you were up underneath your bed.

(*Id*. at 946.) The foregoing precludes any reasonable finding that prejudice ensued from the prosecution's incorrectly recounting that C.O. Sears used the word "die."

The Court concludes that Petitioner's claim is without merit and that the Ohio Supreme Court's decision concluding the same, albeit without discussion, was reasonable. The Court accordingly **DENIES** as without merit Petitioner's ninth ground for relief.

The Court is satisfied that both Petitioner's claim as set forth above meets the showing required by *28 U.S.C. § 2253(c)(2)*. Although the hurdle for prevailing on a claim of prosecutorial misconduct is steep, the challenged conduct at issue troubles this Court.

Ground Thirteen: Denial of Fair Proportionality Review.

Petitioner argues here that the state denied him a fair proportionality review as mandated by statute in violation of the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments*. (Petition, ECF No. 14-14, at ¶¶ 710-768.) Conceding that "proportionality review is not constitutionally required," Petitioner reasons that "once a state chooses to conduct **[*253]** proportionality review of capital cases as an additional safeguard against the arbitrary and capricious imposition of the death penalty, the state creates a liberty interest that cannot be denied." (*Id*. at ¶ 715.) To that point, Petitioner notes that Ohio statutory law provides for proportionality review and does so, Petitioner argues, in "'explicitly mandatory language.'" (*Id*. at ¶ 726 (quoting *Coe v. Bell, 161 F.3d 320, 352 (6th Cir. 1998)*.)

Having pleaded his case for why Ohio's statutory framework for proportionality review creates a liberty interest that makes his claim cognizable in habeas corpus, Petitioner proceeds to argue that "Ohio courts did not perform meaningful proportionality review, by failing to follow the spirit, intent, and express language of the statute." (*Id*. at ¶ 736.) The gist of Petitioner's complaint is that reviewing courts in Ohio limit comparison to cases in which the death sentence was imposed and do not even meaningfully compare that limited pool of cases. Petitioner asserts that the courts ignore those cases with similar facts in which the death penalty was not imposed. Petitioner punctuates his argument by stressing that "[n]ever has the Ohio Supreme Court found a death sentence to be disproportionate." **[*254]** (*Id*. at ¶ 740.) To that point, Petitioner cites to the frequent criticism that Ohio Supreme Court Associate Justice Pfeifer—the legislative architect of Ohio's death penalty

statute—has lobbed at the manner in which Ohio courts conduct proportionality review.

Petitioner further asserts that Ohio's passing of a proportionality review statute mandates the creation of a "data base garnered from the entire Ohio community of capital prosecutions." (*Id*. at ¶ 750.) Without reference to such a data base, Petitioner argues, "there is no way to objectively determine whether, in this community, the death penalty *in this particular* case is disproportionate as applied." (*Id*. at ¶ 754 (emphasis in original).) Petitioner also asserts that such a data base is necessary to provide a pool of "similar" cases for purposes of proportionality comparison.

In his Return of Writ, Respondent provides a string cite of Sixth Circuit decisions echoing the Supreme Court's holding in *Pulley v. Harris* that expressly rejected the argument that the *Eighth Amendment* requires proportionality review. (ECF No. 21, at Page ID # 560-561.) Citing *Coe v. Bell and Williams v. Bagley, 380 F.3d 932, 962 (6th Cir. 2004)*, Respondent further argues that Petitioner "does not have a liberty interest in the proper **[*255]** application of proportionality review in Ohio." (*Id*. at Page ID # 561.) Specifically, Respondent asserts, contrary to Petitioner's position, the Ohio legislature has not specified the exact requirements for proportionality review sufficient to give rise to a liberty interest in proper proportionality review. "[E]ven if Ohio ha[d] created a liberty interest," Petitioner continues, "habeas corpus relief cannot be warranted because there is no substantial right [a]ffected." (*Id*. (citing *Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir. 1996))*.)

In his Memorandum in Support, Petitioner incorporates by reference the arguments he set forth in his Petition and then takes aim at Respondent's argument that there does *not* exist in Ohio a liberty interest in proportionality review. (ECF No. 93, at Page ID # 2269-2271.) Petitioner insists that "this Court should not accept Respondent's reliance on *Coe v. Bell, 161 F.3d 320 (6th Cir. 1998)* and *Williams v. Bagley, 380 F.3d 932, 962 (6th Cir. 2004)*." (*Id*.) Petitioner reasons that *Coe* holds only that Tennessee's proportionality statute did not create a liberty interest in proportionality review. Petitioner continues to insist that, unlike Tennessee, the Ohio legislature, as well as the Ohio Supreme Court's interpretation of the statute in *State v. Jenkins, 15 Ohio St. 3d 164, 208-09, 15 Ohio B. 311, 473 N.E.2d 264 (1984)*, "created the 'explicitly mandatory language' on how to conduct [proportionality] **[*256]** review" sufficient to give rise to a liberty interest in the review. (*Id*. at Page ID # 2270.) Petitioner also dismisses Respondent's reliance on *Williams v. Bagley*, asserting that the case did not specifically address the arguments that Petitioner raises herein. Finally, Petitioner disputes Respondent's reliance on *Ceja v. Stewart* for the proposition that even if Ohio did create a liberty interest in proportionality review, habeas corpus relief is not warranted because no substantial right is affected. According to Petitioner, *Ceja* involved "a circumstance whe[ere] there was no statutory provision or even a rule requiring proportionality review." (*Id*. at Page ID # 2271.)

Respondent raises no additional arguments in his Merits Brief. (ECF No. 101, at Page ID # 2477-2479.)

Petitioner presented these arguments on direct appeal (App. Vol. II, at 247-49) and the Ohio Supreme Court rejected them without discussion by citing a prior decision (App. Vol. III, at 156; *Stojetz, 84 Ohio St. 3d at 467-68*). The issue before this Court, accordingly, is whether the Ohio Supreme Court's decision rejecting Petitioner's claim, albeit without discussion, contravened or unreasonably applied clearly established federal law. It did not.

In *Williams v. Bagley*, the petitioner had argued "that, **[*257]** in establishing proportionality review, Ohio has created a constitutionally protected liberty interest, and that Ohio has 'reduced' proportionality review to 'a meaningless, capricious procedure in violation of the *Due*

Process Clause.'" *Id. at 961*. The Sixth Circuit set forth Ohio's statute establishing proportionality review, *Ohio Revised Code § 2929.05(A)*, and then explained that the petitioner's complaint centered around the Ohio Supreme Court's *State v. Steffen, 31 Ohio St. 3d 111, 123-24, 31 Ohio B. 273, 509 N.E.2d 383 (1987)*, decision interpreting the statute. The Sixth Circuit explained that, in *Steffen*, the Ohio Supreme Court concluded that reviewing courts satisfy *Ohio Revised Code § 2929.05(A)* by reviewing cases already decided by the court in which death was imposed and need not consider any case where death was sought but not obtained or where death could have been sought but was not. The Sixth Circuit then explained that the petitioner, after conceding the holding set forth in *Pulley, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29* that proportionality review is not constitutionally required, "maintain[ed] that the Ohio legislature created a constitutionally protected liberty interest when it established a system of proportionality review." *Williams, 380 F.3d at 962*. With the protected-liberty-interest concept as the foundation of his argument, the Sixth Circuit summarized the petitioner's reasoning as follows:

> Thus, he insists **[*258]** that the Ohio Supreme Court's decision as to what cases are "similar" for purposes of *§ 2929.05(A)* "must be made in an environs of *some* 'reasonable and non-capricious' guiding principles, lest those decisions be completely arbitrary" in violation of the *Due Process Clause*. (emphasis in original) And he concludes that, given *Ohio Revised Code § 2929.021(A)*'s requirement that all capital indictments be reported to the Ohio Supreme Court, and given *Ohio Revised Code § 2929.03(F)*'s requirement that the trial court file an opinion with the appellate courts explaining its sentencing decision in any capital case, the only reasonable interpretation of "similar cases" for purposes of *§ 2929.05(A)* is all capitally indicted cases, regardless of whether a sentence of death was imposed.

Williams, 380 F.3d at 962. The Sixth Circuit then noted in unmistakable language: "This court has held repeatedly that Ohio's system of proportionality review complies with the dictates of the *Due Process Clause*." (*Id*. (string citation omitted).) The Sixth Circuit stated further: "And this court has held consistently that, in 'limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed.'" *Id. at 962-63* (quoting *Buell v. Mitchell, 274 F.3d 337, 369 (6th Cir. 2001)*.) The Sixth Circuit concluded **[*259]** that the petitioner had not presented any authority compelling it to revisit its prior decisions.

Contrary to Petitioner's position, the Court is satisfied that *Williams v. Bagley, 380 F.3d at 961-63*, is sufficiently (if not precisely) dispositive of the arguments that Petitioner makes here. The Court is not persuaded either that Petitioner's arguments herein are so different from those that the Sixth Circuit rejected in *Williams* that *Williams* does not speak to them or that Petitioner's arguments would otherwise compel the Sixth Circuit to revisit its decisions rejecting due process challenges to Ohio's proportionality review system. In his Petition and Memorandum in Support, Petitioner argues for why Ohio has created a protected liberty interest in proportionality review. Petitioner's arguments to that point distinguishing between states where the statute creating proportionality review allow too much discretion to create a protected liberty interest are insufficient to remove Petitioner's claim from the purview of *Williams*. Petitioner's subsequent arguments for how Ohio courts fail to perform meaningful proportionality review in violation of the intent and express language of Ohio's statute due to the pool of cases to **[*260]** which courts limit their review do not, in this Court's view, substantively differ from the arguments that the Sixth Circuit considered and rejected in *Williams* and other prior decisions. Finally, the arguments that Petitioner raises about the ramifications of Ohio's failure to establish a data bases of relevant aggravated

murder cases for reviewing courts to consult also appears to have been a matter that the *Williams* decision rejected. In short, the *Williams* decision essentially addressed and rejected the key components of Petitioner's arguments herein. And *Williams* forecloses relief on Petitioner's claim. *See also Getsy v. Mitchell, 495 F.3d 295, 306 (6th Cir. 2007)* ("In an unbroken line of precedent, this court has upheld challenges to Ohio's limited comparative-proportionality review." (citation omitted).)

For the foregoing reasons, the Court concludes that the Ohio Supreme Court's decision rejecting Petitioner's proportionality review claim did not contravene or unreasonably apply clearly established federal law. The Court **DENIES** as without merit Petitioner's thirteenth ground for relief.

The Court cannot conclude that this claim satisfies the showing required by *28 U.S.C. § 2253(c)(2)* for a certificate of appealability. Sixth Circuit law forecloses **[*261]** relief on Petitioner's claim and nothing about his arguments persuades this Court that the issue warrants further consideration on appeal.

Ground Fourteen, Sub-Parts (B) and (C): Appropriateness of Death Sentence.

In his fourteenth ground for relief, Petitioner raises a litany of arguments purporting to establish that his death sentence is constitutionally inappropriate, arbitrary, and capricious. (Petition, ECF No. 14-15, at ¶¶769-812.) The Court determined in its September 30, 2005 Opinion and Order that Petitioner had procedurally defaulted sub-part (A) of his claim, contained in paragraphs 772-779. (ECF No. 39, at Page ID # 1659-1663.) Left for this Court to consider is Petitioner's assertion that his death sentence is disproportionate because neither the jury, the trial court, nor the reviewing courts considered several critical facts, to wit: Petitioner is the only person on Ohio's death row upon conviction of a single aggravating circumstance; Damico Watkins's death resulted from Watkins's threats to kill Petitioner; and Petitioner's Post-Traumatic Stress Disorder ("PTSD"). With respect to his single-aggravating-factor argument, Petitioner asserts that "[a]ll other men on death row **[*262]** for a prison killing had at least one other aggravating circumstance" and offers a laundry list of Ohio death-row inmates as proof. (ECF No. 14-15, at ¶ 780.) Concerning Watkins's alleged complicity in his own killing, Petitioner asserts that Watkins induced his murder by not only his blindside assault of a juvenile inmate (Doug Haggerty) whom Petitioner had endeavored to protect, but also by his threats to kill Petitioner—threats that were all the more amplified by the fact that they were made in the volatile and dangerous setting of prison. Finally, Petitioner argues that the severe PTSD from which he suffered, through his exposure to multiple violent events throughout his life, exasperated his perception of the direness of Watkins's threats to kill Petitioner.

In his Return of Writ, Respondent urges this Court to summarily reject Petitioner's claim on the basis that Petitioner "committed a particularly brutal and horrific murder[]" and that "[t]he evidence at trial overwhelming[ly] showed that [Petitioner] wielded a knife and that he was the leader (or certainly one of the leaders) of the attack against Damico Watkins." (ECF No. 21, at Page ID # 568-569.)

Petitioner asserts in his Memorandum in Support **[*263]** that Respondent's argument "hardly addresses the breadth of Petitioner's allegations of error, and the unique factual circumstances of his case and the tenuous basis for imposing death." (ECF No. 93, at Page ID # 2272.) Petitioner then proceeds to reiterate arguments from his Petition concerning critical facts that were omitted from consideration in determining the appropriateness of Petitioner's death sentence. Petitioner thus contests Respondent's assertion that the Ohio Supreme Court reasonably determined the appropriateness of Petitioner's death sentence.

This Court's analysis begins the Ohio Supreme

Court's decision and the Ohio Supreme Court determined the appropriateness of Petitioner's death sentence as follows:

> Having considered appellant's propositions of law, we must now independently review the sentence of death for appropriateness (also raised in appellant's Proposition of Law No. 2) and proportionality.
>
> We find that the aggravating circumstance appellant was found guilty of committing, *R.C. 2929.04(A)(4)*, was proven beyond a reasonable doubt.
>
> In mitigation, appellant's stepfather, John Untermoser, his sister, Denise Crosston, his stepsister, Lorrie Holdreith, and his brother-in-law, Timothy **[*264]** Holdreith, testified concerning appellant's history, character, and background.
>
> Appellant's stepfather, John Untermoser, testified that appellant was raised by his grandmother and his mother. Untermoser stated that there was constant conflict between appellant's mother and grandmother on how to raise him. The stepfather indicated that he never developed a close relationship with the appellant and that he and appellant seldom communicated after appellant became incarcerated. Despite the lack of communication, Untermoser also testified that he always cared for appellant and never knew him to be a violent person.
>
> Appellant's brother-in-law, Timothy Holdreith, testified that he knew appellant for approximately thirteen years, since appellant was in his early thirties. Timothy visited appellant in prison once a month for about eight years and stated that appellant lived with him and his wife (appellant's stepsister Lorrie) for six months when appellant was on parole. Timothy testified that he never saw appellant lose his temper or act violently against anybody and that appellant "always seemed to be caring in showing love and support for his family."
>
> Lorrie Holdreith testified that appellant **[*265]** was very protective and caring and that he was a "good brother." Lorrie indicated that appellant never had a formal education, and she recalled that most of appellant's adult life was spent in prison. Lorrie additionally stated that she never saw appellant commit a violent act.
>
> Denise Crosston, appellant's sister, testified that when appellant was a young boy he witnessed his grandfather's suicide. Crosston described appellant as a thief who, while growing up, would bring home stolen items to try to make his mother happy. Crosston testified that appellant was "always institutionalized," that she knew appellant best while they were growing up, and that she built a relationship with appellant by visiting him in prison and making sure he had money in his prison account. She further testified that appellant had both of his ankles broken as a result of a prison fight. Crosston also recalled that appellant had his throat cut while in prison. She expressed her view that appellant is not a murderer but "is a product of the environment that he is in."
>
> Eberhard Eimer, Ph.D., a professor of psychology at Wittenberg University and a clinical psychologist, also testified on appellant's behalf. Dr. **[*266]** Eimer met with appellant on two occasions at the London Correctional Institution for approximately ten and one-half hours. Dr. Eimer also interviewed Lorrie Holdreith and appellant's girlfriend of ten years, Diane Ash, and additionally performed psychological testing.
>
> Dr. Eimer administered or attempted to administer a total of four tests. Dr. Eimer concluded from the testing that appellant adjusts poorly to "life circumstances" and that appellant tends to have an exaggerated conception of his capability, is highly suspicious, and is alienated from himself and from society. In Dr. Eimer's opinion appellant is capable of being aggressive, is easily provoked, is constantly worried and scared for his life, and is intensely fearful and on guard.

Dr. Eimer also expressed his belief that appellant sees the world as a threatening place and suffers from long-term depression.

Through interviews with appellant, Lorrie Holdreith, and Diane Ash, Dr. Eimer elicited further information regarding appellant's history and background. Dr. Eimer testified that appellant's mother worked as a barmaid and appellant's father was a laborer, a musician, and an alcoholic, whom appellant saw a total of three times. **[*267]** Appellant was raised primarily by his grandparents until age five, at which point the grandfather committed suicide.
Dr. Eimer testified that appellant's mother thought the most effective way of raising appellant was to strike him when he did something wrong. Dr. Eimer further stated that appellant would thus turn to the grandmother, who protected appellant from his own behavior and from his mother. Dr. Eimer found that both the mother's and grandmother's methods of child rearing were highly unhealthy.
Dr. Eimer further noted that appellant has spent much of his adult life in prison. According to Dr. Eimer, appellant became a "citizen of the institution," and abided by rules such as "if one is threatened, one also has a choice to die or to kill." In contrast, Dr. Eimer considered appellant's earning his G.E.D. and receiving an associate degree from Ashland University to be quite an achievement in light of appellant's limited intellectual potential.

Based on the psychological testing of appellant as well as the clinical interviews with appellant, his stepsister, and girlfriend, Dr. Eimer concluded that appellant is "not socialized in terms of moral norms." According to Dr. Eimer, appellant **[*268]** lacked adequate parenting in his formative years and appellant's adult role models were abusive and amoral. Dr. Eimer further noted that appellant is "even more dysfunctional in our society," given that appellant was "institutionalized" at an early age and spent much of his adult life in jail.

