No. ___________ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

Richard Bays,

Applicant-Petitioner,

v.

Warden, Chillicothe Correctional Institution,

Respondent.

On Application for a Certificate of Appealability
The United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

No. 18-3101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 28, 2018
DEBORAH S. HUNT, Clerk

RICHARD BAYS,	)	
Petitioner-Appellant,	)	
v.	)	O R D E R
WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION,	)	
Respondent-Appellee.	)	

Before: GIBBONS, KETHLEDGE, and DONALD, Circuit Judges.

Richard Bays, an Ohio prisoner under sentence of death, appeals from a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The case is now pending before this court for review of Bays's application for an expanded certificate of appealability (COA).

After Bays waived his right to a jury trial, a three-judge panel convicted Bays of aggravated murder and aggravated robbery. The panel subsequently sentenced Bays to death for the aggravated murder conviction, plus twenty-five years of imprisonment for the aggravated robbery conviction. On appeal, the Ohio Supreme Court affirmed his convictions and sentence. *State v. Bays*, 716 N.E.2d 1126, 1145 (Ohio 1999).

In 1996, Bays filed a state petition for post-conviction relief. After conducting an evidentiary hearing, the trial court denied Bays's petition, and the Ohio Court of Appeals affirmed that decision. *State v. Bays*, No. 2003 CA 4, 2003 WL 21419173 (Ohio Ct. App. June 20, 2003). In 2003, Bays filed a second state post-conviction petition, alleging that he was intellectually disabled and ineligible to be executed. Bays voluntarily dismissed this petition, but

later moved to withdraw this voluntary dismissal. The trial court denied this motion, but not before Bays had filed a third state post-conviction petition, again challenging his competency to be executed. On appeal, the Ohio Court of Appeals affirmed the trial court's decision denying Bays's motion to withdraw the voluntary dismissal of his second post-conviction petition, but the court remanded for consideration of his third state post-conviction petition. *State v. Bays*, No. 2014-CA-24, 2015 WL 2452324 (Ohio Ct. App. May 15, 2015). Bays's third post-conviction petition remains pending in the trial court.

In 2008, Bays filed his § 2254 petition, raising eleven grounds for relief. The magistrate judge issued reports recommending that part of Bays's Fourth Claim concerning counsel's performance during the trial's penalty phase and his Ninth Claim concerning the state courts' proportionality review be dismissed as procedurally defaulted. The magistrate judge also recommended that his Tenth Claim be dismissed without prejudice as premature and not exhausted in state court. *Bays v. Warden*, No. 3:08-CV-076, 2009 WL 1617950 (S.D. Ohio Mar. 16, 2009); *Bays v. Warden*, No. 3:08-CV-076, 2009 WL 1617946 (S.D. Ohio Apr. 29, 2009). The district court adopted these recommendations. *Bays v. Warden*, No. 3:08-CV-076, 2009 WL 1617944 (S.D. Ohio June 9, 2009).

The magistrate judge subsequently recommended that Bays's remaining claims be dismissed as meritless. *Bays v. Warden*, No. 3:08-CV-076, 2012 WL 553092 (S.D. Ohio Feb. 21, 2012). While this report was pending before the district court, Bays moved to file an amended § 2254 petition, raising new claims concerning Ohio's lethal injection protocol, and the magistrate judge granted the motion to amend. The district court subsequently overruled Bays's objections to the magistrate judge's report concerning the claims from his original habeas petition and dismissed those claims. *Bays v. Warden*, No. 3:08-CV-076, 2012 WL 3224107 (S.D. Ohio Aug. 6, 2012).

Bays next moved to file another amended habeas petition raising a claim that he was intellectually disabled and ineligible for execution, as well as a related ineffective-assistance-of-counsel claim. The magistrate judge denied this motion, *Bays v. Warden*, No. 3:08-CV-076,

2013 WL 4502205 (S.D. Ohio Aug. 22, 2013), and the district court overruled objections to that decision. *Bays v. Warden*, No. 3:08-CV-076, 2014 WL 29564 (S.D. Ohio Jan. 3, 2014). The magistrate judge did grant Bays permission to file another amended complaint raising additional challenges to Ohio's execution protocol, *Bays v. Warden*, No. 3:08-CV-076, 2017 WL 1315793 (S.D. Ohio Apr. 10, 2017), and the district court overruled objections to this decision. The magistrate judge subsequently issued reports recommending that Bays's remaining claims be dismissed, *Bays v. Warden*, No. 3:08-CV-076, 2017 WL 5128277 (S.D. Ohio Nov. 6, 2017); *Bays v. Warden*, No. 3:08-CV-076, 2017 WL 6035231 (S.D. Ohio Dec. 6, 2017), and the district court adopted that recommendation. *Bays v. Warden*, No. 3:08-CV-76, 2017 WL 6731493 (S.D. Ohio Dec. 29, 2017).

The district court did grant Bays a COA for the following issues: (1) whether his inculpatory statements to the police were improperly admitted at trial; (2) whether Ohio can constitutionally execute Bays because the only manner available under the law to execute him violates his Eighth Amendment rights; (3) whether Ohio can constitutionally execute Bays because the only manner available for execution violates the Due Process Clause or the Privileges or Immunities Clause; (4) whether Ohio can constitutionally execute Bays because the only manner of execution available under Ohio law violates the Equal Protection Clause; and (5) whether Ohio can constitutionally execute Bays because Ohio's violations of federal law constitute a fundamental defect in the execution process, and the only manner of execution available depends on execution laws that are preempted by federal law. *Bays*, 2017 WL 6731493; *Bays v. Warden*, No. C-3:08-CV-076, 2013 WL 361062 (S.D. Ohio Jan. 29, 2013).