In addition, Dr. Eimer diagnosed appellant as suffering from Post-Traumatic Stress Disorder ("PTSD") and determined that appellant has a paranoid schizoid personality with antisocial tendencies. According to Dr. Eimer, appellant's difficulty in adjusting to societal roles is comparable to that experienced by some survivors of military combat. In Dr. Eimer's view, appellant's PTSD and personality disorder qualify as a mental disease. Nevertheless, Dr. Eimer ultimately concluded that appellant holds himself accountable for his actions. Dr. Eimer opined that although appellant "is largely unfamiliar with our [society's] moral norms * * * that doesn't mean that he doesn't know them. * * * [Appellant] knows what he is doing but he has not internalized our societal norms."

Appellant gave a rather lengthy unsworn statement in which he chronicled his life history both in and out of prison. Appellant recounted **[*269]** the time his grandfather committed suicide, how appellant began stealing at an early age, and when he visited his dying mother in the hospital accompanied by prison guards.
Appellant also gave his version of the events leading up to the murder of Watkins. According to his statement, appellant had promised to protect Doug Haggerty, a juvenile inmate at Madison Correctional. Apparently, Haggerty's father and appellant were once cellmates at Lucasville Correctional Institution. Appellant stated that he was informed that Watkins, and other juvenile inmates, had attacked Haggerty. Appellant also stated that he was informed that Watkins had threatened appellant and other members of the Aryan Brotherhood. Appellant alleged that his only intention was to answer Watkins's threat with a fight, but that "things got out of control."
Appellant concluded his unsworn statement by extending sympathy to Watkins's family and by expressing sorrow for his (appellant's) part in Watkins's murder. Finally, appellant asked the

court and God to forgive him and have mercy on his life.

Upon a review of the evidence in mitigation, we find that the nature and circumstances of the offense do not reveal any mitigating **[*270]** value. The murder of Watkins took place in a detention facility amidst an atmosphere full of racial animosity. Appellant and five fellow inmates seized control of the juvenile unit at knifepoint and then tracked down and repeatedly stabbed their intended victim. Finally, as Watkins pleaded for his life, appellant and another inmate cornered Watkins and stabbed him to death.

The record does reflect, however, that appellant had a troubled childhood. At the age of five years, appellant witnessed his grandfather's suicide. Testimony established that appellant's formative years were marked by a lack of proper supervision and parental guidance, that appellant was subjected to conflicting methods of discipline from his mother and grandmother, and that appellant lacked a formal education. We believe that appellant's childhood and other history are entitled to some weight in mitigation.

We now consider the statutory mitigating factors listed in *R.C. 2929.04(B)*. The *R.C. 2929.04(B)(4)* and *(5)* mitigating factors are not applicable on the record before us. *R.C. 2929.04(B)(6)* is also inapplicable because evidence produced at trial overwhelmingly established that appellant was a principal offender in the death of Watkins.

In his second proposition of **[*271]** law, appellant asserts that, in view of the fact that he suffers PTSD, Watkins's attack on Haggerty induced or facilitated Watkins's death. Moreover, appellant contends that Watkins's threat to kill appellant, coupled with appellant's PTSD, caused him to be under duress and triggered or provoked Watkins's own murder. We disagree.

The fact that appellant apparently suffers from PTSD compels very little weight, if any, in mitigation under *R.C. 2929.04(B)(1)* or *(2)*. Although Dr. Eimer diagnosed appellant as suffering from PTSD, Dr. Eimer also added that appellant "knows what he is doing" and that appellant holds himself accountable for his actions.

The fight that involved Watkins and Haggerty could perhaps be construed under other circumstances as having motivated appellant and his accomplices to seek revenge against Watkins. However, in light of overwhelming evidence to the contrary, this court finds that this incident was merely an excuse used by appellant to achieve other ends. Testimony at trial established that appellant wanted to get transferred out of Madison Correctional and had his belongings already packed when prison officials went to this cell after the murder. Further, shortly after killing Watkins, **[*272]** appellant told corrections officer Vanover something to the effect that "this will definitely get me my ride out (of Madison Correctional)." We therefore consider that the *R.C. 2929.04(B)(1)* mitigating factor is not implicated here.

In addition, the *R.C. 2929.04(B)(2)* mitigating factor is entitled to little or no weight. There was no direct provocation by Watkins against appellant. Appellant failed to establish that he was under a threat of imminent harm from Watkins. After the assault on Haggerty and the alleged threat by Watkins, appellant had sufficient time to consider his course of action. Watkins's purported threat to appellant, as well as the assault on Haggerty, is a weak attempt by appellant to justify his use of deadly force. Moreover, as previously stated, the evidence at trial established that appellant committed the murder to compel a transfer out of Madison Correctional. It was further established at trial that the murder of Watkins was also intended to send a message to the black juvenile inmates at

Madison Correctional that the Aryan Brotherhood would not be intimidated.

We also conclude that Dr. Eimer's diagnosis of appellant's mental condition is not entitled to weight under *R.C. 2929.04(B)(3)*. Dr. Eimer agreed that appellant's **[*273]** mental condition was, in fact, a "mental disease." However, Dr. Eimer never asserted, and we do not find, that appellant's mental condition caused him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. See *State v. Lawrence (1989), 44 Ohio St.3d 24, 32, 541 N.E.2d 451, 460*. Accordingly, we conclude that appellant's paranoid schizoid personality with antisocial tendencies and his PTSD are entitled to only modest mitigating weight as *R.C. 2929.04(B)(7)* mitigating factors.

In regard to other *R.C. 2929.04(B)(7)* factors, appellant apparently cares for his family and they for him. Nonetheless, their relationship reveals nothing of any mitigating value. Finally, appellant's expressions of sorrow and remorse in his unsworn statement are entitled to some, but very little, weight in mitigation. See *State v. Rojas (1992), 64 Ohio St.3d 131, 143, 1992 Ohio 110, 592 N.E.2d 1376, 1387*, and *State v. Raglin, 83 Ohio St.3d at 273, 699 N.E.2d at 498*.

Weighing appellant's evidence presented in mitigation against the single *R.C. 2929.04(A)(4)* aggravating circumstance, we conclude beyond a reasonable doubt, that the aggravating circumstance outweighs the mitigating factors. Therefore, the penalty of death is statutorily appropriate.

As a final matter we find that the death penalty imposed in this case is neither excessive nor disproportionate to similar cases where the offender committed **[*274]** murder while a prisoner in a detention facility. See, *e.g.*, *State v. Zuern, 32 Ohio St.3d 56, 512 N.E.2d 585*, and *State v. Carter (1992), 64 Ohio St.3d 218, 1992 Ohio 127, 594 N.E.2d 595*.

Stojetz, 84 Ohio St. 3d, at 468-73.

Petitioner's basis for asserting that neither the jury, the trial court, nor any reviewing courts considered these factors is elusive. During the mitigation hearing, Petitioner's defense counsel did present arguments and evidence concerning the extent to which Watkins provoked his own murder, as well as the extent to which Petitioner's PTSD and prison culture exasperated Petitioner's perception of threats and danger. (Tr. Vol. VII, at 1056, 1084-85, 1109-10, 1113, 1118-19, 1161-64, 1169-71, 1182-84.) Petitioner offers no basis underlying his assertion that the jury did not consider those factors in deciding that death was the appropriate sentence to recommend. The Court gives little weight to any failure on the part of the jury to consider in its appropriateness determination the fact that Petitioner would be the only person on Ohio's death row under sentence of death for the sole aggravating circumstance of committing murder while detained in a state correctional facility. That strikes the Court as a clumsy (if not misguided and unsuitable) argument for defense counsel to have made. It also would have been inconsistent **[*275]** with the mitigation strategy that counsel reasonably investigated and decided upon and smacks of the hindsight against which *Strickland* cautions.

Petitioner also has little basis for asserting that the trial court failed to consider the issues Petitioner highlights in his claim when the trial court considered the appropriateness of sentencing Petitioner to death. The trial court's Decision and Entry on the Death Penalty makes unmistakably clear that the trial court *did* consider the issues Petitioner highlights, albeit not according those issues the weight Petitioner feels they deserved. The trial court expressly acknowledged Petitioner's argument "that Watkins induced or facilitated his own aggravated murder" but ultimately concluded from the record that the issue deserved "little

weight." (App. Vol. I, at 279.) In considering Petitioner's argument "that it was unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation," the trial court agreed that "[i]t appears that defendant was provoked that Watkins assaulted Haggerty the night before the aggravated murder." (*Id.*) The trial court then ultimately concluded that the issue deserved **[*276]** "little weight" because of the tenuousness of the connection between Petitioner and Watkins, the disproportionateness of Petitioner's response to Watkins' assault on Haggerty, and Petitioner's ulterior motive to facilitate a transfer out of MaCI. (*Id.* at 280.) The trial court also took into account Petitioner's PTSD as an *Ohio Revised Code § 2929.04(B)(7)* "catch-all" mitigating factor. The fact that the trial court ultimately gave the issue no weight does not mean that the trial court did not consider the matter in determining whether death was an appropriate sentence; reasonable minds could differ on the nexus between Petitioner's mental inflictions of PTSD and paranoia and his commission of aggravated murder. Finally, if the trial court did not explicitly consider the fact that Petitioner would have been the only offender on Ohio's death row under conviction of the sole aggravating circumstance that he committed murder while detained in a state penal facility, the trial court certainly touched upon the issue when it acknowledged the sole aggravating circumstance Petitioner was convicted of committing and expressed its opinion about the importance of the public policy underlying that aggravating circumstance, to wit: "Absent **[*277]** a death penalty, there would be little deterrence to aggravated murder in a penal institution." (*Id.* at 282.)

Similarly, Petitioner's assertion that the Ohio Supreme Court failed to consider the factors that Petitioner highlights in his claim is unfounded. The Ohio Supreme Court expressly considered Petitioner's assertion "that, in view of the fact that he suffers from PTSD, Watkins's attack on Haggerty induced or facilitated Watkins's death" and "that Watkins's threat to kill appellant, coupled with appellant's PTSD, caused him to be under duress and triggered or provoked Watkins's own murder." *Stojetz, 84 Ohio St. 3d at 471*. The Ohio Supreme Court simply accorded those factors little or no weight based on its review of the record. The Ohio Supreme Court gave Petitioner's PTSD "very little weight" due to the fact that Petitioner's own expert testified that in spite of his PTSD, Petitioner knew what he was doing and held himself accountable for his actions. *Stojetz, 84 Ohio St. 3d at 471*. The Ohio Supreme Court suggested a willingness to consider the fight between Watkins and Haggerty mitigating under different circumstances, but ultimately gave it little weight because of the appearance that it served merely as an excuse for Petitioner to achieve other **[*278]** ends: facilitating his transfer out of MaCI. The Ohio Supreme Court similarly concluded that Watkins never directly provoked Petitioner, that Watkins posed no imminent threat to Petitioner, and that Petitioner had sufficient time after Watkins's fight with Haggerty and alleged threats against Petitioner to contemplate his actions. "Watkins's purported threat to appellant, as well as the assault on Haggerty," the Ohio Supreme Court concluded, "is a weak attempt by appellant to justify his use of deadly force." *Stojetz, 84 Ohio St. 3d at 472*. As for the fact that Petitioner was or would have been the only person on Ohio's death row under sentence of death for the sole aggravating factor that he committed aggravated murder while incarcerated in a state penal institution, the Ohio Supreme Court at least expressly recognized that Petitioner faced a single aggravating factor. *Id.*

The question before the Court is whether the Ohio Supreme Court's decision rejecting Petitioner's specific arguments and concluding that Petitioner's death sentence was appropriate contravened or unreasonably applied clearly established federal law. *See, e.g.*, *Getsy v. Mitchell, 495 F.3d 295, 308 (6th Cir. 2007)* ("Ultimately, the question before us is whether the determination of the Ohio Supreme **[*279]** Court that Getsy's death sentence

was not arbitrary or disproportionate was contrary to, or involved an unreasonable application of, clearly established federal law."). That Petitioner's jury, the trial court, and the Ohio Supreme Court gave certain factors less weight than Petitioner preferred does not undermine their determination that Petitioner's death sentence was appropriate. Their decisions were reasoned and supported by the record. Petitioner can disagree with their conclusions regarding his arguments; he cannot, however, complain that they failed to consider his arguments. That being so, the Court is not persuaded that the appropriateness review of Petitioner's death sentence was so inadequate as to render his death sentence arbitrary and capricious and is satisfied that the Ohio Supreme Court's decision reaching the same result was reasonable.

The Court **DENIES** as without merit sub-parts (B) and (C) of Petitioner's fourteenth ground for relief.

The Court is inclined to find that this claim satisfies the showing required by *28 U.S.C. § 2253(c)(2)* for a certificate of appealability. Although not overly informative to the Court's decision rejecting Petitioner's claim, the fact that Petitioner was the **[*280]** only attacker who received a death sentence persuades this Court that Petitioner's claim deserves further consideration on appeal. The Court accordingly **Certifies for Appeal** sub-parts (B) and (C) of Petitioner's fourteenth ground for relief.

Ground Fifteen: Death Sentence Based on Improper Victim Impact Evidence.

Petitioner argues in his fifteenth ground for relief that his death sentence is based on improper victim impact evidence in violation of his *Eighth Amendment* rights. (Petition, ECF No. 14-16, at ¶¶ 815-35.) The Court already addressed Petitioner's claim in full when the Court considered and rejected sub-part (J) of Petitioner's first ground for relief, where Petitioner challenged defense counsel's failure to object to the victim impact evidence. The Court **DENIES** as without merit Petitioner's fifteenth ground for relief. The Court further concludes that Petitioner's claim does not satisfy the showing required by *28 U.S.C. § 2253(c)(2)*.

Ground Seventeen: Unconstitutionality of Ohio's Death Penalty.

In his seventeenth ground for relief, Petitioner raises a litany of familiar challenges to the constitutionality of Ohio's death penalty scheme. (Petition, ECF No. 14-18, at ¶¶ 863-1070.) Petitioner acknowledges in his Memorandum **[*281]** in Support "that the Sixth Circuit has, on occasion, rejected the basis of these allegations." (ECF No. 93, at Page ID # 2276.) "However," Petitioner continues, "because death is different and constitutional principles sometimes shift, Petitioner continues to assert that the arguments contained within the Claim constitute constitutional error in his case." (*Id.* (citations omitted).) Petitioner proceeds to "stand[] on the legal arguments and authority submitted with the habeas petition[]" but presents additional arguments in support of his assertion that the trial court, during voir dire and the sentencing phase, improperly instructed the jury to consider the nature and circumstances as aggravation instead of mitigation as required by *Ohio Revised Code § 2929.04(B)*. (*Id.* at Page ID # 2277-2279.) Finally, Petitioner asserts first that *§ 2254(d)* does not constrain this Court's review and in the alternative that the Ohio Supreme Court's summary decision violated *§ 2254(d)*.

In his Return of Writ, Respondent responds to Petitioner's "same, tired constitutional challenges to Ohio's death penalty" (ECF No. 21, at Page ID # 572) by addressing each argument one by one, explaining essentially that no United States Supreme Court authority or **[*282]** Sixth Circuit decisions support any of Petitioner's arguments. (*Id.* at Page ID # 573-580.) In his Merits Brief, Respondent incorporates those arguments and additionally asserts that any mistake the trial court

may have made during *voir dire* when defining "circumstances" the trial court remedied during sentencing-phase instructions. There, Respondent contends, the trial court adequately and precisely defined "circumstances" for the jury. (ECF No. 101, at Page ID # 2479.)

The Ohio Supreme Court rejected Petitioner's claim on the merits, albeit by referencing prior decisions and incorporating their reasoning rather than setting forth the court's reasoning anew. Contrary to Petitioner's assertion, the Ohio Supreme Court's modus operandi was sufficient to constitute an adjudication on the merits that invokes *§2254(d)* review. If *§ 2254(d)* does not require a state court to set forth any reasoning in order for its decision to be deemed an adjudication on the merits within the meaning of *§ 2254(d)*, *see* *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 785, 178 L. Ed. 2d 624 (2011)*, then it stands to reason that the Ohio Supreme Court's decision that rejected Petitioner's constitutional challenges to Ohio's death penalty by citing to prior decisions and incorporating their reasoning surely qualifies **[*283]** as an adjudication on the merits. To the extent that Petitioner raised his challenges on direct appeal, the Ohio Supreme Court considered and rejected them on the merits. This Court accordingly reviews the Ohio Supreme Court's decision through the prism of *§ 2254(d)* for reasonableness.

Petitioner entreats that "death is different and constitutional principles sometimes shift" in response to his recognition that the Sixth Circuit has rejected constitutional challenges to Ohio's death penalty. (ECF No. 93, at Page ID # 2276.) Having considered anew every one of Petitioner's arguments, however, this Court reaches the same conclusion that Respondent pleads and Petitioner concedes: the Sixth Circuit, relying on and applying United States Supreme Court precedent, has squarely rejected each of Petitioner's arguments. Further, having considered Petitioner's specific arguments against the backdrop of the Sixth Circuit's decisions, the Court is not persuaded that Petitioner's arguments represent or portend a shift in constitutional principles sufficient to believe that any of Petitioner's arguments warrant habeas corpus relief.

The Court below lists each of Petitioner's arguments, followed by the Sixth **[*284]** Circuit decisions that considered and rejected those arguments.

> (A) Ohio's capital statutory scheme provides for a sentencing recommendation by the same jury which determines the facts at trial if the accused is found guilty. This procedure violates the defendant's rights to effective assistance and to a fair trial before an impartial jury as guaranteed by the Constitution. *See* *Lockhart v. McCree, 476 U.S. 162, 188, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986)* (Marshall, J., dissenting).