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists

could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

In his application for an expanded COA, Bays raises the following issues: (1) whether the district court improperly denied his motion to amend and add a claim challenging his competency to be executed and a related ineffective-assistance-of-counsel claim; (2) whether the trial court improperly denied him access to the identity of the confidential informant; (3) whether his trial counsel rendered ineffective assistance by failing to introduce compelling evidence in support of his motion to suppress his confession to the police; (4) whether his jury waiver was knowing, intelligent, and voluntary; (5) whether his trial counsel were ineffective in advising him to waive his right to a jury trial and in failing to ensure that his jury waiver was knowing, intelligent, and voluntary; and (6) whether cumulative error deprived Bays of a fair trial. Although Bays seeks a COA for these issues from his § 2254 petition (in addition to the issues already granted a COA by the district court), he does not request a COA for a number of other claims from that petition. Consequently, this court considers the remaining issues from his § 2254 petition to be abandoned and not reviewable. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

Upon review, we conclude that Bays has not made a substantial showing of the denial of a federal constitutional right for any of the issues from his COA application. Accordingly, we **DENY** Bays's application for an expanded COA. The Clerk's Office shall issue a briefing schedule.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-3101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 21, 2019
DEBORAH S. HUNT, Clerk

RICHARD BAYS, Petitioner-Appellant, v. WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION, Respondent-Appellee.	)	ORDER

Before: GIBBONS, KETHLEDGE, and DONALD, Circuit Judges.

Richard Bays, an Ohio prisoner under sentence of death, appeals from a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. On March 15, 2019, Bays filed a second application for an expanded certificate of appealability (COA) with this court, and the Warden has filed a response opposing the COA application.

Upon review, we **DENY** Bays's second application for an expanded COA.

ENTERED BY ORDER OF THE COURT

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

RICHARD BAYS

Petitioner,

-v-

WARDEN, Ohio State Penitentiary

Respondent.

Case No. 3:08-cv-076

Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

ENTRY AND ORDER OVERRULING BAYS' OBJECTIONS (Doc. #162) TO THE MAGISTRATE JUDGE'S DECISION AND ORDER (Doc. #160); OVERRULING BAYS' OBJECTIONS (Doc. #171) TO THE MAGISTRATE JUDGE'S SUPPLEMENTAL OPINION AND SUPPLEMENTAL REPORT AND RECOMMENDATIONS (Doc. #169); ADOPTING THE MAGISTRATE JUDGE'S SUPPLEMENTAL REPORT AND RECOMMENDATIONS (Doc. #169) IN ITS ENTIRETY; DISMISSING BAYS' SECOND MOTION FOR LEAVE TO FILE AN AMENDED PETITION (Doc. #153) AND DECLINING TO CERTIFY ANY RELEVANT QUESTION TO THE OHIO SUPREME COURT

This matter comes before the Court pursuant to Petitioner Richard Bays' ("Bays'") Objections (doc. #162) to Magistrate Judge Michael R. Merz's Decision and Order (doc. #160) and Bays' Objections (doc. #171) to Magistrate Judge Merz's Supplemental Opinion and Supplemental Report and Recommendations (doc. #169). The Decision and Order determined that Bays has no right to amend his Petition for a Writ of Habeas Corpus and recommended that the Court decline to certify any relevant question to the Ohio Supreme Court. The Supplemental Opinion and Supplemental Report and Recommendations confirmed that Bays had no right to amend his Second Motion for Leave To File an Amended Petition for a Writ of Habeas Corpus and again recommended that the Court decline to certify any relevant question to the Ohio Supreme Court.

On September 16, 2013, Bays filed Objections to the Decision and Order. (Doc. #162.) The matter was recommitted to Magistrate Judge Merz who issued a Supplement Opinion and Supplemental Report and Recommendations.[1] (Doc. #169.) On December 18, 2013, Bays filed Objections (doc. #171) to the Supplemental Opinion and Supplemental Report and Recommendations. On December 20, 2013, the Warden filed a Response to Bays' Objections (doc. #172). Both of Bays' Objections are, therefore, ripe for decision.

Although the caption of the Decision and Order does not indicate a recommendation is being made, therein the Magistrate Judge recommends that the Court not certify a question to the Ohio Supreme Court. Bays objects to both the Magistrate Judge's Decision regarding leave to amend his Petition for a Writ of Habeas Corpus and the Magistrate Judge's recommendation regarding certification of an issue to the Ohio Supreme Court. Thus, Bays' objection to the Decision and Order will be reviewed under the applicable standard of review and Bays' objection to the recommendation will be reviewed under the applicable standard of review.

The Magistrate Judge's Decision and Order denying Bays' Second Motion for Leave To File an Amended Petition is a non-dispositive order. Federal Rule of Civil Procedure 72(a) provides that a district court must modify or set aside any part of a non-dispositive order that is clearly erroneous or is contrary to law. *American Coal Sales Co. v. Nova Scotia Power, Inc.*, No. 2:06-cv-94, 2009 WL 467576 at *13 (S.D. Ohio Feb. 23, 2009)(citing Fed. R. Civ. P. 72(a)). Thus, a "clearly erroneous" standard applies to factual findings made by the magistrate judge. *Id.*

---

[1]The Warden filed a Response to Bays' Objection (doc. #165) after the matter had been recommitted.