(Petition, ECF No. 14-18, at ¶ 885.) The Sixth Circuit has upheld Ohio's bifurcated system using the same jury to determine guilt at the trial phase and the accused's sentence at the mitigation phase. *Williams v. Bagley, 380 F.3d 932, 966 (6th Cir. 2004)*; *Cooey v. Coyle, 289 F.3d 882, 924 (6th Cir. 2002)* ("While the Supreme Court has approved schemes that allow the determination of aggravating circumstances at the sentencing phase rather than at the trial phase, it has certainly not held that such a separation is constitutionally required." (discussing *Lowenfield v. Phelps, 484 U.S. 231, 244, 246, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988))*); *Buell v. Mitchell, 274 F.3d 337, 367 (6th Cir. 2001)* (including Ohio's bifurcated guilt phase/sentencing phase trial as one of several procedures that reduce the likelihood of arbitrary and capricious imposition of the death penalty); *Coleman v. Mitchell, 268 F.3d 417, 443 (6th Cir. 2001)*.

> (B) The language contained in the Ohio death penalty statutory scheme: "that the aggravating circumstances ... outweigh the mitigating factors" violates **[*285]** the *Eighth* and *Fourteenth Amendments to the United States Constitution* by inviting arbitrary and

> capricious jury decisions. These constitutional guarantees require that the aggravating circumstances must more than merely "outweigh" the mitigating factors in imposition of the death penalty.
> . . .
>
> Additional problems exist because the mitigating circumstances are vague. The jury must be given "specific and detailed guidance" and be provided with "clear and objective standards" of their sentencing discretion to be adequately channeled, according to *Gregg* and *Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)*. Without such guidance, a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

(Petition, ECF No. 14-18, at ¶¶ 898, 900.) Relying on Supreme Court precedent, the Sixth Circuit has repeatedly concluded that the Constitution does not require a capital sentencing jury to set forth specific findings supporting its decision and that Ohio's capital statutory scheme provides sufficient guidance to the sentencing jury in its weighing of aggravating circumstances and mitigating factors. *Williams, 380 F.3d at 966*; *Buell, 274 F.3d at 368-69*; *Coleman, 268 F.3d at 443* ("We find the detailed guidance on aggravating circumstances under *§ 2929.04(A)* to be distinguishable from the ill-defined sentencing scheme in *Godfrey*.").

Within this argument, Petitioner **[*286]** also challenges the fact that "[*Ohio Revised Code] § 2929.03(D)(1)* specifically instructs the jury to weigh the 'testimony and evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing.'" (Petition, ECF No. 14-18, at ¶ 904.) According to Petitioner, "[t]he term 'nature and circumstances' loses its 'common-sense core of meaning' as the result of *R.C. §§ 2929.03(D)(1)*." (*Id.* at ¶ 907.) The Sixth Circuit has upheld the "nature and circumstances" component of Ohio's capital statutes, albeit in the context of a slightly different argument. In *Cooey*, the petitioner essentially challenged the anomaly of the fact that *Ohio Revised Code § 2929.03(D)(1)* requires the sentencer to consider the "nature and circumstances" of the aggravating circumstances, while *Ohio Revised Code § 2929.04(B)* requires the sentencer to consider the "nature and circumstances of the offense" for purposes of mitigation. The Sixth Circuit rejected that challenge, explaining as follows:

> The only conceivable way for a court properly to weigh all the aggravating and mitigating circumstances is to take a hard look in both instances at the "nature and circumstances of the offense." We cannot understand how the court's analysis could possibly become "unconstitutionally **[*287]** vague" by looking at the nature and circumstances of the offense in determining both aggravating and mitigating circumstances. We cannot even imagine a constitutional violation here.

Cooey, 289 F.3d at 927-28. Other lower court decisions further persuade this Court that Petitioner's "nature and circumstances" challenge is foreclosed by United States Supreme Court precedent and would fail in the Sixth Circuit. In *Smith v. Bradshaw, No. 1:04-CV-694, 2007 U.S. Dist. LEXIS 71968, 2007 WL 2840379, at *31-32 (N.D. Ohio Sep. 27, 2007)*, the district court faced an argument challenging as unconstitutional the fact that Ohio's statute permits the sentencer to consider the nature and circumstances as an aggravating circumstances when the sentencer should consider the nature and circumstances only as a mitigating factor. The district court disagreed, explaining as follows:

> This claim cannot prevail. The United States Supreme Court has held that, "the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" *Tuilaepa v. California, 512 U.S. 967,*

> *979-80, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994)*(quoting *Zant v. Stephens, 462 U.S. 862, 875, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)*(further citations omitted). Thus, because Ohio's death penalty scheme requires that the fact finder limit those eligible for the death penalty by **[*288]** requiring it to find the existence of at least one aggravating circumstance set forth in *§ 2929.04(A)* during the culpability phase of trial, the Ohio scheme complies with the constitutional requirements as proscribed by the Supreme Court.

*2007 U.S. Dist. LEXIS 71968, [WL] at *32*. Similarly, in *Moore v. Mitchell, No. 1:00-cv-023, 2007 U.S. Dist. LEXIS 96523, 2007 WL 4754340 (N.D. Ohio Feb. 15, 2007)*, the district court stated:

> Moore challenges the constitutionality of *Ohio Rev. Code §§ 2929.03(D)(1)* and *2929.04* as being vague. (Petition, Doc. No. 29 at 98.) In his first portion of this claim he asserts that the reference to "the nature and circumstances of the aggravating circumstance" incorporates these factors to be weighed in favor of death. *Id*. at 102. This claim has been previously rejected. *Cooey v. Coyle, 2000 U.S.App LEXIS 38700 (6th Cir. 2000)*. ***

*2007 U.S. Dist. LEXIS 96523, [WL] at *91*. *See also Hand v. Houk, No. 2:07-CV-846, 2011 U.S. Dist. LEXIS 69001, 2011 WL 2446383, at *112 (S.D. Ohio Apr. 25, 2011)* ("Mr. Hand claims that the Ohio death penalty statutes are unconstitutionally vague because they permit the jury to consider the statutory mitigating factor of the nature and circumstances of the offense as an aggravator. The United States Supreme Court has previously rejected this argument. *Tuilaepa, 512 U.S. at 976*.")

This sub-part of Petitioner's seventeenth ground for relief does not present a Constitutional violation.

> (C) *O.R.C. §§ 2929.022*, *2929.03* and *2929.04* and *Ohio R. Crim. P. 11(C)(3)* place an unconstitutional burden of the defendant's right to a jury trial **[*289]** under the *Sixth* and *Fourteenth Amendments to the United States Constitution* and his rights to be free from compulsory self-incrimination under the *Fifth* and *Fourteenth Amendments to the United States Constitution*.

(Petition, ECF No. 14-18, at Page ID # 142-143.) The Sixth Circuit has consistently held that Ohio's statutory scheme at issue, which permits a trial court to dismiss death penalty specifications when an accused agrees to waive jury trial and plead guilty, does not unduly burden the accused's right to trial by jury. *Williams, 380 F.3d at 966*; *Wickline v. Mitchell, 319 F.3d 813, 824 (6th Cir. 2003)* ("the Supreme Court has found that pleas are not invalid simply because of the possibility of the death penalty" (citing *Brady v. United States, 397 U.S. 742, 751, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)*)); *Cooey, 289 F.3d at 924-25*.

> (D) *O.R.C. §2929.03* fails to provide a meaningful basis for distinguishing between life and death sentences, as it does not explicitly require the jury, when it recommends life imprisonment, to specify the mitigating circumstances found, or to identify its reasons for such sentence. This denies the accused his rights under *O.R.C. §2929.03(A)*, the Constitution.

(Petition, ECF No. 14-18, at Page ID # 145-146.) The Sixth Circuit has made clear that the absence of a requirement that the sentencer identify specific findings when it imposes life imprisonment instead of a death sentence does not render Ohio's death penalty statutes unconstitutional or undermine the adequacy of appellate review. **[*290]** *Smith v. Mitchell, 567 F.3d 246, 261 (6th Cir. 2009)*; *Buell, 274 F.3d at 368-69*.

> (E) *O.R.C. §§ 2929.021*, *2929.03* and *2929.05* fail to assure adequate appellate analysis of arbitrariness, excessiveness and disproportionality of death sentences and the Supreme Court of Ohio fails to engage in a

> level of analysis that ensures against arbitrary death sentencing.

(Petition, ECF No. 14-18, at Page ID # 147.) Asserting that meaningful appellate review "is a precondition to a finding that a state death penalty system in constitutional," Petitioner assails the adequacy of appellate review in Ohio, both for incomplete reporting of data or findings in cases where death was sought but not obtained and what Petitioner characterizes as "illusory" review by the Ohio Supreme Court for excessiveness, proportionality and arbitrariness. (*Id*. at Page ID # 148-149.) The Sixth Circuit has consistently rejected challenges to the constitutionality of Ohio's appellate review in capital cases. *Smith, 567 F.3d at 261* (rejecting challenge that appellate review is undermined by inadequate data reporting and the Ohio Supreme Court's cursory appropriateness review); *Williams, 380 F.3d at 961-62* (approving of appellate courts' appropriateness review pursuant to *Ohio Revised Code § 2929.05(A)*); *Cooey, 289 F.3d at 928* (same); *Buell, 274 F.3d at 367* (listing "meaningful appellate review" as one of several capital sentencing procedures reducing the **[*291]** likelihood of arbitrary and capricious imposition of the death penalty in Ohio).

> (F) The appellate review provision of *O.R.C. §2929.05* fails to specifically require inquiry and findings regarding arbitrariness, passion, or prejudice, and thus is constitutionally inadequate under the *Eighth* and *Fourteenth Amendments to the United States Constitution*.

(Petition, ECF No. 14-18, at Page ID # 158.) As the Court noted above, the Sixth Circuit has repeatedly rejected *Eighth* and *Fourteenth Amendment* challenges to *Ohio Revised Code § 2929.05*. Further, the Court is not persuaded that Petitioner's specific arguments, to the extent they are novel and have not been squarely considered by the Sixth Circuit, are sufficiently compelling to prompt the Sixth Circuit to reconsider its repeated approvals of Ohio's capital appellate review.

> (G) The Ohio death penalty statute impermissibly mandates imposition of the death penalty and precludes a mercy option in the absence of mitigating evidenced or when aggravating circumstances outweigh mitigating factors. The statute also fails to require a determination that death is the appropriate punishment.

(Petition, ECF No. 14-18, at Page ID # 159.) The Sixth Circuit has rejected the argument that Ohio's death penalty is unconstitutional for failing to have a "mercy option" that would allow **[*292]** the sentencer to impose life even in the absence of mitigating factors or where the aggravating circumstance(s) outweighed the mitigating factors. *Williams, 380 F.3d at 964-65*; *Buell, 274 F.3d at 367-69*. Further, in addition to the numerous decisions this Court has highlighted approving of the layers of appropriateness determinations that Ohio's death penalty statute provides for, the Court notes that the Sixth Circuit has also rejected the specific argument that Ohio's death penalty is unconstitutional for failing to require proof that death is the only appropriate penalty. *Greer v. Mitchell, 264 F.3d 663, 691 (6th Cir. 2001)*.

> (H) *O.R.C. §§ 2929.03*, *2929.04* and *2929.05* violate the *Eighth* and *Fourteenth Amendments to the United States Constitution* by failing to require the jury to decide the appropriateness of the death penalty.

(Petition, ECF No. 14-18, at Page ID # 162.) Petitioner has not cited, and the Court is not aware of, any authority supporting his contention that the Constitution requires the jury to decide the "appropriateness" of the death penalty. In any event, to the extent the Constitution does impose such a requirement, it is absurd to suggest that Ohio's capital scheme does not satisfy it. As the Court set forth above, the Sixth Circuit has approved of the several layers of appropriateness review embedded in Ohio's death penalty scheme. Further, the Sixth Circuit, **[*293]** relying on Supreme Court precedent, has approved of capital schemes that narrow the class of offenders eligible

for the death penalty through statutory aggravating factors. Finally, the Sixth Circuit has unfailingly found constitutional Ohio's system of weighing aggravating circumstances against mitigating factors to achieve individualized sentencing. In view of the foregoing, the Court finds Petitioner's instant argument unpersuasive. That is, when a jury determines beyond a reasonable doubt that the aggravating circumstance(s) the accused was found guilty of committing outweigh or outweighs any mitigating factors and recommends that the accused be sentenced to death, the jury has essentially determined that the death penalty is appropriate. Further, as this Court has already noted, the absence of specific findings (purporting to set forth the jury's "appropriateness" determination) does not undermine the adequacy of appellate review of the jury's sentencing decision.

> (I) The Ohio death penalty scheme permits imposition of the death penalty on a less than adequate showing of culpability by failing to require a conscious desire to kill, premeditation, or deliberation as the culpable **[*294]** mental statue, by denying lesser offense instructions and by allowing affirmance of capital convictions on the basis of unconstitutional presumptions respecting the presence of an intent to kill.

(Petition, ECF No. 14-18, at Page ID # 165.) Petitioner's argument fails because the Sixth Circuit has repeatedly upheld as constitutional the fact that Ohio's capital scheme permits imposition of the death penalty without a showing of a "specific intent to kill." *Coleman, 268 F.3d at 442*; *Greer, 264 F.3d at 690-91* ("The Supreme Court has held that such a conscious desire to kill is not required in order to impose the death penalty." (citing *Tison v. Arizona, 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)*)).

> (J) The standard of burden of proof required for capital cases should be proof beyond all doubt. The jury should be instructed during both phases that the law requires proof beyond all doubt of all the required elements. Most importantly, death cannot be imposed as a penalty except upon proof beyond all doubt of both the crime itself and the fact that the aggravating circumstances outweigh the mitigating circumstances.

(Petition, ECF No. 14-18, at ¶ 1020.) Neither the Supreme Court nor the Sixth Circuit has ever suggested, much less held, that the burden of proof for capital cases should be "proof beyond **[*295]** all doubt." Lower courts within the Sixth Circuit, not surprisingly, have rejected this identical claim. *See, e.g., Cowans v. Bagley, 624 F. Supp. 2d 709, 823 (S.D. Ohio 2008)*; *Morales v. Coyle, 98 F. Supp. 2d 849, 883 (N.D. Ohio 2000)*. Petitioner's argument thus finds no support in controlling or persuasive case law and the Court cannot find anything about Petitioner's arguments that warrants reconsideration of the matter.

> (K) The State of Ohio should have the burden of proving the absence of mitigating factors beyond a reasonable doubt because it will prevent arbitrary decisions in close cases. The accused cannot be obliged to bear the burden of proving the existence of mitigating factors. If the defense is so obligated, then in all close cases, where aggravating and mitigation are equally balanced, the jury would be required to recommend death. This statute must not be interpreted in a manner which allows the State to "win ties." This would be contrary to the requirements of the Constitution insofar as it mandates respect for humanity and the greater need for reliability as to the appropriateness of the death penalty. *See Woodson, 428 U.S. at 305*; *Lockett, 438 U.S. at 604*; and *Mullaney v. Wilbur, 421 U.S. 684, 697-701, 703-704, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)*.

(Petition, ECF No. 14-18, at ¶ 1036.) The Sixth Circuit has repeatedly rejected this exact argument. *Cooey, 289 F.3d at 923*; *Buell, 274 F.3d at 367-68*; *Greer, 264 F.3d at 691*.

> (L) In order to satisfy constitutional

> requirements on individualized **[*296]** sentencing, Ohio adopted a "catch-all mitigating factor. O.R.C. § 2929.04(B)(7) permits introduction of "any other factors that are relevant to the issue of whether the offender should be sentenced to death."
>
> The problem with this definition is that it permits consideration of non-statutory aggravating circumstances. The plain wording of the statute instructs the jury to consider evidence relevant to "death."

(Petition, ECF No. 14-18, at ¶¶ 1042-1043.) Relying on numerous Supreme Court decisions, the Sixth Circuit squarely overruled this challenge in *Cooey, 289 F.3d at 924*.

> (M) Ohio's statutory nature and circumstances mitigating factor is improperly used as a non-statutory aggravating circumstance.

(Petition, ECF. No. 14-18, at Page ID # 177.) Petitioner essentially argues that because "nature and circumstances" is defined so vaguely and because the jury is given such guidance-less discretion in sentencing, *Ohio Revised Code § 2929.04(B)* setting forth Ohio's mitigation scheme is unconstitutional. Petitioner's argument ignores several critical truths. First, the Sixth Circuit has approved of the inclusion, definition, and operation of *§ 2929.04(B)*'s "nature and circumstances" component in Ohio's capital sentencing scheme. *See, e.g.*, *Cooey, 289 F.3d at 927*. Further, the Sixth Circuit has repeatedly **[*297]** upheld the weighing process in Ohio's capital sentencing scheme. *See, e.g.*, *Coleman, 268 F.3d at 442-43*. Finally, it bears noting that the Supreme Court has held that 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, 209-10 (6th Cir. 2004)* (citing *Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)*; *see also Durr v. Mitchell, 487 F.3d 423, 442 (6th Cir. 2007)*; *Slagle v. Bagley, 457 F.3d 501, 521 (6th Cir. 2007)*. The Court is satisfied that Petitioner's argument is foreclosed by Supreme Court and Sixth Circuit precedent.

Petitioner expands upon this argument in his Memorandum in Support, purporting to demonstrate "that the trial court improperly instructed the jury to consider the nature and circumstance as aggravation instead of mitigation as required by the Ohio death penalty statute." (ECF No. 93, at Page ID # 2277.) Petitioner proceeds to list jurors who, during individual *voir dire* and/or sentencing, were instructed by the trial court to "consider the nature and circumstances of the aggravating circumstance was aggravation, not mitigation." (*Id.* at Page ID # 2277-2278.) Petitioner's argument misses the mark in several regards. First, any misstatement on the part of the trial court during individualized *voir dire* was harmless in view of the fact that the mitigation-phase instructions made clear that Petitioner **[*298]** stood convicted of a single aggravating circumstance and that the "nature and circumstances of the offense" were to be considered only in mitigation. (Tr. Vol. VII, at 1185. 1187, 1188. 1189, 1190, 1191, 1192, 1193.)[13]

For example, four pages into its sentencing-phase instructions, the trial court stated unambiguously:

> There's only one aggravating circumstance that must be weighed in favor of imposition of a death penalty, the aggravated murder committed by a prisoner in a detention facility. *Neither the murder itself nor the nature and circumstances of the murder nor any other factors or circumstances can be considered as aggravating circumstances.*

(*Id.* at 1189 (emphasis added).)