Legal conclusions are reviewed under the more lenient "contrary to law" standard. *Id.* Both of these standards provide considerable deference to the determinations made by the magistrate judge. *Id.* (citing *In re Search Warrants Issued August 29, 1994*, 889 F. Supp. 296, 298 (S.D. Ohio 1995)).

A magistrate judge's factual findings are considered clearly erroneous if, on the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed. *Id.* The test is whether there is evidence in the record to support the magistrate judge's finding and whether the magistrate judge's construction of that evidence is reasonable. *Id.* (citing *Heights Community Congress v. Hilltop Realty Corp.*, 774 F.2d 135, 140 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986)). A legal conclusion is contrary to law if the court determines that the magistrate judge's legal conclusions "contradict or ignore applicable precepts of law…." *Id.*(citing *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992).

In this case, this District Judge has reviewed the Magistrate Judge's factual findings and finds that they are not clearly erroneous. The District Judge has also reviewed the Magistrate Judge's conclusions of law and finds that they do not contradict or ignore applicable law. Therefore, Bays' Objections (doc. #162) to the Magistrate Judge's Decision and Order (doc. #160) and Bays' Objections (doc. #171) to the Magistrate Judge's Supplemental Opinion are OVERRULED.

Regarding the Magistrate Judge's recommendation and Supplemental Report and Recommendations, 28 U.S.C. §636(b) and Federal Rules of Civil Procedure Rule 72(b) require the District Judge to make a de novo review of the record in this case and particularly of the matters raised in Bays' Objections and the Warden's Response. Upon said review, the Court

finds that Bay's Objections to the Magistrate Judge's recommendation and Supplemental Report and Recommendations are not well taken and they are OVERRULED.

Bays' Second Motion for Leave To File an Amended Petition (doc. #153) is OVERRULED. Also, the Court declines to certify any relevant question to the Ohio Supreme Court.

DONE and **ORDERED** in Dayton, Ohio, this Second Day of January, 2014.

s/Thomas M. Rose

____

THOMAS M. ROSE
UNITED STATED DISTRICT JUDGE

Copies furnished to:

Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

RICHARD BAYS,

Petitioner, : Case No. 3:08-cv-076

\- vs -

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

WARDEN, Ohio State Penitentiary,

:

Respondent.

SUPPLEMENTAL OPINION; SUPPLEMENTAL REPORT AND RECOMMENDATIONS ON MOTION TO CERTIFY

This capital habeas corpus case is before the Court on Petitioner's Objections (Doc. No. 162) to the Magistrate Judge's Decision and Order of August 22, 2013, denying Petitioner leave to amend, denying a stay pending exhaustion, and recommending the Court decline to certify a question to the Ohio Supreme Court (hereinafter, the "Decision," Doc. No. 160). The Warden has responded to the Objections (Doc. No. 165). With Court permission and without opposition by the Warden, Bays filed a Reply in Support of Objections (Doc. No. 168). District Judge Rose has recommitted the matter for further analysis (Doc. No. 163).

Bays' Motion sought to add two Grounds for Relief:

> **Ground Fourteen:** Richard Bays is mentally retarded, and as a result his execution is barred under *Atkins v. Virginia*, 536 U.S. 304 (2002).
>
> **Ground Fifteen:** Richard Bays was deprived of his constitutional right to the effective assistance of counsel in his post-conviction *Atkins* proceeding.

(Motion, Doc. No. 153-1, PageID 6587-88.)

The Magistrate Judge denied the Motion on the bases that:

(1) Ground Fifteen does not state a claim upon which habeas corpus relief could be granted (Decision, Doc. No. 160, PageID 7433-35).

(2) Both proposed Grounds for Relief are barred by the AEDPA statute of limitations *Id.*, PageID 7435-40.

(3) The dilatory motive of Bays' counsel in waiting nearly five years to move to amend also bars the amendment. *Id.*, PageID 7440-41.

(4) Bays has not proved his "actual innocence of the death penalty" so as to excuse the delay. *Id.,* PageID 7441-42.

(5) Bays' asserted mental incompetence is not an "extraordinary circumstances" sufficient to toll the limitations period. *Id.,* PageID 7442.

The Magistrate Judge also recommended the Warden's procedural default defense to these two claims be found to be premature because the asserted default had not yet been enforced against Bays in the Greene County Common Pleas Court. *Id.* at PageID 7443. Finally, the Magistrate Judge recommended[1] that the question whether the State of Ohio "provides a corrective process for claims of ineffective assistance of post-conviction *Atkins* counsel" not be certified to the Ohio Supreme Court. *Id.* at PageID 7444.

Bays objects to every determination made by the Magistrate Judge except that decision on the procedural default defense would be premature.

[1] The Decision reads "the Court should decline to certify . . . ." Although the caption does not indicate a recommendation is being made on a dispositive motion, the Magistrate Judge made a recommendation rather than a decision on this branch of the Motion because, as a matter of Ohio law, a Magistrate Judge can only certify a question to the Ohio Supreme Court in a case in which he or she is exercising plenary jurisdiction under 28 U.S.C. § 636(c). Ohio S. Ct. R. Prac. 9.03(A).

Failure of Proposed Ground Fifteen to State a Claim for Relief

In his proposed Fifteenth Ground for Relief, Bays asserts he has a constitutional right to the effective assistance of counsel in post-conviction *Atkins* proceedings and he was deprived of that right when his post-conviction *Atkins* counsel voluntarily withdrew his *Atkins* claim.