Petitioner points to no evidence that his jury construed the nature and circumstances of his

[13] The Court recognizes that the two of the three verdict forms, as read to the jurors by the trial court, listed aggravating circumstances in the plural rather than the singular. (Tr. Vol. VII, at 1196-97.) The Court is not persuaded, however, that that error was significant enough to undermine the sentencing-phase instructions, which were accurate.

offense in aggravation as opposed to mitigation. That said, any possible ambiguity to **[*299]** which Ohio's capital scheme gives rise with respect to the sentencer's consideration of the "nature and circumstances" (or the trial court's instructions setting forth that scheme) was cured by the Ohio Supreme Court's independent weighing of the aggravating circumstance and mitigating factors. *Moore v. Mitchell, 708 F.3d 760, 798 (6th Cir. 2013)*; *see also Baston v. Bagley, 420 F.3d 632, 637-38 (6th Cir. 2005)*; *Fox v. Coyle, 271 F.3d 658, 667 (6th Cir. 2001)*. Couple the foregoing with the Sixth Circuit's emphatic admonition that the only way the sentencer can properly weigh aggravating circumstances and mitigating factors is to take a hard look at the nature and circumstances of the offense, *Cooey, 289 F.3d at 927*, as well as the fact that the Supreme Court has held that consideration of a non-statutory aggravating circumstance does not violate the Constitution, *see, e.g., Smith, 348 F.3d at 209-10*, and Petitioner's claim fails.

> (N) The Ohio death penalty scheme violate[s] Article VI of the United States Constitution and various international laws including, but not limited to, the Organization of American States Treaty, the International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man.

(Petition, ECF No. 14-18, at ¶ 1051.) The Sixth Circuit has repeatedly rejected this and similar arguments. *Coleman, 268 F.3d at 443*; *Greer, 264 F.3d at 691*. In *Buell*, the Sixth Circuit addressed the issue at length, squarely rejecting the myriad **[*300]** of arguments that Petitioner raises here. *274 F.3d at 370-76*.

For the foregoing reasons, the Court concludes that Petitioner's seventeenth ground is without merit and that the Ohio Supreme Court's decision rejecting it was fully in line with clearly established federal law. The Court accordingly **DENIES** as without merit ground seventeen.

The Court further concludes that Petitioner's claim does not satisfy the showing required by *28 U.S.C. § 2253(c)(2)* for a certificate of appealability. Because Sixth Circuit case law so clearly forecloses relief on Petitioner's constitutional challenges to Ohio's death penalty scheme, the issue is not debatable among jurists of reason. This Court is of the view that it is for the Sixth Circuit to decide whether it should revisit any of these challenges.

Ground Eighteen: Cumulative Error.

In his eighteenth ground for relief, Petitioner asserts that "[t]he cumulative impact of the ineffective assistance of counsel, prosecutorial misconduct, trial court errors, invalid jury instructions, inadequate state remedies, and other errors all worked to render the convictions and sentences unreliable." (Petition, ECF No. 14-19, at ¶ 1073.) Petitioner explains that "'errors that might not be so prejudicial as **[*301]** to amount to a deprivation of due process when considered alone ... may cumulatively produce a trial setting that is fundamentally unfair.'" (*Id.* at ¶ 1074 (quoting *United States v. Hernandez, 227 F.3d 686, 697 (6th Cir. 2000)*).)

In his Return of Writ, Respondent argues first that Petitioner's claim is barred by procedural default, due to Petitioner's failure to raise it in any state court. (ECF No. 21, at Page ID # 581.) Respondent further argues that Petitioner's claim is meritless, asserting that "[i]t has never been identified as a cognizable claim in habeas corpus by the United States Supreme Court." (*Id.*)

Citing *Chambers v. Mississippi, 410 U.S. 284, 298, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)*, Petitioner asserts in his Memorandum in Support that "if this Court does not grant relief on any individual claims, this Court must examine all of the errors in this case as a whole to evaluate whether Petitioner was denied a fundamentally fair trial and thus should receive either a new trial or a new sentencing phase." (ECF No. 93, at Page ID # 2281.) Petitioner then provides a list of decisions establishing, in his view, the Sixth Circuit's support

for cumulative error review. Petitioner concludes by urging the Court to reject Respondent's assertion that cumulative error is not cognizable in habeas corpus and instead "follow the legal **[*302]** principle flowing from the precedent the Supreme Court set thirty-five years ago, in *Chambers v. Mississippi*, where the Court conducted, as noted above, a cumulative analysis of the harm of all errors that took place." (*Id*. at Page ID # 2282.)

In its September 30, 2005 Opinion and Order addressing procedural default, this Court stated that it would consider the cumulative impact of any claims not procedurally defaulted where constitutional error had been demonstrated. (ECF No. 39, at Page ID # 168.) Fatal to Petitioner's claim, however, is that the Sixth Circuit has made clear that cumulative error claims are not cognizable in habeas corpus. *Williams v. Anderson, 460 F.3d 789, 816 (6th Cir. 2006)*; *see also Sheppard v. Bagley, 657 F.3d 338, 348 (6th Cir. 2011)*; *Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005)*; *Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002)*. This Court is bound by that law but even if the law were otherwise, Petitioner could not prevail. This Court found no constitutional error in any of Petitioner's preserved claims so there is no impact to cumulate. *See Baze v. Parker, 371 F.3d 310, 330 (6th Cir. 2004)*; *Moceri v. Stovall, No. 2:06-CV-15009, 2008 U.S. Dist. LEXIS 90969, 2008 WL 4822063, at *16 (E.D. Mich. Nov. 4, 2008)*; *Williams v. Lavigne, No. 2:04-cv-114, 2006 U.S. Dist. LEXIS 61827, 2006 WL 2524220, at *1 (W.D. Mich. Aug. 30, 2006)*. The Court **DENIES** Petitioner's eighteenth ground for relief as not cognizable and in the alternative as without merit.

For the same reasons, the Court concludes that Petitioner's claim does not satisfy the showing required by *28 U.S.C. § 2253(c)(2)* for a certificate **[*303]** of appealability.

V. Reconsideration of Postconviction Procedural Default Decision

On September 30, 2005 and February 10, 2006, this Court issued two decisions concluding that many of Petitioner's claims were barred by procedural default, due to Petitioner's failure to litigate an appeal of the trial court's decision in postconviction rejecting Petitioner's claims. (ECF Nos. 39, 43.) As the Court explained in its September 30, 2005 Opinion and Order:

> [A]fter being granted several extensions of time, as well as leave to file a brief in excess of twenty pages, petitioner's postconviction counsel, John J. Gideon, apparently failed to file his appellate brief, or a request for an extension of time, within the time permitted by the appellate court. Accordingly, the appellate court issued an order on September 10, 2001, directing counsel for petitioner to show cause why the appeal should not be dismissed. (App. Vol. VII, at 42). On September 24, 2001, counsel for petitioner responded to the show cause order, explaining that he had never received the appellate court's entry dated June 25, 2001 granting him leave to file a brief in excess of twenty pages, because that entry, according to counsel, was sent to him at the **[*304]** Ohio Attorney General's Office, though counsel for petitioner did not work at the Ohio Attorney General's Office. (App. Vol. VII, at 44). On October 9, 2001, the appellate court issued an entry in response to counsel for petitioner's "show cause" brief directing him to file his appellate brief before October 15, 2001. (App. Vol. VII, at 51.) Counsel for petitioner apparently failed again to file his appellate brief.
>
> On January 10, 2002, the appellate court dismissed petitioner's appeal with prejudice. (App. Vol. VII, at 53.)

(ECF No. 39, at Page ID # 1531-1532.) Subsequently, the Court further elaborated that:

> Petitioner explains that at some point between the initiation of his appeal and the appellate court's dismissal of his appeal, Gideon suffered a mental breakdown that left him incapable of representing petitioner and other clients, incapable of communicating with petitioner

> and others, and incapable of seeking assistance to protect petitioner's rights. Petitioner notes that Gideon was sanctioned for misconduct for this and other dereliction of duties.

(*Id.* at Page ID # 1536.) After considering at length and with the utmost thought Petitioner's detailed arguments for why the default should be excused either because of Gideon's **[*305]** ineffectiveness or under the "actual innocence" exception, this Court confidently albeit ruefully rejected the arguments and found Petitioner's claims to have been procedurally defaulted. In so doing, the Court hastened to make clear that it was "not unsympathetic to petitioner's plight." (*Id.* at Page ID # 1541.) The Court recognized that Petitioner was "faced with the forfeiture of numerous constitutional claims due to a clear dereliction of duties on the part of the attorney appointed to represent him during his postconviction appeal." (*Id.*) The Court also recognized, however, that

> [P]etitioner's arguments urging this Court to find no support in controlling case law. Petitioner was entitled to counsel in postconviction as a matter of Ohio statutory law, not because of constitutional compulsion. As a result, his postconviction counsel was not bound by minimum guarantees of effectiveness. In the absence of authority holding that there is a constitutional right to counsel in state postconviction proceedings, whether under the *Eighth Amendment* or as a matter of due process, this Court, however sympathetic it might be, cannot excuse the procedural default that occurred when petitioner's counsel failed to file an **[*306]** appellate brief resulting in the with-prejudice dismissal of his state postconviction appeal.

(*Id.*)

Petitioner urges this Court to reconsider its procedural default decision. Petitioner premises his request on several bases, the first of which is *28 U.S.C. § 2254(b)*. (ECF No. 93, at Page ID # 2282.) That section provides as follows:

> (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.*

28 U.S.C. § 2254(b) (emphasis added). Petitioner argues that his being saddled with a procedural default due to the failure of his postconviction counsel to file an appellate brief falls within (b)(ii). Petitioner asserts that that section "reflects a codification of the Supreme Court's recognition of the importance of counsel in post-conviction, especially capital cases." (ECF No. 93, at Page ID # 2282.)

Petitioner cites no binding authority or even advisory committee notes supporting **[*307]** his argument. In fact, this Court has found that cases in which litigants have raised a *§ 2254(b)(1)(B)(ii)* defense to excuse exhaustion demonstrate how exacting the standard is and how rarely the defense prevails. *Beazley v. Johnson, 242 F.3d 248, 271 (5th Cir. 2001)* (rejecting argument that appointment of over-burdened counsel rendered collateral process ineffective sufficient to excuse raising claims for the first time in habeas corpus); *Balentine v. Quarterman, 324 F. App'x 304, 306 (5th Cir. 2009)* (finding that ineffective assistance of state collateral counsel cannot excuse default of claims in collateral proceeding); *McCary v. Zavaras, Civil Action No. 10-cv-01035-BNB, 2010 U.S. Dist. LEXIS 67670, 2010 WL 2400664, at *2-3 (D.Colo. Jun. 15, 2010)* (rejecting argument that failure of trial and appellate counsel to present certain evidence excused requirement that petitioner exhaust claims before raising them in federal habeas corpus). The Court recognizes that these cases involve distinguishable factual scenarios than what Petitioner presents here but

they demonstrate nonetheless that the circumstances under which a *§ 2254(b)(1)(B)(ii)* claim prevails are rare. Further, the fact remains that Petitioner fails to cite to any binding authority supporting his interpretation of *§ 2254(b)(1)(B)(ii)*.

This Court takes guidance from *Shabazz v. Louisiana, No. 3:14-cv-00290-BAJ-RLB, 2014 U.S. Dist. LEXIS 97823, 2014 WL 3547057 (M.D. La. Jul. 17, 2014)*, where a district court recently explained the difficulty of satisfying **[*308]** *§ 2254(b)(1)(B)(ii)*'s stringent standard. That court opined that the "exceptional circumstances" necessary for excusing exhaustion pursuant to *(B)(ii)* "may exist, for example, when the state system is found to have inordinately and unjustifiably delayed a review of a petitioner's claims so as to impinge upon his due process rights." *2014 U.S. Dist. LEXIS 97823, [WL] at *2* (citation omitted). The court further explained that "[i]t is necessary, however, that the delay in such instance be found to be wholly and completely the fault of the State." *Id. Shabbazz* is informative for several reasons. First, although the attorney misconduct that doomed Petitioner's postconviction claims appears, at first glance, to constitute "exceptional circumstances" warranting federal court interference, the fact remains that the blunder may not have been Petitioner's fault but, having occurred in a collateral proceeding in which Petitioner was not constitutionally entitled to counsel, neither was it the fault of the State.

Further, it is difficult to find that the instant circumstances "impinged" on Petitioner's due process rights, as *Shabazz* described, where, as here, this Court has thoroughly examined and taken into account the evidence that Petitioner presented **[*309]** and developed during postconviction proceedings in considering and rejecting the claims of ineffective assistance of trial counsel that were properly before this Court. The Court explained in more detail, when it addressed Petitioner's claim of ineffective assistance for the failure to investigate and present a defense, that this Court would consider not only the trial record but also *all* of the evidence that Petitioner presented and developed in postconviction. Having done so, the Court is satisfied as to the constitutionality of Petitioner's death sentence, both factually and legally, and is not persuaded that the circumstances that befell Petitioner, however regrettable, satisfy *28 U.S.C. § 2254(b)(1)(B)(ii)* sufficient to warrant reversal of this Court's procedural default decision.

Before leaving this issue, the Court would be remiss if it did not take into account the decisions of *Maples v. Thomas, 132 S.Ct. 912, 181 L. Ed. 2d 807 (2012)*, and *Martinez v. Ryan, 132 S.Ct. 1309, 182 L. Ed. 2d 272 (2012)*. At the time of its procedural default decision, the Court was unable to accept the alleged ineffectiveness of Petitioner's postconviction appellate attorney as cause to excuse Petitioner's procedural default during his postconviction appeal because the Supreme Court had expressly held that there was no constitutional right **[*310]** to counsel in postconviction. In *Martinez v. Ryan*, however, the Supreme Court held for the first time that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel if, in the initial-review collateral proceeding (postconviction review Ohio), there was no counsel or counsel in that proceeding was ineffective." *132 S.Ct. at 1320*. *Martinez* does not, however, bolster Petitioner's motion for reconsideration of the Court's procedural default decision because *Martinez* is expressly limited to the performance of counsel during the initial postconviction step—not the performance of counsel during a postconviction appeal. *Martinez, 132 S.Ct. at 1320* ("The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts."

Whatever support *Martinez* lends to Petitioner's position that the Supreme Court recognizes the importance of effective representation in postconviction, Petitioner got the benefit that

Martinez sought to protect: effective representation by initial-review collateral **[*311]** counsel to secure review of substantial claims of ineffective assistance of counsel raised in that initial-review collateral proceeding. The Supreme Court in *Martinez* noted that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id. at 1316*. "The same is not true," the Supreme Court continued, "when counsel errs in other kinds of postconviction proceedings." *Id*. The Supreme Court explained the distinction as follows:

> While counsel's errors in these proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, *or the trial court in an initial-review collateral proceeding*. (emphasis added.)

Id. (citation omitted). Here, Petitioner had the benefit of counsel during the initial stage of Petitioner's postconviction action who *did* present claims of ineffective assistance of trial counsel. That counsel developed, presented, and argued an enormous amount of evidence in support of those claims. And the trial court issued a thorough 113-page decision considering Petitioner's claims and evidence. **[*312]** This Court afforded Petitioner the same consideration. In other words, Petitioner got the benefit *Martinez* sought to ensure.

Several months prior to *Martinez*, the Supreme Court held in *Maples v. Thomas* that complete abandonment by postconviction counsel may constitute "extraordinary circumstances beyond [a petitioner's] control" sufficient to satisfy the "cause" component of the cause-and-prejudice test to excuse procedural default. *132 S.Ct. at 923-24*. *Maples* involved a situation where two attorneys from New York had volunteered to represent an inmate in Alabama, but who subsequently left their firm without advising the Alabama court or ensuring that other counsel from their firm took over, thereby causing the inmate to miss critical state appellate deadlines. The Supreme Court in *Maples* clarified, however, as follows:

> Negligence on the part of a prisoner's postconviction attorney does not qualify as "cause." *Coleman, 501 U.S. at 753, 111 S.Ct. 2546*. That is so, we reasoned in *Coleman*, because the attorney is the prisoner's agent, and under "well-settled principles of agency law," the principle bears the risk of negligent conduct on the part of his agent. *Id. at 753-754, 111 S.Ct. 2546*. *** Thus, when a petitioner's postconviction attorney misses a filing deadline, the **[*313]** petitioner is bound by the oversight and cannot rely on it to establish cause. *Coleman, 501 U.S., at 753-754, 111 S.Ct. 2546*. We do not disturb that general rule.

Id. at 922.

The Court is not persuaded that Petitioner can demonstrate "cause" under *Maples* because the conduct of Petitioner's postconviction appellate counsel was more akin to neglect, however egregious, than to abandonment. In *Mays v. Soto, No. CV 98-3489 CAS (MRW), 2014 U.S. Dist. LEXIS 120161, 2014 WL 4258256 (C.D. California Jul. 10, 2014)*, a district court in California recently rejected a *Maples*-based claim of "cause" under circumstances similar to Petitioner's in this case. In *Mays*, after the state appellate court affirmed the petitioner's convictions on direct appeal, the petitioner's attorney filed an untimely petition for review in the state supreme court. *2014 U.S. Dist. LEXIS 120161, [WL] at *1*. The attorney then filed an application for relief from default and sought permission to file the late petition, both of which the state supreme court denied. *Id*. The district court rejected the petitioner's *Maples*-based cause argument as follows:

> In the present case, the Court has no basis to find that Petitioner's appellate lawyer "abandoned" him during the state proceedings. The lawyer apparently missed an important court deadline that caused Petitioner to lose his

> right to review of his conviction **[*314]** in the state supreme court. However, the lawyer recognized that error and sought to rectify it by filing a request for relief with that court. The lack of success of that request is insufficient to establish that counsel abandoned Petitioner under *Maples* and *Moorman*. It also fails to establish that the lawyer was "not operating as his agent" in the state case. *Holland, 130 S.Ct. at 2568*.

*2014 U.S. Dist. LEXIS 120161, [WL] at *3*.

As in *Mays*, the failure of Petitioner's postconviction appellate attorney to file an appellate brief caused Petitioner to lose appellate review of claims he had raised in postconviction. Similar to *Mays*, within days of the Ohio court of appeals' decision denying Petitioner's postconviction appeal for the failure of Petitioner's postconviction appellate attorney to prosecute the appeal, the Ohio Public Defender stepped in and attempted to rectify the error. (ECF No. 39, at Page ID # 1512.) And as in *Mays*, the Ohio Public Defender failed to succeed in either the court of appeals or the Ohio Supreme Court. (*Id*. at Page ID # 1513, 1514.) The only notable difference between *Mays* and Petitioner's case is the fact that in Petitioner's case, it was new appellate counsel, rather than original appellate counsel, who sought to rectify **[*315]** the error that original appellate counsel made. This Court cannot discern a substantive effect or practical distinction from that difference sufficient to make *Maples* applicable to Petitioner's case.

Moreover, even assuming that the failure of Petitioner's postconviction appellate attorney to file an appellate brief constituted abandonment-based "cause" within the meaning of *Maples*, Petitioner would still have to demonstrate prejudice. *Hoak v. Idaho, No. 1:09-cv-00389-EJL, 2013 U.S. Dist. LEXIS 139604, 2013 WL 541010, at *9 (D. Idaho Sep. 25, 2013)*. The Court is not persuaded that any of the ineffective assistance of trial counsel claims that Petitioner defaulted in postconviction were meritorious sufficient to conclude that Petitioner was prejudiced by postconviction appellate counsel's failure to preserve them. *Id*.

Petitioner argued in postconviction that trial counsel were ineffective with respect to pretrial and trial publicity, the failure to call certain witnesses, the failure to advise Petitioner about and permit him to exercise his right to testify, the failure to offer evidence to rebut the prosecution's theory that the killing of Watkins was motivated by race, and the failure to move for separation of witnesses. Having thoroughly considered the trial record **[*316]** and evidence that Petitioner presented and developed during postconviction, as well as having expressly considered or at least touched upon in the instant decision all of these purported examples of trial counsel ineffectiveness, the Court cannot find that any of the claims of ineffective assistance of trial counsel that Petitioner defaulted in postconviction were meritorious. In addressing sub-part (A) of Petitioner's first ground for relief, this Court expressly considered and rejected Petitioner's claims of ineffective assistance with respect to counsel's alleged failures to call certain witnesses, to advise Petitioner about and permit him to exercise his right to testify, and to offer evidence to rebut the prosecution's theory that the killing of Watkins was motivated by race. Although this Court did not specifically address Petitioner's claims that his trial attorneys rendered ineffective assistance with respect to pretrial publicity, the Court gave thorough attention to counsel's performance during *voir dire* in addressing sub-part (B)(2) of Petitioner's first ground for relief. The Court additionally rejected any suggestion that counsel were ineffective for failing to move for **[*317]** a mistrial due to a newspaper article conveying information that the jury did not hear, as well as Petitioner's sixth ground for relief challenging the alleged exposure of his jury to a newspaper article attributing incriminating statements to Petitioner. Finally, in addressing Petitioner's seventh ground for relief, the Court considered and rejected Petitioner's allegation that trial counsel's failure to move for a

separation of witnesses tainted the testimony of Correction Officer Browning with respect to evidence linking Petitioner to the longest of the knives used during the attack on Watkins. In short, the Court is satisfied that none of the trial counsel ineffectiveness claims that Petitioner defaulted during postconviction were meritorious under *Strickland*.

Petitioner's invocation of *Maples* and *Martinez* consisted of a single sentence in his Amended Traverse. (ECF No. 137, at Page ID # 8859.) That is understandable considering that neither case advances his quest to have this Court reconsider its procedural default decision.

Beyond the foregoing, Petitioner also urges the Court to excuse any procedural default that Petitioner committed in postconviction on the basis of the "actual **[*318]** innocence" exception. (ECF No. 93,at Page ID # 2285-2298.) Petitioner first argues that he is factually innocent because he can establish "that it is more likely than not that a reasonable juror, given all the evidence presented to the habeas court, would not have found Petitioner guilty beyond a reasonable doubt." (*Id*. at Page ID # 2285-2286 (quoting *Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*).) Relying on *Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001)*, Petitioner further asserts that he is innocent of the death penalty sufficient to qualify for the actual innocence exception to procedural default. To satisfy that exception, Petitioner acknowledges that he "must 'show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.' " (ECF No. 93, at Page ID # 2287-2288 (quoting *Sawyer v. Whitley, 505 U.S. 333, 336, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992)*).) In support of both arguments, Petitioner revisits the arguments he presented in an effort to persuade this Court that Petitioner's attorneys were ineffective for failing to investigate and present a defense, to wit: evidence that Petitioner was not the leader of the Aryan Brotherhood at MaCI; evidence that the overtaking of Adams A and attack on Damico Watkins were not racially **[*319]** motivated and evidence of the role that Petitioner's PTSD played in Petitioner perceiving Watkins as an imminent threat to him (Petitioner); evidence that the attackers had no plan or intent to kill Watkins; evidence that accomplices Bishop and Vandersommen actually killed Watkins; and evidence that Petitioner's belongings being already packed up was not indicative that Petitioner had planned for Watkins to be killed. (ECF No. 93, at Page ID # 2288-2296.) The Court has considered those arguments and evidence at length and finds them unpersuasive. Accordingly, the Court cannot find that Petitioner qualifies for the "actual innocence" exception to excuse procedural default.

For the foregoing reasons, the Court **OVERRULES** Petitioner's request for reconsideration of the Court's decision finding that Petitioner procedurally defaulted his postconviction claims.

The Court is satisfied, however, that its original decision finding procedural default as a result of the failure of postconviction appellate counsel to file an appellate brief (ECF No. 39), as well as the instant decision rejecting Petitioner's request for reconsideration of the original procedural default decision, meet the showing **[*320]** required by *28 U.S.C. § 2253(c)(2)*.

VI. Grounds Nine and Ten

Petitioner's ninth ground for relief, as originally pleaded in the Petition, set forth numerous allegations of prosecutorial misconduct. (ECF No. 14-10.) The Court concluded in its September 30, 2005 Opinion and Order addressing procedural default that all but sub-parts (B) and (C) were barred by procedural default. (ECF No. 39, at Page ID # 1627-1628, 1633-1634.) The Court confirmed that determination above in rejecting the allegations of ineffective assistance of trial counsel that Petitioner set forth in his first ground for relief. In

the instant order, the Court denied as without merit sub-parts (B) and (C) of Petitioner's ninth ground for relief.

Petitioner argued in his tenth ground for relief the state had withheld exculpatory, mitigating, and/or impeachment evidence. (ECF No. 14-11.) According to Petitioner, the prosecution not only misrepresented facts as to Petitioner's motivation and role in the incident, but also withheld evidence in its possession that would have proven the falsehood. (*Id*. at ¶ 607.) Petitioner explains that during state postconviction proceedings, he learned that the prosecutor and Sergeant Downey had provided during **[*321]** pretrial discovery an edited version of Downey's investigative report. According to Petitioner, Downey's original report consisted of twenty-two pages, while the report that Petitioner's defense counsel received during discovery consisted of only fifteen pages. Omitted from the edited version, Petitioner continues, were the statements of inmate-witnesses Sidney Taylor, Brandon Hill, and Roman Ward. Petitioner further asserts that although the prosecution cited security reasons for withholding those statements from Petitioner prior to his trial, the prosecution subsequently provided those statements to Petitioner's codefendants prior to their trials. The Court concluded in its September 30, 2005 Opinion and Order that Petitioner had procedurally defaulted his tenth ground for relief. (ECF No. 39, at Page ID # 1646-1647.)

On March 17, 2010, this Court issued an Opinion and Order granting Petitioner's motion for leave to amend his ninth and tenth grounds for relief. (ECF No. 119.) Petitioner's request to amend those claims stemmed from this Court's May 21, 2008 Opinion and Order directing the release of certain medical and other prison documents relating to Petitioner. (ECF No. 87.) Following **[*322]** the Court's decision allowing Petitioner to amend his petition, Petitioner returned to the state courts to exhaust those claims in light of the new evidence. Petitioner filed his Amended Petition on March 12, 2013. (ECF No. 130.) After filing several supplements to the appendix/state court record (ECF Nos. 131, 132, 133), Respondent filed an Amended Return (Answer) on June 10, 2013. (ECF No. 134.) Petitioner filed his Amended Traverse on July 17, 2013. (ECF No. 137.) These pleadings are now before the Court for consideration.

In his amended ninth ground for relief, Petitioner argues that the prosecutor committed misconduct during the penalty phase of Petitioner's trial. (ECF No. 130, at ¶ 599(A).) Petitioner explains that the essence of his mitigation defense was that the PTSD that Petitioner suffered as the result of several assaults he suffered in prison—including a life-threatening slashing of his throat—contributed to Petitioner's perceiving Watkins's threat against Petitioner as imminent and life-threatening. Petitioner proceeds to argue that the prosecution effectively neutralized the testimony of Petitioner's psychologist, Dr. Eimer, by suggesting that the attack Petitioner suffered **[*323]** never occurred or at most amounted to a "scratch on the skin." (*Id*. at ¶ 599(C).) Petitioner asserts that the prosecution pursued this line of demeaning cross-examination and argument about the nature of the attack despite being in possession of records from the Ohio Department of Rehabilitation and Correction ("ODRC") documenting the severity of the assault on Petitioner and the wound he suffered. (*Id*. at ¶(E).)

Petitioner argues in his amended tenth ground for relief that "[t]he trial prosecutors suppressed material exculpatory and impeaching evidence, in violation of Petitioner's rights under the *Fifth, Sixth, Eighth*, and *Fourteenth Amendments to the United States Constitution*." (*Id*. at ¶ 623(A).) Specifically, Petitioner complains that the prosecution withheld from Petitioner's defense counsel the ODRC records documenting the severity of the assault and wound Petitioner suffered—all while cross-examining Dr. Eimer and delivering closing arguments in a manner that falsely suggested the attack resulted in little more than a scratch on Petitioner's neck. As Petitioner explains:

> The suppressed evidence, had it been provided to counsel and presented to his jury, would have been relevant to the penalty phase, including the nature and circumstances of the offense **[*324]** as well as the *O.R.C. § 2929.04(B)(7)* mitigating factor. This evidence would have corroborated Dr. Eimer's testimony. It would have negated the State's attempts to trivialize Petitioner's prison experience as a "scratch." It would have given real life to the defense's claims that Petitioner perceived Watkins to be a threat, and responded based on the horrific experiences he suffered while incarcerated.

(*Id*. at ¶ 623(H).)

In his Amended Return (Answer), Respondent raises several affirmative defenses against Petitioner's claims and further argues in the alternative that the claims are without merit. (ECF No. 134.) First, Respondent argues that Petitioner's claims are barred by the one-year statute of limitations under *28 U.S.C. § 2244(d)(1)*. According to Respondent, "the predicate facts supporting Stojetz's amended claims were discoverable, through the use of due diligence, at trial or directly thereafter." (ECF No. 135, at Page ID # 8818.) Respondent reasons that Petitioner and any one of his attorneys knew that Petitioner had been incarcerated for most of his adult life, that ODRC maintained records on each prisoner, and that *Ohio Revised Code § 5120.21(C)(2)* entitled Petitioner to request those records.

Continuing with his argument that Petitioner's claims are **[*325]** time-barred, Respondent asserts that the most recent iteration of Petitioner's claims does not relate back to the original petition sufficient to deem that they, as the original petition, are timely. Respondent explains that in his original ninth and tenth grounds for relief, Petitioner attacked the constitutionality of his conviction. In his amended claims, on the other hand, Petitioner attacks the constitutionality of his death sentence. (ECF No. 134, at Page ID # 8819.)

Finally, Respondent asserts that Petitioner's "arguments that he acted diligently are belied by the record and common sense." (*Id*. at Page ID # 8820.) Respondent explains:

> Before the murder, Stojetz had been in prison for years. He knew there were records related to his incarceration. Stojetz knew that he was stabbed in 1987 and was treated for his injuries. In fact, Stojetz relayed this information to his expert during their interview. (PAGEID # 1113, PAGEID # 7905.) However, Stojetz deliberately waited until he was in habeas corpus before he even bothered to seek those records. Instead of just simply signing a release, and having his attorneys drive out to London, Ohio, and review or copy the medical records (at **[*326]** their discretion), Stojetz waited years and then requested a federal court for something he could get with a simple phone and fax machine. Stojetz then pretended to be surprised when his own medical records disclosed [] what he already knew — his 1987 stabbing was more akin to a wound than a scratch. In this regard, Stojetz's actions, or lack thereof, cannot be described as diligent. Dilatory maybe, not diligent.

(*Id*.) Discussing *Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)*, *28 U.S.C. § 2242*, and *Federal Rule of Civil Procdure 15*, Respondent concludes that Petitioner's newly amended claims do not relate back to his original claims sufficient to render them as timely as the original petition. Specifically, Respondent asserts that claims do not relate back simply because they implicate the same constitutional cases or seminal cases and that the Southern District of Ohio frowns on amendments to add new claims that bear no factual or legal relationship to the original claims.

Petitioner responds in his Amended Traverse that this Court resolved this issue when it allowed Petitioner to amend his Petition and that "there is no reason for this Court to reconsider its ruling[.]" (ECF No. 137, at Page ID # 8867.) The Court

disagrees.

In its March 17, 2010 **[*327]** Opinion and Order, this Court considered the parties' arguments and controlling authority on the issue of whether Petitioner's proposed amendments "related back" to his original Petition sufficient to find that they were timely. (ECF No. 119 (discussing *Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)*, & *Fed. R. Civ. P. 15(c)(1)*).) This Court's March 17, 2010 Opinion and Order made clear, however, that the issue of whether Petitioner had exercised due diligence in discovering the facts and evidence supporting his amended claims was murky and that the Court would "revisit the issue anew in view of the decisions of the state courts and any facts developed during the state court proceedings." (ECF No. 119, at Page ID # 2637 n.1.) To the extent the Court hinted at finding that Petitioner had exercised due diligence (because the Court prefers, in death penalty habeas cases, to err on the side of allowing liberal factual development), the Court nonetheless more distinctly and more than once stated that any such determination was tentative. In finding, for purposes of deciding whether to allow Petitioner to amend his Petition, that the ODRC records could not have been discovered earlier through the exercise of due diligence, the Court noted that it was doing **[*328]** so based on a "scant" record and was doing so "out of an abundance of caution." (*Id.* at Page ID # 2635.) The Court further stated in unmistakable terms that "nothing in this Order should be construed as binding this Court on the issue of whether Petitioner exercised due diligence in discovering the factual basis underlying his proposed amendment in the event that the state courts determined he did not." (*Id.* at Page ID # 2637 n.1.) To that point, Petitioner asserts that he sought but was denied the opportunity to conduct factual development in the state courts on this issue and that "the facts simply have not changed." Petitioner overlooks this Court's admonition that it would revisit the "due diligence" issue not just on the basis of "any facts developed during the state court proceedings," but equally on the basis "of the decisions of the state courts." (*Id.*) Neither those decisions nor the facts bode well for Petitioner.

The facts are as shaky now as they were when Petitioner first presented them in support of his motion to amend. That the Court glossed over that issue then, electing as always to try to permit generous factual development in death penalty habeas cases, does not permit **[*329]** the Court to overlook the dubious nature of the facts, essentially unchanged as they are, now. The "contract" assault against Petitioner that resulted in a "5 to 6 inch long gaping wound in the throat" occurred on September 6, 1987. (ECF No. 132-3, at Page ID # 6307-6308.) Petitioner presumably knew or should have known about the assault against him and the wound he suffered as a result. The ODRC records documenting the assault, Petitioner's treatment, and investigation existed and were available to Petitioner at that time. Although Petitioner continues to intimate that he could not have discovered the records earlier, he has not made any persuasive arguments demonstrating that fact. Noting that the Court announced its intention to revisit the issue on the basis of facts that Petitioner developed when he returned to the state courts to exhaust his claims and that "the State of Ohio successfully thwarted his efforts in the state trial and appellate courts" (ECF No. 137, at Page ID # 8867), Petitioner essentially relies on this Court's earlier "ruling" that "credited Stojetz's diligence[.]" (*Id.*) As the Court explained above, however, its "ruling" on the due diligence issue was expressly **[*330]** tentative, and the Court stated its intention to revisit the matter on the basis not only of any facts that Petitioner developed when he returned to the state courts but also on any state court decisions addressing the issue. (ECF No. 119, at Page ID # 2637 n.1.)