Atkins was decided June 20, 2002, and held that mental retardation was an absolute bar to execution, overruling *Penry v. Lynaugh*, 492 U.S. 302, 305 (1989). After that date it would be ineffective assistance of capital trial counsel to fail to raise mental retardation as a defense if a defendant had a colorable *Atkins* claim. Bays argues that the same right exists for capital defendants convicted and sentenced before *Atkins* when they present an *Atkins* claim in a post-conviction proceeding in Ohio under *State v. Lott,* 97 Ohio St. 3d 303 (2002).

Bays' sole reliance for the existence of the claimed right is on *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012). There the Tenth Circuit held, as Bays argues, that there is a constitutional right to effective assistance of counsel in *Atkins* proceedings, "a right that stems directly from, and is a necessary corollary to *Atkins*. For that reason we further hold that the right to counsel in *Atkins* proceedings is 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 1185. Neither Bays nor the *Hooks* Court points to any other court which has reached this conclusion.

Moreover, the *Hooks* Court did not deal with the Warden's principal objection, to wit, that even if there is a constitutional right to effective assistance of counsel in a post-conviction *Atkins* proceeding, this Court lacks authority to grant habeas relief on that basis. 28 U.S.C. § 2254(i) expressly provides "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding

arising under section 2254." The *Hooks* Court did not discuss § 2254(i) at all, presumably because it decided that counsel was not ineffective in presenting the *Atkins* claim.[2] Bays has made no argument and presented no authority to the effect that § 2254(i) is unconstitutional. Congress generally has authority to govern the scope of the writ. *Ex parte Bollman,* 8 U.S. 75, 93 (1807)(Marshall, Ch. J.); *Brown v. Allen*, 344 U.S. 443, 499 (1953)(Frankfurter, J.)

In the original Motion, Bays made a conclusory Equal Protection claim which the Decision rejected (Doc. No. 160, PageID 7434-35). In his Objections, Bays argues "[w]hether the Constitution requires Ohio to provide effective *Atkins* counsel is beside the point because Ohio has already extended that right to some Ohio defendants." (Objections, Doc. No. 162, PageID 7460.) Bays' counsel then go on to elaborate the Equal Protection claim at considerable length. *Id.* at PageID 7460-66. The gist of the argument is that if post-*Atkins* defendants with a mental retardation claim have a trial right to effective assistance of counsel in presenting that claim, then it is a denial of equal protection not to give the same right to capital defendants who were convicted before the *Atkins* decision.

The fundamental flaw in this claim is in identifying the right in question. The right to effective assistance of counsel in particular criminal proceedings is granted by the Sixth Amendment to the United States Constitution, not by the State of Ohio. Ohio does not choose which proceedings are covered by that right. The State of Ohio does not discriminate at all between those *Atkins* defendants who presented the issue before or after *Atkins* was decided: if indigent, both are provided with appointed counsel, as was Bays in this case. An Equal Protection violation requires some deliberate intentional action by the State, but Ohio did not

---

[2] The *Hooks* Court also faced a different procedural situation. Hooks' *Atkins* claim was tried to a jury, whereas in Ohio retroactive *Atkins* claims are, per *Lott, supra*, dealt with in post-conviction proceedings under Ohio Revised Code § 2953.21. As noted in the Decision, this procedure was implicitly approved by the Supreme Court in *Bies v. Bobby*, 556 U.S. 825 (2009).

discriminate against post-conviction *Atkins* claims by directing the Ohio Public Defender not to bring them or to litigate them unprofessionally. There is no "state action" discriminating between these two classes of people and therefore no Equal Protection violation.

Because 28 U.S.C. § 2254(i) expressly prohibits this Court from granting habeas relief for ineffective assistance of counsel in a post-conviction proceeding, Bays should not be permitted to add his proposed Fifteenth Ground for Relief.

Both Proposed Grounds for Relief Are Barred by the Statute of Limitations

Bays' Motion to Amend asserted it was timely because it was made within one year of discovering its factual predicate in the January 28, 2013, Affidavit of Dr. Gale Roid. The Decision rejected this assertion on the grounds that Bays' counsel had not been diligent in discovering it because the issue of Bays' mental retardation had been in the case since before he was tried in 1995 (Doc. No. 160, PageID 7436-39).

Bays objects that somehow the "confidential nature of IQ testing and scoring materials prevented him from discovering the scoring errors in his 2007 test" until another expert Bays had engaged, Dr. McNew, referred Bays to Dr. Roid on November 13, 2012 (Objections, Doc. No. 162, PageID 7469). McNew had first been contacted September 12, 2012, and retained October 1, 2012. *Id.*

In deciding Bays' counsel had not exercised due diligence, the Decision noted that counsel admitted questioning the prior expert evaluations from the initial *Atkins* proceedings (Doc. No. 160, PageID 7437, quoting Reply Memo, Doc. No. 159, PageID 7416). While counsel have shown they acted with some dispatch from the time they hired McNew (October 1, 2012)

until the time they filed the Motion to Amend (May 24, 2013), they have not shown they acted with reasonable dispatch in following up on their original questioning of the prior evaluations during the period from the Notice of Intent (March 6, 2008) to the date the Motion to Amend was filed more than five years later.

The Magistrate Judge also concluded that Bays' failure to raise an *Atkins* claim in these proceedings was not excused by the fact that he was initially represented here by Ruth Tkacz, the same lawyer whose ineffectiveness in the *Atkins* proceeding is being claimed. The Decision found that was so because Melissa Callais ceased to have a potential conflict of interest with Ms. Tkacz when she left the Ohio Public Defender's Office (where she and Ms. Tkacz had been employed together) and joined the Capital Habeas Unit of the Federal Defender's Office on September 29, 2008. Assuming there is a conflict of interest between two attorneys in the same public defender office, it would have ended at that point. "Bays objects to this determination because it would have required a junior attorney to assert a claim of ineffectiveness against lead counsel on the case." (Objections, Doc. No. 162, PageID 7470.) Bays cites no authority for the proposition that a lawyer's duty to zealously protect her client's constitutional rights is excused by the fact this would involve her in a conflict of positions with another lawyer in the case, even "lead" counsel. In any event, any such conflict would have disappeared when Ms. Tkacz withdrew as counsel on July 26, 2010, almost three years before the Motion to Amend was filed (Doc. No. 62).[3]

Bays also objects that the "legal basis" of his claim "has been evolving since last year, when the U.S. Supreme Court issued its decision in *Martinez*" *v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (Mar. 20, 2012). If *Martinez* had actually recognized a new constitutional right – which it did not -- and made it retroactively applicable, the time within

[3] Ms. Takacz withdrew for "medical reasons" and has since died.

which to file a pre-existing claim based on *Martinez* would have expired March 20, 2013, more than two months before the instant Motion. Nothing in the AEDPA jurisprudence provides a fourteen-month statute of limitations for claims which are "evolving."

The Amendment Is Also Barred by Bays' Dilatory Motive in Bringing It

The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc.
> -- the leave sought should, as the rules require, be "freely given."

371 U.S. at 182.

In the Decision the Magistrate Judge found, apart from the statute of limitations bar, that Bays had a dilatory motive in moving to amend which weighed against allowing the amendment (Doc. No. 160, PageID 7440-41). Bays objects that this factual determination was "impermissibly made without receiving evidence relevant to counsel's motive and conduct." (Objections, Doc. No. 162, PageID 7472.)

The facts on which the Magistrate Judge relied are patent on the face of the case record. There is no good reason why the testimony of counsel about motive would be any more persuasive than the circumstantial evidence in the record. Bays had an experienced capital attorney – Ruth Tkacz – who filed an *Atkins* claim on his behalf and litigated it vigorously to the

point of obtaining a reversal from the state court of appeals for appointment of an expert on mental retardation. Having examined the expert's report, Ms. Tkacz voluntarily dismissed Bays' *Atkins* post-conviction proceeding. Then she and another experienced capital attorney, Melissa Callais, filed the Petition here in 2008 without making an *Atkins* claim. More than five years later, after the District Judge had decided the merits of this case, after Ms. Callais/Jackson had withdrawn, and after Ms. Tkacz had died and could no longer be questioned about her professional judgment in dismissing the claim, Bays moved to add these two claims. He now says that after Ms. Barnhart took over the case, she had to spend time familiarizing herself with the case and the four experts involved had to "manage a variety of competing demands on their time," and a new investigator substituted for the old investigator. All of these claims are credible, but they must be viewed against the backdrop of the facts already of record. Counsel ends by stating:

> Mr. Bays's mental-retardation status is not a singular object existing in a vacuum. Understanding it and the way in which he and facts about his life interact with complicated clinical standards and practices, and scientific nuances that require extensive expertise to identify and apply, requires a sensitive and comprehensive approach. This is not something that could, or did, take place overnight. To suggest otherwise is an unfair dismissal of Mr. Bays's dignity as an individual whose Constitutional rights deserve to be heard before the government ends his life.

(Objections, Doc. No. 162, PageID 7474.)

On the afternoon of November 15, 1993, Bays beat 76-tyear-old Charles Weaver to death with a battery charger and/or stabbed him to death with a knife in an attempt to obtain money for drugs. *State v. Bays*, 87 Ohio St. 3d 15 (1999). In the ensuing twenty years, Bays has been represented by a succession of skilled and trained attorneys, all of whom knew his possible mental retardation was an issue. It is no insult to his dignity as a human being to conclude that

he had enough time prior to May 24, 2013, to raise and litigate this claim or to infer from the fact that he wants to "start over" with a new lawyer that he has a dilatory motive in seeking to amend at this late stage.

Bays' Asserted Mental Incompetence Is Not Grounds for Equitable Tolling

In the Reply in Support of the Motion, Bays argued "[t]his Court should also grant equitable tolling of the limitations period based on Bays's mental incompetence. "[A] petitioner's mental incompetence, which prevents the timely filing of a habeas petition, is an extraordinary circumstance that may equitably toll AEDPA's one-year statute of limitations." (Reply, Doc. No. 159, PageID 7423), *citing Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011).

The Magistrate Judge rejected this argument, noting that Muzaffer Ata, the petitioner in the cited case, was found to have been without counsel during the time he should have filed his habeas petition and the Sixth Circuit found this grounds to excuse his untimely filing (Decision, Doc. No. 160, PageID 7442).

Bays objects that "[n]othing in *Ata* indicates that the absence of counsel is a mandatory prerequisite to equitable tolling based on mental incompetence." (Objections, Doc. No. 162, PageID 7475.) Reading *Ata* as if the absence of counsel were irrelevant makes no sense of the decision. How could the mental incompetence of a litigant who has a competent attorney possibly excuse failure to meet a filing deadline?

Furthermore, *Ata* excuses not filing during a period of mental incompetence, not mental retardation. Muzaffer Ata was a paranoid schizophrenic and suffered from other psychoses. *Ata*, 662 F.3d at 737. There is no suggestion in the *Ata* decision that mental retardation will excuse

missing a filing deadline. In fact, if mental retardation would excuse missing the statute of limitations, then the statute would never run for the mentally retarded because, by hypothesis, it has an onset before age 18 and is a permanent mental condition.