As to the fact at the heart of Petitioner's claim—whether the prosecution was in possession of, and had reviewed, the ODRC records in question when the prosecution asserted facts that those records contradicted— the only evidence that Petitioner points to in support of that position is the *1997*

transcript documenting the prosecution's penalty-phase cross-examination of Dr. Eimer and closing arguments. (ECF No. 137, at Page ID # 8870-8871.) The Court notes that Petitioner sought but was denied the ability to develop facts concerning, among other things, whether the prosecution was in possession of and had reviewed those records before cross-examining Dr. Eimer. The Court further notes that any ruminations it made in its March 17, 2010 decision allowing Petitioner to amend his Petition as to what the prosecution had, knew, or felt obligated to disclose at the time of Petitioner's mitigation proceedings were expressly couched **[*331]** in terms of what was "evident" at the time on the basis of a record that was "scant." (ECF No. 119, at Page ID # 2635-2636.) That being so, they lend little support to any definitive finding that the prosecution was in fact in possession of an aware of the ODRC records when it asserted facts—suggesting that Petitioner's wound was superficial—that those records contradicted. That leaves the seventeen-year-old mitigation proceeding transcript as the only support for Petitioner's assertion that the prosecution was in possession of, and had reviewed, the ODRC records at the time of Petitioner's mitigation proceeding.

The facts set forth above, combined with the state court decisions this Court did not have at the time it decided to allow Petitioner to amend his Petition, constitute a fatal blow to any determination that Petitioner exercised due diligence with respect to the ODRC records and newly amended arguments. The state trial court disallowed the filing of Petitioner's second/successive postconviction action, concluding that Petitioner "ha[d] failed to establish that he was unavoidably prevented from discovering the facts upon which he must rely in his post-conviction petition and that **[*332]** but for constitutional error at sentencing no reasonable factfinder would have found him eligible for the death penalty." (ECF No. 132-3, at Page ID # 6379 (discussing *Ohio Rev. Code §2953.23(A)(1)*).) In so concluding, the trial court found that "Petitioner's claim appears circuitous[]" because "[h]e is relying upon the documents, which he alleges were wrongfully withheld under Brady, to argue that the documents were wrongly withheld." (*Id.* at Page ID # 6377.) The trial court further found "that the 'facts upon which he must rely' were always available to Defendant-Petitioner, and indeed were mentioned during the mitigation phase of trial." (*Id.*)

In overruling Petitioner's motion for leave to file an out-of-time motion for new trial, the trial court concluded "that the Defendant-Petitioner failed to show by clear and convincing evidence that he was [] unavoidably prevented from the discovery of evidence upon which he must rely to file an untimely motion for a new trial." (*Id.* at Page ID # 6385 (discussing *Ohio Rev. Code § 2945.80*).) The trial court expressly rejected the argument that there existed "any evidence that the State was in possession of these documents and relied upon them to present evidence that they knew to be false." (*Id.* at **[*333]** Page ID # 6384.) The trial court further concluded that "[t]he State, in preparing its case, if it did come across records of the incident, could not be expected to consider it at all relevant to trial unless the defendant had informed them that he would use it in mitigation at trial." (*Id.*)

The Ohio Court of Appeals for the Twelfth Appellate District affirmed the trial court's decision disallowing the filings of Petitioner's second/successive postconviction action and untimely motion for a new trial. (ECF No. 132-4, at Page ID # 6699.) The appellate court held in the first instance that both were barred under Ohio's doctrine of *res judicata* because Petitioner "could have raised them in his direct appeal." (*Id.* at Page ID # 6702.) More pertinent for purposes of the instant discussion is that the appellate court held, with respect to Petitioner's effort to file an untimely second/successive postconviction action, that:

> [A]ppellant was certainly aware of the facts underlying this claim, as they existed since September 1987 and appellant first raised the issue at trial. While appellant arguably might

> not have been aware of records documenting the prior prison attacks, appellant has failed to demonstrate **[*334]** how he was prevented from obtaining them.

(*Id.*) With respect to Petitioner's motion for leave to file his motion for a new trial, the appellate court stated:

> As we discussed above in resolving appellant's first assignment of error, appellant has failed to demonstrate that he was unavoidably prevented from discovering the evidence supporting his motion for new trial pursuant to Crim.R. 33(B). Specifically, appellant has failed to establish that the evidence has been discovered since the trial, could not have been discovered in the exercise of due diligence before trial, is material to the issues, and is not merely cumulative to former evidence.

(*Id.* at Page ID # 6707-6708.)

This Court does not disagree with, much less find unreasonable, these state court decisions. They are based on the same facts that this Court has already noted are fatal to any determination that Petitioner was prevented from discovering the ODRC records or whether the prosecution was in possession of those records prior to Petitioner's mitigation proceedings. Nothing about the state courts' denial of Petitioner's request to conduct discovery on the issue negates or undermines the reasonableness of the facts that are **[*335]** evident and that informed the basis of the state courts' decisions.

The foregoing leaves this Court unable to conclude that Petitioner exercised due diligence sufficient to find that Petitioner's newly amended claims relate back to his original Petition and are not untimely within the meaning of *Federal Rule of Civil Procedure 15(c)(1)* and *Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582*. *See* ECF No. 119.

Respondent raises a second affirmative defense against Petitioner's new claims—namely that they are barred by procedural default. (ECF No. 134, Page ID # 8824.) Respondent explains that the state trial court rejected both Petitioner's second postconviction action and motion for a new trial as untimely. Respondent further states that the appellate court affirmed the trial court's timeliness ruling, additionally rejected the claims on the basis of *res judicata*, and alternatively rejected the claims on the merits. (*Id.* at Page ID # 8825.)

Petitioner responds in his Amended Traverse that the appellate court's reliance on Ohio's *res judicata* rule was misplaced. Petitioner explains that under Ohio's *res judicata* rule, claims involving evidence on the trial record must be raised on direct appeal, while claims involving evidence outside the trial record must be raised in postconviction. **[*336]** A *Brady* claim, by its very nature, involves evidence outside the trial record and could not, Petitioner states, be raised on direct appeal. (ECF No. 137, at Page ID # 8868-8869.) With respect to the decisions of the state courts rejecting Petitioner's second/successive postconviction action as untimely, Petitioner reiterates that he could not have uncovered the ODRC records on his own earlier and that this fact satisfied Ohio's law allowing for the filing of untimely second or successive postconviction actions. (*Id.* at Page ID # 8870-8871.)

Although the Court agrees with Petitioner's arguments about *res judicata*, that does little to assist Petitioner in view of this Court's determination above that it appears that the ODRC records, and certainly the facts underlying their existence, could have been discovered earlier through the exercise of due diligence. That determination supports the state courts' decisions that Petitioner's second postconviction action was untimely under *Ohio Revised Code § 2953.23* and that Petitioner's motion to leave to file an untimely motion for new trial was untimely under *Ohio Revised Code § 2945.80*. Thus, under the four-part test the Sixth Circuit set forth in *Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986)*, the Court determines that Petitioner violated **[*337]** state rules, that the state courts enforced those rules, that

those rules are adequate and independent bases for denying habeas corpus relief, and that Petitioner has not satisfied the cause-and-prejudice or actual-innocence exceptions to excuse the default. The Sixth Circuit has determined that *Ohio Revised Code § 2953.23* constitutes an adequate and independent ground under *Maupin*. *See* *Davie v. Mitchell, 547 F.3d 297, 311 (6th Cir. 2008)* (citing *Broom v. Mitchell, 441 F.3d 392, 399-401 (6th Cir. 2006)*). The Court is also satisfied that Ohio's rules establishing time limits and exceptions to those limits for filing a motion for a new trial are adequate and independent. *See, e.g.*, *Anderson v. Warden, No. 5:09 CV 0671, 2010 U.S. Dist. LEXIS 31255, 2010 WL 1387504, at *9-10 (N.D. Ohio Mar. 9, 2010)*.

Respondent devotes the remainder of his Amended Return (Answer) to arguing why Petitioner's amended claims are without merit. (*Id*. at Page ID # 8825-8846.) Petitioner similarly allocates the majority of his Amended Traverse to the merits of his ninth and tenth grounds as amended. (ECF No. 137, at Page ID # 8872-8892.) Although this Court has determined above that Petitioner's newly amended claims do not relate back to the original Petition and are accordingly untimely, as well as barred by procedural default, the same caution that drove this Court to err on the side of caution in allowing Petitioner to **[*338]** amend his Petition compels this Court in the alternative to consider the merits of Petitioner's newly amended claims. The Court does so below.

Respondent begins by first setting forth in detail the decisions by both the trial court and appellate court that rejected Petitioner's claims and then reiterating *§ 2254(d)*'s deferential standard that governs this Court's review of Petitioner's claims. (*Id*. at Page ID # 8830-8839.) With respect to Petitioner's *Brady* claim (ground ten), Respondent asserts that the ODRC records at issue are not material and were never "withheld" within the meaning of *Brady v. Maryland*. To that point, Respondent disputes that the prosecutor referred to Petitioner's neck wound as a "scratch" and contends that it was Dr. Eimer, in answering whether he had independently verified Petitioner's account of his injury, who uttered the word "scratch" as an admission that he did not independently verify Petitioner's injury. Respondent further asserts that there was never a dispute that Petitioner was stabbed in the neck while in prison, with vivid accounts having been testified to by Petitioner's sister Denise, Dr. Eimer, and Petitioner himself during his unsworn statement. Further, **[*339]** according to Respondent, it was Petitioner's PTSD and paranoid schizoid personality that formed the linchpin of his mitigation defense. Respondent asserts that numerous incidents and factors, only one of which was the prison assault at issue, contributed to Petitioner's mental conditions. Revisiting details of the incident and the evidence against Petitioner, Respondent proceeds to impugn any suggestion by Petitioner that, but for the prosecutor's cross-examination as to Petitioner's throat being slashed, Petitioner would not have received the death penalty. (ECF No. 134, at Page ID # 8842.)

Respondent continues to dispute the position that Petitioner's ODRC records withheld within the meaning of *Brady*. Reiterating that allegedly withheld material evidence implicates *Brady* only if those materials were wholly within the control of the prosecution, Respondent repeats that Petitioner's ODRC were always available to him.

With respect to Petitioner's claim under *Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)* (ground nine), Respondent disputes Petitioner's account of how the prosecution knowingly presented, or failed to correct, false testimony. Respondent argues in the alternative that there is no reasonable likelihood that the testimony **[*340]** in question affected the judgment of the jury. (ECF No. 134, at Page ID # 8844-8845 (citing *Brooks v. Bobby, 458 F. App'x 416, 418 (6th Cir. 2011)*).) Regarding his first point, Respondent explains as follows:

> The Court [in *Napue v. Illinois, 360 U.S. 264, 270, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)]*

> explained the principle that a State may not *knowingly* use false testimony to obtain a conviction. As explained by the trial court, Stojetz never disclosed Dr. Eimer's report before trial. Therefore, the prosecution had no idea, until Dr. Eimer testified, anything concerning psychological opinions or information he relied upon in forming those opinion[s]. (PAGEID# 6385.) Without the benefit of time or a report, the prosecutor had to conduct a cross-examination. The state appellate court was not unreasonable in finding "[w]e find it disingenuous of (Stojetz) to fail to notify the state that it planned to use Dr. Eimer's opinions regarding the 'near death experiences' and then later argue the state violated *Brady* by purposely withholding reports of those incidents." *State v. Stojetz, 2010 Ohio 2544, 2010 Ohio App. LEXIS 2068, ¶ 15 (12th Dist. Ct. App. 2010)*.

(ECF No. 134, at Page ID # 8844.)

Respondent's second point challenging Petitioner's *Napue* claim is that there is no reasonable likelihood that the prosecution's alleged presentation of, or failure to correct, false testimony affected the jury's sentencing decision. Respondent **[*341]** reiterates that because Petitioner's PTSD likely ensued from a number of experiences and factors, such as Petitioner having witnessed his grandfather's suicide, "cross examination about the 1987 stabbing likely had little to no effect." (ECF No. 134, at Page ID # 8845.) Respondent also points to the Ohio Supreme Court's findings that Petitioner's PTSD mitigation was weak and that Petitioner's allegations of fear and need to defend himself were self-serving fabrication. Respondent further asserts that in view of the heinous nature of the crime, it is likely that the jury accepted Petitioner's PTSD and still recommended that Petitioner receive the death penalty. Finally, Respondent reiterates that to the extent Petitioner premises his amended *Napue* claim on the ODRC records documenting his throat having been slashed, "there is no evidence that Stojetz was precluded from obtaining his own ODRC records." (*Id*.)

Petitioner begins by addressing the Due Process violation that he alleges in his Ninth Ground for Relief. Citing *Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*, Petitioner asserts at the outset that "the evidence of guilt was not overly strong as to him being the actual killer[]" and that the evidence against him as to his death **[*342]** sentence "was not strong, and the jury was only considering a *single* aggravating factor." (ECF No. 137, at Page ID # 8872-8873 (emphasis in original).) Petitioner insists that he "has shown that the improper cross-examination denied him a fair trial and or sentence." (*Id*. at Page ID # 8873.) Petitioner continues to insist that the transcript demonstrates that the prosecution possessed and had reviewed the ODRC records when it cross-examined Dr. Eimer and subsequently made closing arguments in a manner suggesting—in direct contradiction to the records—that Petitioner suffered only a minor wound from the September 6, 1987 assault against him. (*Id*. at Page ID # 8873.)

Regarding the *Napue* violation[14]

that he alleges in ground nine, Petitioner begins by distinguishing the test for materiality for a *Napue* violation from the test for materiality for a *Brady* violation. (ECF No. 137, at Page ID # 8886.) According to Petitioner, "a *Napue* violation is material when there is 'any reasonable likelihood that the false testimony *could* have affected the judgment of the jury[.]'" (*Id*. (citing *United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)* (emphasis added)).) To that point, Petitioner reiterates that his position that "[d]uring the prosecutor's cross-examination **[*343]** and his closing argument, the trial prosecutor *implied* that he had the corrections records." (*Id*. at Page ID # 8887 (emphasis added).) Petitioner further explains that "[o]f course the prosecutor did not technically

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[14] Petitioner explains that he asserts a *Napue* violation in grounds nine and ten. (ECF No. 137, at Page ID # 8872.)

rely on the records to present evidence they knew to be false; rather, the prosecutor relied on his own failure to disclose this evidence to create a materially false impression with the jury about what was contained therein." (*Id*.) Petitioner also dismisses as important the fact that defense counsel did not provide notice to the prosecution prior to the mitigation proceeding as to defense counsel's intent to present Dr. Eimer's testimony or the information that formed the basis of his testimony. (*Id*.)

Petitioner continues by setting forth how the prosecution's cross-examination of Dr. Eimer disingenuously implied that the prosecution had reviewed the ODRC records and that those records documented only a "cut" or "superficial" injury. (*Id*. at Page ID # 8888.) With respect to Respondent's argument noting that the Ohio Supreme Court accepted as true Dr. Eimer's PTSD **[*344]** diagnosis but gave it little weight, Petitioner responds that that fact "demonstrates the effectiveness and reach of the prosecutor's misconduct." (*Id*. at Page ID # 8889.) Petitioner also dismisses Respondent's suggestion the jury likewise accepted as true the PTSD diagnosis but gave it little weight in their weighing process and sentencing decision. Petitioner reiterates that "[u]nder *Napue*, the test is 'any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.'" (*Id*. at Page ID #8890 (quoting *Agurs, 427 U.S. at 103* (emphasis added)).) Petitioner concludes that he can satisfy the *Napue* standard, insofar as the alleged prosecutorial misrepresentation "prevented the consideration of a valid and powerful mitigating factor, PTSD . . . ." (*Id*.)

Petitioner next turns his attention to the *Brady* violation that he alleges in his tenth ground for relief. The essence of Petitioner's *Brady* claim is that he filed pretrial motions for discovery and for access to all information in possession of the State of Ohio to which he was entitled; that the prosecutors indicated they would liberally comply with *Brady* but did not turn over the ODRC records in question; and that the prosecutor "*implied* ***[*345]*** during his cross-examination of Dr. Eimer and in his penalty phase closing arguments, that he had Stojetz's correctional department medical records." (ECF No. 137, at Page ID # 8874 (emphasis added).) Petitioner reasons that "[e]vidence of the violent attacks suffered by Stojetz and detailed in the suppressed records was directly relevant to both his defense at trial and mitigation phases." (*Id*. at Page ID # 8874-8875.) Petitioner further argues that the prosecution, by virtue of its suppression of the records, wrongly neutralized compelling testimony by Dr. Eimer as to the life-threatening incidents that caused Petitioner to suffer from PTSD and the manner in which that serious condition contributed to Petitioner's perception and resulting actions. Specifically, Petitioner explains, because Dr. Eimer did not have the benefit of the records (while the prosecution presumably did), the prosecutor was able to utilize Dr. Eimer's failure to corroborate the attack to get him to concede that the attack "'might have just been a scratch on the skin.'" (*Id*. at Page ID # 8876 (quoting Tr. Vol. VII, at 1138).) Thus, Petitioner concludes, "[t]he suppressed records corroborate Stojetz's allegations and Dr. Eimer's **[*346]** testimony, refuting the state's inappropriate insinuations." (ECF No. 137, at Page ID # 8876.)

Petitioner disputes Respondent's argument that it was Dr. Eimer, responding to a question, and not the prosecutor, who characterized Petitioner's wound as a scratch. According to Petitioner, "[t]his parses too much." (*Id*.) Petitioner also takes issue with Respondent's attempt to "divine[] the purpose behind the prosecutor's questions as simply undermining the expert and not as a suggestion that this had not occurred." (*Id*.) To that point, Petitioner reiterates again his position that the prosecutor implied that he was in possession of the ODRC records and intimated that no such attack occurred. Petitioner also notes that the prosecutor during closing arguments asserted that the PTSD diagnosis, as premised on uncorroborated evidence, was invalid.

With respect to Respondent's argument that the ODRC records were not material because there were other components to Petitioner's PTSD to which the records did not speak, Petitioner explains that "[t]his ignores the critical nexus which could have been argued" between that particular assault, as documented in the records, and the PTSD that affected the severity **[*347]** with which Petitioner perceived threats that fellow inmates made against him. (*Id*. at Page ID # 8877.) Petitioner also targets Respondent's reliance on the Ohio Supreme Court's appropriateness review, pointing out that the Ohio Supreme Court did not make those findings in the context of a *Brady* claim. Further, Petitioner asserts, "the Ohio Supreme Court's independent assessment of sentence does not substitute as a materiality review[.]" (*Id*. at Page ID # 8878.) Discussing *Kyles v. Whitley, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*, Petitioner stresses that "[t]his Court must not resort to a sufficiency of the evidence test to determine whether a constitutional violation has occurred." (*Id*.)