"Actual Innocence"

Bays also relies on the "actual innocence" exception to the statute of limitations recognized by the Supreme Court in *McQuiggin v. Perkins,* 569 U.S. ___, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). The Magistrate Judge captioned one section of the Decision "Bays Has Not Established That He Is 'Actually Innocent of the Death Penalty.'" (Decision, Doc. No. 160, PageID 7441.) Bays objects if this caption means that the Magistrate Judge has determined the merits of the *Atkins* claim (Objections, Doc. No. 162, PageID 7475-76).

The text of this section of the Decision notes the filing by Bays of a motion to reopen his *Atkins* proceeding in the Greene County Common Pleas Court and this Court's intention not to interfere with that process. The Magistrate Judge did not intend to imply any decision on the merits of the *Atkins* claim except that Bays had not yet shown those merits sufficiently to overcome the statute of limitations defense.

Certification to the Ohio Supreme Court

In the Motion, Bays asked this Court to certify to the Ohio Supreme Court the question whether Ohio provides a corrective process for ineffective assistance of post-conviction *Atkins* counsel (Motion, Doc. No. 153, PageID 6583).

The Magistrate Judge declined to recommend such a certification because

(1) to the extent Bays is asserting a federal constitutional claim to effective assistance of counsel in post-conviction *Atkins* proceedings, this Court had already decided that question, and

(2) to the extent Bays is asserting a non-federal right to assistance of counsel in such a proceeding, that was not a concern of this Court.

Bays' objection reads in its entirety "[b]ecause all of the Magistrate Judge's reasons for declining to certify a question to the Ohio Supreme Court concerning the cognizability of his *Strickland* claim are subject to objections from Bays, Bays also objects to this determination." (Objections, Doc. No. 162, PageID 7476.) A general objection has the same effect as a failure to file altogether. *Howard v. Sec. of HHS,* 932 F.2d 505, 509 (6th Cir. 1991). The reason is that failure to focus the district court's attention on any specific issues makes the initial reference useless and undermines the purpose of the Magistrate's Act. *Id*. at 509. "A district judge should not have to guess what arguments an objecting party depends on when reviewing a magistrate's report." *Id*., *quoting Lockert v. Faulkner*, 843 F.2d 1015, 1019 (7th Cir. 1988) and citing *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); and *Goney v. Clark*, 749 F.2d 5, 7 (3rd Cir. 1984).

CONCLUSION

For reasons stated above, the Magistrate Judge adheres to his prior recommendations as set forth in the Decision and Order of August 22, 2013.

November 21, 2013.

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

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

RICHARD BAYS,

Petitioner, : Case No. 3:08-cv-076

\- vs -

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

WARDEN, Ohio State Penitentiary,

:

Respondent.

DECISION AND ORDER

This capital habeas corpus case is before the Court on Petitioner's Second Motion for Leave to File an Amended Petition (Doc. No. 153). The Warden opposes the Motion (Doc. No. 157) and Petitioner has filed a Reply in support (Doc. No. 159). Motions to amend are within the decisional authority of United States Magistrate Judges.

The Parties' Positions

Bays moves to amend his Petition to add the following Grounds for Relief:

> **Ground Fourteen**: Richard Bays is mentally retarded, and as a result his execution is barred under *Atkins v. Virginia*, 536 U.S. 304 (2002).
>
> **Ground Fifteen:** Richard Bays was deprived of his constitutional right to the effective assistance of counsel in his post-conviction *Atkins* proceeding.

(Motion, Doc. No. 153-1, PageID 6587-88.)

The Warden opposes the Motion asserting the new grounds are (1) barred by the statute of limitations, (2) both unexhausted and procedurally defaulted, (3) not brought with the required diligence, and (4) a remand is inappropriate for a ground for relief previously dropped and a ground where relief is statutorily precluded.

Relevant chronology[1]

The murder of Charles Weaver, for which Bays stands sentenced to death, occurred November 15, 1993, when Bays was approximately 28 years old[2]. Bays was indicted June 14, 1994. The trial was completed and the three-judge trial panel sentenced Bays to death on December 15, 1995. Because the crime occurred before January 1, 1995, Bays' direct appeal was to the Ohio intermediate court of appeals for the Second District which affirmed the conviction January 30, 1998. *State v. Bays,* 1998 Ohio App. LEXIS 227 (2nd Dist. Jan. 30, 1998). The Ohio Supreme Court affirmed. *State v. Bays,* 87 Ohio St. 3d 15 (1999).

While the direct appeal was pending, Bays filed a petition for post-conviction relief under Ohio Revised Code § 2953.21 on July 29, 1996. The trial court denied relief. However, on January 30, 1998, the same day that it affirmed the conviction and sentence, the Second District Court of Appeals remanded the post-conviction proceeding for an evidentiary hearing. *State v. Bays,* 1998 Ohio App. LEXIS 226 (2nd Dist. Jan. 30, 1998). After hearing, the trial court again denied relief and this time the court of appeals affirmed on June 20, 2003. *State v. Bays*, 2003 Ohio 3234, 2003 Ohio App. LEXIS 2897 (2nd Dist. Jun. 20, 2003).

While Bays' first post-conviction petition was pending, the United States Supreme Court

[1] Record references for the dates in this chronology can be found in the Magistrate Judge's Report and Recommendations on the merits (Doc. No. 109).
[2] Bays first IQ test is reported to have occurred in 1976 when he was eleven.

decided *Atkins v. Virginia*, 536 U.S. 304 (2002). The Ohio Supreme Court determined *Atkins* claims on behalf of those already convicted could be brought in a new post-conviction petition, regardless of whether a defendant had previously filed such a petition, and set a deadline of June 9, 2003, for doing so. *State v. Lott,* 97 Ohio St. 3d 303 (2002). Bays filed an *Atkins* post-conviction petition on April 4, 2003. It was dismissed involuntarily without hearing and the court of appeals remanded with directions to fund an expert witness on the mental retardation issue. *State v. Bays,* 159 Ohio App. 3d 469 (2nd Dist. 2005). The trial court obeyed the mandate, and on June 28, 2005, granted funds not to exceed $5,000 to retain Dr. David Hammer "to evaluate [Bays] and to assist his counsel in preparing evidence on the factual issue of Petit ioner's mental retardation status." (Entry, Appendix to Return of Writ, Doc. No. 151, PageID 5822).[3] However, Bays voluntarily dismissed the *Atkins* petition on November 9, 2007, pursuant to Ohio R. Civ. P. 41(A)(Notice, Appendix to Return of Writ, Doc. No. 151, PageID 5825). Bays was at the time represented by Assistant Ohio Public Defender Ruth Tkacz. *Id.*

Under Ohio law a plaintiff can dismiss a civil complaint without stating a reason, without prejudice, and without the consent of either the opposing party or the court until the first witness is sworn in a non-jury proceeding. Thus Ms. Tkacz stated no reason for the dismissal in the Notice. However, when she filed Bays' Notice of Intention to File Habeas Corpus Petition in this Court, she stated the dismissal was done "after being evaluated for his mental retardation status." (Doc. No. 3, PageID 14.) That Notice was also signed by Assistant Ohio Public Defender Melissa Callais. *Id.* Both women were then appointed as counsel for Bays in this proceeding under 21 U.S.C. § 848(q)(4)(B), the then-authorizing statute (Order of March 17, 2008, Doc. No. 6). Sometime between then and September 30, 2008, Ms. Callais left the Ohio

[3] On March 6, 2013, the State of Ohio refiled the Appendix in this case electronically (Doc. Nos. 10, 151). All references to the Appendix herein are to the electronic version.

Public Defender's Office and became employed by Steven Nolder, the Federal Defender for this judicial district, in the Capital Habeas Unit. On that date, the Court formally substituted Mr. Nolder for Ms. Callais with Mr. Nolder's designation of her "as responsible for litigating this case" and with Ms. Tkacz continuing as the trial attorney (Motion, Doc. No. 14, and notation order granting; Doc. No. 15). On November 16, 2008, Ms. Tkacz and Ms. Callais filed the Petition the only mention of mental retardation therein is a repetition of the statement "[o]n November 9, 2007, after being evaluated for his mental retardation status, Bays voluntarily withdrew his *Atkins* petition." (Petition, Doc. No. 16,PageID 67.) The Petition further avers "Bays functions at the borderline level of intelligence, with an I.Q. of 74. *Id.* at ¶ 66, PageID 93.

On July 27, 2010, the Court granted Ms. Tkacz's Motion to Withdraw for medical reasons (Doc. No. 62 and notation order granting). On the same day the Court granted Ms. Callais'[4] Motion to be appointed trial attorney and appointed Carol Wright, supervisor of the Federal Defender's Capital Habeas Unit, as co-counsel (Doc. No. 63 and notation order granting). On March 7, 2012, Carol Wright filed a Notice substituting herself as trial attorney for Ms. Jackson and designating Assistant Federal Defender Sharon A. Hicks as co-counsel. It was represented to the Court that Ms. Jackson was "no longer assigned to the above styled case." (Doc. No. 113, PageID 1625.) Shortly thereafter Ms. Jackson left the Federal Defender's Office and withdrew altogether (Doc. No. 117 and notation order granting). On the same day, Ms. Hicks withdrew as co-counsel and Ms. Barnhart, also an Assistant Federal Defender, entered her appearance (Doc. Nos. 118, 119). Ms. Wright as trial attorney and Ms. Barnhart as co-counsel continue to represent Bays as of the date of this Order.[5]

---

[4] By then Meliaa Callais was known as Melissa Jackson.

[5] Mr. Nolder has left the Federal Defender's Office, but has not withdrawn from this case, nor has his successor, Dennis Terez, whom the Magistrate Judge understands is designated Interim Federal Defender, entered an appearance. Given that Ms. Wright has now substituted as trial attorney, these facts have no significance from the

The Standard for Motions to Amend

28 U.S.C. § 2242 provides in pertinent part "[i]t [the application for a writ of habeas corpus] may be amended or supplemented as provided in the rules of civil procedure applicable to civil actions." The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc.
> -- the leave sought should, as the rules require, be "freely given."

371 U.S. at 182. In considering whether to grant motions to amend under Rule 15, a court should consider whether the amendment would be futile, i.e., if it could withstand a motion to dismiss under Rule 12(b)(6). *Hoover v. Langston Equip. Assocs.,* 958 F.2d 742, 745 (6th Cir. 1992); *Martin v. Associated Truck Lines, Inc.,* 801 F.2d 246, 248 (6th Cir. 1986); *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984); *Communications Systems, Inc., v. City of Danville*, 880 F.2d 887 (6th Cir. 1989). *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983); *Neighborhood Development Corp. v. Advisory Council*, 632 F.2d 21, 23 (6th Cir. 1980). Likewise, a motion to amend may be denied if it is brought after undue delay

---

Court's perspective, as it is the trial attorney who has ultimate responsibility. S. D. Ohio Civ. R. 83.4(a).

or with dilatory motive. *Foman v. Davis*, 371 U.S. 178 (1962); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990).