Finally, Petitioner disputes any argument that his awareness of the assault and wound he suffered imposed on him a requirement to secure the records regardless of their suppression. According to Petitioner, "[t]his gives short-shrift to the United States Supreme Court test that requires disclosure regardless of a request from defense counsel." (*Id*. at Page ID # 8879 (citing *Kyles, 514 U.S. at 433*, *citing to Bagley, 473 U.S. at 682*).) Petitioner further asserts that in view of the prosecutors' representation that they would liberally provide exculpatory evidence, Petitioner's defense counsel reasonably could presume **[*348]** from nondisclosure that evidence did not exist. Petitioner contests any suggestion that counsel has a duty to seek and find evidence, which plays a role in the analysis of any *Brady* claim. Petitioner goes on to point out factual determinations by the trial court in rejecting Petitioner's second/successive postconviction action that, according to Petitioner, were unreasonable. (ECF No. 137, at Page ID # 8880-8883.)

Although the state courts rejected Petitioner's claims on state procedural grounds, in so doing, the state courts made certain findings and conclusions that this Court is not free to ignore.

In concluding that Petitioner's proposed second/successor postconviction action was untimely under state law, the trial court made the following findings and conclusions about the veracity of Petitioner's claims:

> The first prong requires that Stojetz show that he was unavoidably prevented from discovery of the facts upon which he must rely to present his claim for relief. Stojetz argues that certain ODRC documents were withheld from him by the State during discovery at trial, and that he was unavoidably prevented from discovering evidence of alleged Brady violations until federal habeas **[*349]** corpus proceedings were initiated. Petitioner's claim appears circuitous. He is relying upon the documents, which he alleges were wrongfully withheld under Brady, to argue that the documents were wrongly withheld. In fact, he is relying upon the contents of the documents to argue that they support an argument he made in mitigation at the penalty phase of his trial. As stated in his petition, the documents apparently "reveal that Stojetz was 'cut on the neck (throat)' on September 6, 1987." See Post-convictin Petition, 14. This "revelation" is asserted to be material and would have altered the outcome of the case, thereby violating Brady. However, the Court notes that the "facts upon which he must rely" were always available to Defendant-Petitioner, and indeed were mentioned during the mitigation phase of trial.
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> Defendant-Petitioner Stojetz argues these materials violated Brady merely because they were "withheld," but that is not the standard. The standard states that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to

punishment, irrespective of good faith or bad faith of prosecution." **[*350]** *Brady v. Maryland (1963), 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215*. The documents in question were not "withheld" under Brady because they were not "favorable to the accused" nor were they "material to guilt or punishment." Defendant-Petitioner was able to make his argument at mitigation that he was injured on the throat in 1987, and that incident among others cause him to suffer post-traumatic stress disorder. His PTSD diagnosis was then the grounds for arguing that he responded violently in 1996 to an alleged threat from the victim in this case, Watkins, because he was afraid of reprisals. Dr. Eimer testified to this diagnosis but added that Stojetz, "knew what he was doing." *State v. Stojetz (1999), 84 Ohio St.3d 452, 471, 1999 Ohio 464, 705 N.E.2d 329*. Stojetz relies on statements by the prosecutor which referred to the incident as an allegation, and implied that Dr. Eimer could not know whether the experience ever took place, and sought to downplay the severity of the injury. Stojetz then asserts that if the ODRC documents had been available they would have bolstered his credibility and his mitigation case. However, the documents are not "facts upon which he must rely." Moreover, the incident was not the linchpin of Stojetz's mitigation case, rather the diagnosis of PTSD was what he relied on.

The jury was presented with **[*351]** evidence that Stojetz did suffer from PTSD and was properly instructed as to what constitutes a mitigating factor. The documents in question did not go to establishing the mitigation, but were merely evidence supporting Stojetz's mitigation theory, which the jury rejected. Meaningfully, the Ohio Supreme Court, in reviewing Stojetz's death sentence, accepted Dr. Eimer's diagnosis as true and yet determined that it carried little to no weight under the statutory mitigating factors analysis. The documents reporting an incident which was part of a diagnosis which did not in fact entitle Defendant-Petitioner to mitigation of his sentence were not material evidence favorable to Stojetz. The Court finds no violation of the Brady standard.

(ECF No. 132-3, at Page ID # 6377-6379.)

In rejecting Petitioner's motion for leave to file an untimely motion for new trial, the state trial court made the following findings and conclusions:

> As mentioned above, the gravamen of Defendant-Petitioner's argument stems from the existence of certain ODRC medical documents referencing an injury Stojetz received in 1987, while incarcerated. The documents substantiate that Stojetz was attacked by another inmate in **[*352]** the recreation yard, and injured on this throat. One report references seeing Stojetz leave the area with his chest covered in blood. The internal ODRC document states that an officer on the scene requested a stretcher, which Stojetz refused. See Post-conviction petition, Ex. A, Request for Approval of Prosecution. The document reports that Stojetz continued to walk up the corridor and was escorted to the infirmary for emergency treatment. Id. It stated that he had received a 5 to 6 inch long gaping wound in the throat, and the Superintendent of the facility recommended prosecution of the assailant. Id. Another internal document stated that he had the entire front of his neck cut. Id., Ex. A, Office Communication of Capt. Randolph Halcomb. A Special Incident report filed by Officer Paul B. Dunn stated: "On September 6, 1987, at approximately 2:30 p.m. I* * *was supervising a recreation break for inmates. * * * Inmate Stojetz asked me for a hospital pass and I saw that he had blood on his chest. I then informed Inmate Stojetz to wait while I called for a stretcher but [he] continued up the corridor." Id. A Report of Unusual Incident filed by an unknown person described the cut as "gaping" **[*353]** and stated there was a "lg. amt blood loss." Id. Stojetz was

subsequently transferred to Mercy Hospital, in Portsmouth.

In *Brady v. Maryland (1963), 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Defendant-Petitioner raised the issue of post-traumatic stress disorder at the sentencing phase of his trial for the aggravated murder of Watkins in 1997, and presented expert testimony in support of his theory that due to the 1987 incident he was incited to react violently to an alleged threat made by Watkins. It is instructive to quote at length from the Ohio Supreme Court's decision affirming our imposition of the death penalty in Stojetz's case:

> Denise Crosston, appellant's sister, testified that when appellant was a young boy he witnessed his grandfather's suicide. Crosston described appellant as a thief who, while growing up, would bring home stolen items to try to make his mother happy. Crosston testified that appellant was "always institutionalized," that she knew appellant best while **[*354]** they were growing up, and that she built a relationship with appellant by visiting him in prison and making sure he had money in his prison account. She further testified that appellant had both of his ankles broken as a result of a prison fight. Crosston also recalled that appellant had his throat cut while in prison. She expressed her view that appellant is not a murderer but "is a product of the environment that he is in."
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> ***
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> Dr. Eimer further noted that appellant has spent much of his adult life in prison. According to Dr. Eimer, appellant became a "citizen of the institution," and abided by rules such as "if one is threatened, one also has a choice to die or to kill." In contrast, Dr. Eimer considered appellant's earning his G.E.D. and receiving an associate degree from Ashland University to be quite an achievement in light of appellant's limited intellectual potential.
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> Based on the psychological testing of appellant as well as the clinical interviews with appellant, his stepsister, and girlfriend, Dr. Eimer concluded that appellant is "not socialized in terms of moral norms." According to Dr. Eimer, appellant lacked adequate parenting in his formative years and appellant's adult **[*355]** role models were abusive and amoral. Dr. Eimer further noted that appellant is "even more dysfunctional in our society," given that appellant was "institutionalized" at an early age and spent much of his adult life in jail.
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> In addition, Dr. Eimer diagnosed appellant as suffering from Post-Traumatic Stress Disorder ("PTSD") and determined that appellant has a paranoid schizoid personality with antisocial tendencies. According to Dr. Eimer, appellant's difficulty in adjusting to societal roles is comparable to that experienced by some survivors of military combat. In Dr. Eimer's view, appellant's PTSD and personality disorder qualify as a mental disease. Nevertheless, Dr. Eimer ultimately concluded that appellant holds himself accountable for his actions. Dr. Eimer opined that although appellant "is largely unfamiliar with our [society's] moral norms * * * that doesn't mean that he doesn't know them. * * * [Appellant] knows what he is doing but he has not internalized our societal norms."
>
> Appellant gave a rather lengthy unsworn statement in which he chronicled his life

history both in and out of prison. Appellant recounted the time his grandfather committed suicide, how appellant began **[*356]** stealing at an early age, and when he visited his dying mother in the hospital accompanied by prison guards.

Appellant also gave his version of the events leading up to the murder of Watkins. According to his statement, appellant had promised to protect Doug Haggerty, a juvenile inmate at Madison Correctional. Apparently, Haggerty's father and appellant were once cellmates at Lucasville Correctional Institution. Appellant stated that he was informed that Watkins, and other juvenile inmates, had attacked Haggerty. Appellant also stated that he was informed that Watkins had threatened appellant and other members of the Aryan Brotherhood. Appellant alleged that his only intention was to answer Watkins's threat with a fight, but that "things got out of control."

Appellant concluded his unsworn statement by extending sympathy to Watkins's family and by expressing sorrow for his (appellant's) part in Watkins's murder. Finally, appellant asked the court and God to forgive him and have mercy on his life.

Upon a review of the evidence in mitigation, we find that the nature and circumstances of the offense do not reveal any mitigating value. The murder of Watkins took place in a detention facility **[*357]** amidst an atmosphere full of racial animosity. Appellant and five fellow inmates seized control of the juvenile unit at knifepoint and then tracked down and repeatedly stabbed their intended victim. Finally, as Watkins pleaded for his life, appellant and another inmate cornered Watkins and stabbed him to death.

The record does reflect, however, that appellant had a troubled childhood. At the age of five years, appellant witnessed his grandfather's suicide. Testimony established that appellant's formative years were marked by a lack of proper supervision and parental guidance, that appellant was subjected to conflicting methods of discipline from his mother and grandmother, and that appellant lacked a formal education. We believe that appellant's childhood and other history are entitled to some weight in mitigation.

We now consider the statutory mitigating factors listed in *R.C. 2929.04(B)*. The *R.C. 2929.04(B)(4)* and *(5)* mitigating factors are not applicable on the record before us. *R.C. 2929.04(B)(6)* is also inapplicable because evidence produced at trial overwhelmingly established that appellant was a principal offender in the death of Watkins.

In his second proposition of law, appellant asserts that, in view of the fact that he suffers **[*358]** PTSD, Watkins's attack on Haggerty induced or facilitated Watkins's death. Moreover, appellant contends that Watkins's threat to kill appellant, coupled with appellant's PTSD, caused him to be under duress and triggered or provoked Watkins's own murder. We disagree.

The fact that appellant apparently suffers from PTSD compels very little weight, if any, in mitigation under *R.C. 2929.04(B)(1)* or *(2)*. Although Dr. Eimer diagnosed appellant as suffering from PTSD, Dr. Eimer also added that appellant "knows what he is doing" and that appellant holds himself accountable for his actions.

The fight that involved Watkins and Haggerty could perhaps be construed under other circumstances as having motivated appellant and his accomplices to seek revenge against Watkins. However, in light

of overwhelming evidence to the contrary, this court finds that this incident was merely an excuse used by appellant to achieve other ends. Testimony at trial established that appellant wanted to get transferred out of Madison Correctional and had his belongings already packed when prison officials went to this cell after the murder. Further, shortly after killing Watkins, appellant told corrections officer Vanover something to the **[*359]** effect that "this will definitely get me my ride out (of Madison Correctional)." We therefore consider that the *R.C. 2929.04(B)(1)* mitigating factor is not implicated here.

In addition, the *R.C. 2929.04(B)(2)* mitigating factor is entitled to little or no weight. There was no direct provocation by Watkins against appellant. Appellant failed to establish that he was under a threat of imminent harm from Watkins. After the assault on Haggerty and the alleged threat by Watkins, appellant had sufficient time to consider his course of action. Watkins's purported threat to appellant, as well as the assault on Haggerty, is a weak attempt by appellant to justify his use of deadly force. Moreover, as previously stated, the evidence at trial established that appellant committed the murder to compel a transfer out of Madison Correctional. It was further established at trial that the murder of Watkins was also intended to send a message to the black juvenile inmates at Madison Correctional that the Aryan Brotherhood would not be intimidated.

We also conclude that Dr. Eimer's diagnosis of appellant's mental condition is not entitled to weight under *R.C. 2929.04(B)(3)*. Dr. Eimer agreed that appellant's mental condition was, in fact, a "mental disease." **[*360]** However, Dr. Eimer never asserted, and we do not find, that appellant's mental condition caused him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. See *State v. Lawrence (1989), 44 Ohio St.3d 24, 32, 541 N.E.2d 451, 460*. Accordingly, we conclude that appellant's paranoid schizoid personality with antisocial tendencies and his PTSD are entitled to only modest mitigating weight as *R.C. 2929.04(B)(7)* mitigating factors.

In regard to other *R.C. 2929.04(B)(7)* factors, appellant apparently cares for his family and they for him. Nonetheless, their relationship reveals nothing of any mitigating value. Finally, appellant's expressions of sorrow and remorse in his unsworn statement are entitled to some, but very little, weight in mitigation. See *State v. Rojas (1992), 64 Ohio St.3d 131, 143, 1992 Ohio 110, 592 N.E.2d 1376, 1387*, and *State v. Raglin, 83 Ohio St.3d at 273, 699 N.E.2d at 498*.

Weighing appellant's evidence presented in mitigation against the single *R.C. 2929.04(A)(4)* aggravating circumstance, we conclude beyond a reasonable doubt, that the aggravating circumstance outweighs the mitigating factors. Therefore, the penalty of death is statutorily appropriate.

State v. Stojetz (1999), 84 Ohio St.3d 452, 469-472, 1999 Ohio 464, 705 N.E.2d 329.

Stojetz now argues that Dr. Eimer's testimony was "neutralized" by the State on the basis that the evidence on which he relied was not corroborated by the allegedly withheld ODRC documents. As the above **[*361]** quotation demonstrates, the jury during the trial was presented with substantial evidence that Stojetz suffered from various mental problems and even diseases at the time of the incident in question, including testimony about the 1987

incident. The Supreme Court upon review appears to have accepted all of Dr. Eimer's testimony and his diagnoses of Stojetz as true, but outweighed by the many aggravating circumstances. There is no evidence that Eimer relied heavily on the incident to present his evidence, therefore the fact that the State undercut his testimony by downplaying the incident does not mean that the defendant's mitigating evidence was neutralized. Nor is there any evidence that the State was in possession of these documents and relied upon them to present evidence they knew to be false.

The PTSD diagnosis upon which Stojetz relies was not undercut by the failure of the State to turn over ODRC documents relating to the 1987 incident. The documents, while arguably under the ambit of the State, were not "material" as required by Brady. The defendant and his counsel were clearly aware of the facts of the incident, as they raised it at trial. The State, in preparing its case, if **[*362]** it did come across records of the incident could not be expected to consider it at all relevant to trial unless the defendant had informed them that he would use it in mitigation at trial. The defendant, who had ample other evidence to rely on for his diagnosis and for evidence of his state of mind while in prison, did not even seem to address Dr. Eimer specifically to the incident for purposes of diagnosing Stojetz. Nor did he, prior to the mitigation hearing, disclose to the State Dr. Eimer's report, opinions or information he relied on in forming his opinions. In particular, Defendant failed to give the State notice that he intended to use the incident as a factor leading to PTSD. It is only now, 12 years after his death sentence was imposed, after a failed post conviction petition and appeal, that Stojetz finds that these internal ODRC documents were obviously material to their mitigation case, and that the State purposely withheld them, neither of which appears to be true.

(ECF No. 132-3, at Page ID # 6380-6385.)

The appellate court, in affirming the trial court's decision disallowing the filings of Petitioner's second/successive postconviction action and motion for a new trial, **[*363]** made the following relevant findings and conclusions:

> In *Brady, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215*, the United States Supreme Court held, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id. at 87*. Evidence is "material" only if there is a reasonable probability that the proceeding would have turned out differently had the evidence been disclosed to the defense. *United States v. Bagley (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L. Ed. 2d 481*. "A successful Brady claim requires a three-part showing: (1) that the evidence in question be favorable; (2) that the state suppressed the relevant evidence, either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice." *State v. Davis, Licking App. No.2008-CA-16, 2008-Ohio-6841, ¶53*, citing *Strickler v. Greene (1999), 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L. Ed. 2d 286*. Further, it is the burden of the defense to prove a *Brady* violation has risen to the level of denial of due process. *State v. Jackson (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549*.
>
> ***
>
> *** Moreover, appellant was certainly aware of the facts underlying this claim, as they existed since September 1987 and appellant first raised the issue at trial. While appellant arguably might not have been aware of the records documenting the prior prison attacks, appellant has failed to demonstrate how he was **[*364]** prevented from obtaining them.
>
> Further, according to the record appellant failed to disclose to the state that he planned to use the report and testimony of Dr. Eberhard Eimer, a licensed clinical psychologist. During

the penalty phase, appellant's mitigation focused on his theory that his attack on the victim was in response to feeling threatened. In support of this theory, appellant presented Dr. Eimer's report and testimony. Dr. Eimer testified that appellant "was provoked easily * * * is worried all the time, * * * is scared for his life, [and] he is intensely fearful and on guard." Dr. Eimer continued, stating that "[appellant] views his world as a threatening place in which there's no place to hide or find safety. His pronounced fearfulness appears to be a controlling part of his life and dominates his thought patterns and overshadows any other feelings." Dr. Eimer diagnosed appellant with PTSD, which he attributed to a near death experiences including the incident where appellant's throat was cut and another experience where appellant allegedly was hung.

We find it disingenuous of appellant to fail to notify the state that it planned to use Dr. Eimer's opinions regarding the "near **[*365]** death experiences" and then later argue the state violated *Brady* by purposely withholding reports of those incidents. Regardless, appellant has failed to demonstrate the state withheld the reports or that the reports are material to its mitigation attempts given appellant's knowledge of the incidents.

In appellant's second and third grounds for relief, he argues the state violated its duty to correct materially false or inaccurate information during trial. A prosecutor, as a state agent, has a constitutional duty to ensure that a defendant has a fair trial. *State v. Staten (1984), 14 Ohio App.3d 78, 83, 14 Ohio B. 91, 470 N.E.2d 249*, citing *Mooney v. Holohan (1935), 294 U.S. 103, 113, 55 S.Ct. 340, 79 L. Ed. 791*. Part of this duty requires a prosecutor to correct any testimony that he knows to be false. Id., citing *Napue v. Illinois (1959), 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L. Ed. 2d 1217*. During the state's cross-examination of Dr. Eimer, the state attempted to neutralize Dr. Eimer's testimony by exposing his failure to seek independent verification of information provided by appellant, questioning the validity of appeallant's MMPI personality test scores, and emphasizing various inconsistencies in statements made by appellant. During this questioning, the following transpired, regarding the prior prison attack on appellant:

"Prosecutor: Let's turn to your clinical interview notes. *** [Appellant] alleged **[*366]** to you he was hung, yes?
"Dr. Eimer: I am not positive whether I learned that from him or his sister.
"Q: Who would be the better source of that?
"A: He would be. I think I did.
"Q: Which sister, Lorrie?
"A: I think I did [hear] from him actually.
"Q: You are not sure?
"A: I think I heard it from him—from his sister first and then him.
"Q: Did you attempt to verify that allegation?
"A: No.
"Q: Whatsoever?
"A: No, not at all.
"***
"Q: Are you making a diagnosis he suffers from post traumatic stress disorder?
"A: Yes.
"Q: I'm assuming you are attributing this to one of those potential traumatic experiences?
"A: Yes.
"Q: Did you attempt to verify the existence of that?
"A: No, I did not.
"Q: My question is do you agree with me or disagree external independent verification of [the incident] might be important as the foundation of your evaluation?
"A: It would be important.
"Q: But you chose not to do that?
"A: I didn't choose to, I failed to.
"Q: The next allegation [was] his throat was cut from one side to the other with a straight edged razor?
"A: Yes.

"Q: Same question, did you verify that?
"A: In the sense that he showed me his scar.
"Q: Did it run from one side to the other?
"A: Yes.

"Q: Did you attempt to ascertain **[*367]** the severity of the underlying incident?
"A: No.
"Q: Whether it was stitched up inpatient hospitalization?
"A: I did not. I have already indicated all my sources of information so I did not have any further sources.
"Q: If we're dealing with something as a potentially traumatic episode which contributes or is the foundation of the post traumatic stress disorder, don't you agree we have to have originally a traumatic experience?
"A: Yes.
"Q: And other than what this man told you, you don't know whether those experiences ever in fact took place?
"A: I would find it hard to imagine how else he would have obtained the scar such as the one that he did show me.
"Q: Could it have been a cut or could [it] have been a slash?
"A: Yes.
"Q: Could [it] have been a superficial wound or severe wound [and if it was] a superficial wound, would that in any manner affect the severity of the traumatic experience?
"A: Yes.
"Q: But you don't know whether it was superficial?
"A: No.
"Q: Or severe wound?
"A: It might have been a scratch on the skin."

(ECF No. 132-4, at Page ID # 6701-6706.)

Having consider the parties' arguments, as well as the state court materials, the Court does not disagree with, much less find unreasonable, **[*368]** the state court decisions rejecting Petitioner's claims. That being so, whether the Court reviews the claims *de novo* or through the prism of *28 U.S.C. § 2254(d)*, the Court cannot find that the claims warrant habeas corpus relief.

The Court begins by noting that in his amended ninth ground for relief, Petitioner sets forth due process and *Napue* claims, arguing essentially that the prosecution engaged in misconduct that rendered Petitioner's conviction and sentence fundamentally unfair. (ECF No. 137, at Page ID # 8872.) The essence of this claim is Petitioner's allegation that "[t]he trial prosecutor indicated that he had reviewed the ODRC medical records during the cross of Dr. Eimer (ECF R. 133-7, p. 148 (Tr. 1139) Page ID # 7931), while simultaneously asking questions about Stojetz exaggerating what had to have been only a 'cut' or a 'superficial' injury." (ECF No. 137, at Page ID # 8873.) In his tenth ground for relief, Petitioner then asserts both a *Brady* violation and a *Napue* claim that the prosecution knowingly presented false evidence. (*Id*. at Page ID # 8874.) At the heart of these two components are Petitioner's assertions that the prosecution failed to disclose the ODRC records in question, in violation **[*369]** of *Brady*, and that the prosecution questioned the occurrence or severity of the 1987 prison assault while being in possession of undisclosed documents contradicting such assertions—in violation of *Napue*. Despite the overlap between Petitioner's ninth and tenth ground, for the sake of clarity, the Court will address the *Brady* claim and the *Napue* claim separately.

Turning first to Petitioner's *Brady* claim, the Court notes that the Sixth Circuit has set forth analysis of a *Brady* claim as follows:

> In order to establish a violation of *Brady*, [the petitioner] must show that the following three requirements are met: "The 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."

Montgomery v. Bobby, 654 F.3d 668, 678 (6th Cir. 2011) (quoting *Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*. Fatal at first glance to Petitioner's *Brady* claim, as to the existence of the ODRC records, is the element of suppression. As the Court noted in its March 17, 2010 Opinion and Order, "the Sixth Circuit has held that the State does not violate *Brady* when it fails to disclose information of which the accused knew or should have been **[*370]** aware or that was otherwise available." (ECF No. 119, at Page ID # 2636 (citations omitted).) Although Petitioner repeatedly intimates that he could not have discovered the records earlier, he has not made any persuasive arguments demonstrating that fact. The Court need not resolve this issue, however, because the Court is of the view that Petitioner's claim, as to the existence of the ODRC records and as to the fact of whether the prosecution was in possession of those records prior to its mitigation-phase cross-examination of Dr. Eimer, fails *Brady*'s materiality (prejudice) component.

Petitioner correctly points out that in *Kyles v. Whitley*, the Supreme Court explained *Brady*'s "materiality" component as follows:

> [F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.***
> ***
>
> [T]he touchstone of materiality is a "reasonable probability" of a different result, and that adjective is important. The question is not whether a defendant would more likely than not have received a different verdict with the evidence, **[*371]** but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). The Sixth Circuit has also cautioned that:

> "Prejudice (or materiality) in the *Brady* context is a difficult test to meet...." *Jamison v. Collins, 291 F.3d 380, 388 (6 th Cir. 2002)*. In order to establish prejudice, "the nondisclosure [must be] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler, 527 U.S. at 281, 119 S.Ct. 1936*. But, the *Brady* standard is not met if the petitioner shows merely a reasonable *possibility* that the suppressed evidence might have produced a different outcome; rather, a reasonable *probability* is required.

Montgomery, 654 F.3d at 678. Finally, the Court recognizes that *Brady*'s standard requirement "is not a sufficiency of evidence test." *Kyles, 514 U.S. at 434*.

In short, the Court is not persuaded that defense counsel's possession of the ODRC records, either to support the defense case or to defuse any attempt by the prosecution to undermine Dr. Eimer's testimony about the severity of Petitioner's wound, considered in conjunction with the evidence **[*372]** that was presented at trial and in mitigation, gives rise to a reasonable probability that the jury would have reached a different sentencing verdict. In suggesting that had defense counsel been armed with the ODRC records, both to support their mitigation case and to defuse any suggestion by the prosecutors that Petitioner's wound was less severe than it was, Petitioner fails to account for the impact of the evidence that was presented on that issue. Petitioner's sister, Denise Croston, testified during the mitigation hearing not only visiting Petitioner once after both of his ankles had been broken, but also about an incident when Petitioner's

"throat was sliced in Lucasville." (Tr. Vol. VII, at 1084-85.)

Dr. Eimer testified at length about Petitioner's being "highly suspicious," "provoked easily," "constantly worried," "scared for his life," and "intensely fearful and on guard." (*Id*. at 1109.) Dr. Eimer further testified that Petitioner "views his world as a threatening place in which there's no place to hide or find safety." (*Id*.) Dr. Eimer explained that "[h]is pronounced fearfulness appears to be a controlling part of his life and dominates his thought patterns and over shadows any other feelings." **[*373]** (*Id*.) In support of Dr. Eimer's diagnosis that Petitioner suffered from PTSD, Dr. Eimer related a host of traumatic events Petitioner had experienced, including the "near death experience[]" when "his throat was cut from one side to the other with a straight edged razor including the jugular." (*Id*. at 1113.) Dr. Eimer explained that Petitioner "survived by clamping the jugular vein with fingers while running to get help in the clinic, and then all the while he was praying he would not lose consciousness and grip on his jugular." (*Id*.) When the prosecutor asked whether Dr. Eimer verified the attack on Petitioner, Dr. Eimer replied that Petitioner had shown Dr. Eimer the scar and that it did in fact run from one side to the other. (*Id*. at 1137.) In response to one of the prosecutor's questions about whether Dr. Eimer could be sure that the slashing incident ever took place, Dr. Eimer responded that he "would find it hard to imagine how else [Petitioner] would have obtained the scar such as the one that he did show me." (*Id*. at 1138.)

Petitioner likewise described vividly the incident during which his throat was cut with a straight razor. Petitioner continued:

> ***I seen blood come out the side of my neck from my jugular **[*374]** vein. I got scared then. I had a towel on my shoulder *** and I wrapped the towel around my neck and I knew that I was bleeding out my jugular vein.
> ***
> When I was walking up the hallway, my towel was soaked with blood. At that time I had to kick the crash gates and motion for the officer to let me through the crash gate. I showed him my neck. He opened the crash gate. I walked off by myself. This is maximum security. I walked myself to the hospital. When I got to the hospital there was a nurse. Lucky for me she knew what to do. She clamped by vein until I went to the outside hospital and the doctor that was in there saved my life.

(*Id*. at 1163-64.)

This testimony was graphic and powerful, and the Court is not persuaded that the ODRC records or the inability of the prosecutor undermine it, would have noticeably strengthened the testimony. The Ohio Supreme Court, in weighing the aggravating circumstance against the mitigating factors, accepted as true Dr. Eimer's PTSD diagnosis but ultimately gave it little weight in determining that the aggravating circumstance outweighed the mitigating factors. Petitioner is dismissive of that fact and suggests that it actually lends proof to the success of the prosecutions **[*375]** suggestions undermining the severity of the wound Petitioner suffered (while being in possession of records that contradicted those suggestions). Petitioner's argument misses the mark. The Ohio Supreme Court accepted the diagnosis, even without the ODRC records. Petitioner has not demonstrated and the Court is not otherwise persuaded that had defense counsel been in possession of the ODRC records and the prosecution not been able to intimate that Petitioner had exaggerated the severity of his wound, the Ohio Supreme Court would have been more definitive in its acceptance of the PTSD diagnosis or given it enough weight to conclude that the aggravating circumstance did not outweigh the mitigating factors beyond a reasonable doubt. It is reasonable to glean from the Ohio Supreme Court's reasoning that the ODRC records, in conjunction with the other mitigation-phase evidence, would not have altered the jury's sentencing decision.

For the foregoing reasons, the Court cannot conclude that defense counsel's not being in possession of the ODRC records gave rise to a an unfair mitigation proceeding whose resulting sentence is unworthy of confidence. That being so, Petitioner cannot show that **[*376]** the prosecution suppressed those records or that the prosecution was in possession of the records prior to the mitigation proceeding in violation of *Brady v. Maryland*.

With respect to the *Napue* (and related due process argument) that Petitioner sets forth in his amended ninth ground for relief, the Court likewise cannot conclude that the prosecution knowingly presented or failed to correct false testimony sufficient to necessitate habeas corpus relief. *Napue v. Illinois*, establishes that a conviction or sentence obtained through the use of false evidence, "known to be such by representatives of the State must fall . . . ." *Napue, 360 U.S. at 269*. In *United States v. Agurs*, the Supreme Court elaborated that a conviction or sentence obtained by the knowing or uncorrected use of perjured or false testimony "is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *See 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)*. The Sixth Circuit has recognized a three-part test for determining whether the prosecution has committed a *Brady-Napue-Giglio* violation:

> In order to establish prosecutorial misconduct or denial of due process, the defendant[] must show (1) the statement **[*377]** was actually false; (2) the statement was material; and (3) the prosecution knew it was false.

Brooks v. Tennessee, 626 F.3d 878, 894-95 (6th Cir. 2010) (quoting *Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998))*.

Petitioner is correct that the test here for materiality is less stringent than that for a *Brady* claim. *Rosencrantz v. Lafler, 568 F.3d 577, 584 (6th Cir. 1999)*. Thus, the Sixth Circuit has explained that "[t]he petitioner need only show that there exists 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Smith v. Metrish, 436 F. App'x 554, 566 (6 th Cir. 2011)* (quoting *Rosencrantz, 568 F.3d at 584*). The Supreme Court in *Agurs* cautioned:

> If there is no reasonable doubt about guilt [or sentence] whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.

427 U.S. at 112-13.

Applying these standards to the record, the Court is not persuaded that Petitioner has demonstrated a *Napue* violation. First, the record is not definitive on the issues of whether the prosecutors were in possession of the ODRC records in question or whether the prosecution's cross-examination of Dr. Eimer at issue was intended to knowingly misrepresent the severity of the wound that Petitioner suffered. In support of his **[*378]** position that the prosecutors were in possession of, and had reviewed, the ODRC records at the time they cross-examined Dr. Eimer and gave closing arguments that the records contradicted, Petitioner can state nothing more than that the prosecution "implied" or "indicated" as much. (ECF No. 137, at Page ID # 8870, 8873, 8874, 8887, 8888.) In so doing, Petitioner does not identify any particular statement or question on the part of the prosecutors "implying" that they were in possession of or "indicating" that they had reviewed the records. Rather, he relies only on the undertones of two pages of the prosecution's cross-examination of Dr. Eimer (Tr. Vol. VII, at 1137-38) and a page from the prosecution's closing argument (*Id*. at 1178-79). Petitioner points to no evidence establishing as fact that the prosecution was in possession of the records and had reviewed them, although the Court recognizes that Petitioner requested but was denied the ability to develop such evidence when he returned to the state courts. In any event, the Court

is not inclined to accept Petitioner's conflation of an "implication" or "indication" with an established fact.

Further, even assuming the prosecutors were in possession **[*379]** of the records, the Court rejects Petitioner's suggestion that there were not other reasonable bases for the prosecution's line of inquiry during cross-examination of Dr. Eimer. That is, it is just as reasonable to construe from the record that the prosecution, in cross-examining Dr. Eimer on whether he had independently verified the prison assaults Petitioner had suffered, was attempting not to establish or suggest that Petitioner did not suffer a serious assault or wound in 1987, but to establish that Dr. Eimer's veracity and diagnoses were suspect because of his failure to independently verify the facts that formed the bases of those diagnoses. Petitioner will not be heard to disparage that interpretation as "divin[ing] the purpose behind the prosecutor's questions as simply undermining the expert," when Petitioner's interpretation is no more substantiated. (ECF No. 137, at Page ID # 8876.) It is not.

Beyond the foregoing, the Court concludes more importantly that Petitioner cannot establish *Napue*'s materiality component. Recognizing that the standard is less stringent than that for a *Brady* violation, the Court nonetheless concludes for the same reasons it set forth above in discussing Petitioner's **[*380]** *Brady* claim that there is not a reasonable likelihood that the omission of the ODRC records, or the prosecution's questions and arguments questioning the severity of the assault Petitioner suffered in prison in 1987, could have affected the jury's sentencing determination. This Court points again to the credible impact of the evidence set forth above describing the 1987 assault and resulting wound that was presented during mitigation—namely Denise Croston's testimony, Dr. Eimer's testimony, and Petitioner's unsworn statement. Evidence that the prosecution was in possession of the ODRC records and knowingly misrepresented their contents is speculative. Further, contrary to Petitioner's arguments, the instant decision reflects this Court's view that the verdict and sentencing decision against Petitioner are not of "questionable validity" sufficient that even "evidence of relatively minor importance might be sufficient" to question whether the jury's sentencing decision was affected. *See Agurs, 427 U.S. at 112-13*. That being so, the Court cannot find that there is any reasonable likelihood that defense counsel's not having the ODRC records and the prosecution's cross-examination and arguments questioning whether **[*381]** Petitioner suffered a "near-death" or serious assault in 1987 could have affected the jury's sentencing decision.

For the foregoing reasons, the Court **DENIES** Petitioner's newly amended ninth and tenth grounds for relief as untimely (because they do not relate back to the filing of the original petition) and barred by procedural default. In the alternative, the Court **DENIES** Petitioner's newly amended ninth and tenth grounds for relief as without merit.

The Court is of the view, however, that both its decision whether the amended claims were untimely and barred by procedural default, as well as Petitioner's amended ninth and tenth grounds for relief, meet the showing required by *28 U.S.C. § 2253(c)(2)*.

VII. Conclusion

The Court **DENIES** Petitioner's claims and **DISMISSES** this habeas corpus action with prejudice. The Clerk shall enter judgment accordingly and terminate this case on the docket records of the United States District Court for the Southern District of Ohio, Eastern Division.

IT IS SO ORDERED.

/s/ Gregory L. Frost

GREGORY L. FROST

UNITED STATES DISTRICT JUDGE

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