Standard for Stay and Abeyance

The United States Supreme Court has decided that district courts have authority to grant stays in habeas corpus cases to permit exhaustion of state court remedies in consideration of the AEDPA's preference for state court initial resolution of claims. It cautioned, however,

> [S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). . . .
> On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

Rhines v. Weber, 544 U.S. 269, 277-278 (2005). It also directed district courts to place reasonable time limits on the petitioner's trip to state court and back.

Analysis

Ground Fifteen Does Not State a Claim Upon Which Habeas Corpus Relief Can Be Granted

In his proposed Fifteenth Ground for Relief Bays asserts he was deprived of his constitutional right to the effective assistance of counsel in his post-conviction *Atkins* proceeding.

The Warden argues relief on this claim is barred by 28 U.S.C. § 2254(i) which provides "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." (Opposition, Doc. No. 157, PageID 7389.)

Bays responds that persons tried after the *Atkins* decision – after June 20, 2002 – "have the right to effective assistance regarding their *Atkins* claims from their *trial* counsel. . . . Equal Protection demands that petitioners asserting a retroactively available *Atkins* claim, like Bays, have the same constitutional rights as those defendants who were tried after *Atkins*. " (Reply, Doc. No. 159, PageID 7414.)

The United States Supreme Court has held that the constitutional right to appointed counsel extends to the first appeal of right and no further. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974). There is, for example, no constitutional right to appointed counsel in habeas cases. *McCleskey v. Zant,* 499 U.S. 467 (1991). Post-conviction state collateral review is not a constitutional right, even in capital cases. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Estelle v. Dorrough*, 420 U.S. 534, 536 (1975); *Kirby v. Dutton,* 794 F.2d 245 (6th Cir. 1986)(claims of denial of due process

and equal protection in collateral proceedings are not cognizable in federal habeas because not constitutionally mandated). *Accord, Greer v. Mitchell,* 264 F.3d 663, 681 (6th Cir. 2001); *Johnson v. Collins,* 1998 WL 228029, 1998 U.S. App. LEXIS 8462 (6th Cir. 1998); *Trevino v. Johnson*, 168 F.3d 173 (5th Cir. 1999); *Zuern v. Tate*, 101 F. Supp. 2d 948 (S.D. Ohio 2000), *aff'd*., 336 F.3d 478 (6th Cir. 2003). Because there is no constitutional right to an attorney in post-conviction proceedings, a habeas petitioner cannot claim unconstitutional deprivation of effective assistance of counsel in such proceedings. *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 425 (6th Cir. 2003), *citing Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991).

The equal protection argument is not elaborated at all.[6] Presumably Bays is adverting to the so-called equal protection component of the Fifth Amendment, since the Equal Protection Clause itself does not govern conduct of the federal government. *See Bolling v. Sharpe,* 347 U.S. 497 (1954). Bays offers no Supreme Court or Sixth Circuit authority even analogously supporting this claim. Most recently in deciding *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), the Supreme Court refused to extend the constitutional right to effective assistance of counsel to post-conviction proceedings even in those States where the only way to raise **any** post-judgment *Strickland* claim was by collateral attack. In fact the same equal protection argument made here was urged on the Court in *Martinez* and rejected. Brief for Petitioner in *Martinez* at p. 14, et seq. (available at www.supremecourtreview.org).

Nor did the Supreme Court in deciding *Atkins* even suggest that persons already convicted but who had a colorable *Atkins* claim had a right to a new trial on the *Atkins* claim. In fact, when this Court attempted in a post-*Atkins* proceeding to hold against the State of Ohio a

[6] "A lawyer need not develop a constitutional argument at length, but he must make one; the words 'due process' are not an argument."' *Riggins v. McGinnis*, 50 F.3d 492, 494 (7th Cir. 1995).

mental retardation finding made at trial, the Supreme Court unanimously rejected that approach and held:

> Our opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall within [*Atkins* compass]." We le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction."

Bobby v. Bies, 556 U.S. 825, 831, *quoting Atkins, supra,* at 317. The Court implicitly approved of the process adopted in *State v. Lott*, 97 Ohio St. 3d 303 (2002). *Id.* There was no hint that an *Atkins* claimant is entitled to a new trial or that effective assistance of counsel in a post-conviction proceeding to litigate the retroactive applicability of *Atkins* is a constitutional trial right. Before *Atkins*, of course, it would not have been ineffective assistance of trial counsel to fail to make an *Atkins* claim, since the Supreme Court had previously rejected the right upheld in *Atkins*. *Penry v. Lynaugh,* 492 U.S. 302 (1989).

The Court concludes the proposed Fifteenth Ground for Relief does not state a claim upon which federal habeas corpus relief can be granted. The Motion to Amend to add that Ground is DENIED on that basis.

Both Proposed Grounds for Relief Are Barred by the Statute of Limitations

The one-year statute of limitations for habeas corpus claims adopted by the AEDPA runs from the latest of one of four dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244 (d)(1).

Bays asserts his claim is timely when measured under § 2244(d)(1)(D) because, he says, exercising due diligence, he discovered his present *Atkins* claim less than one year before he filed the instant Motion. The relevant factual discovery is claimed to be Bays' learning that he did not, as he had been told, score 78 on his IQ test in 2007. Instead, he learned this from Dr. Gale Roid that the 2007 test was invalid. Bays counsel refers the Court to Dr. Roid's Affidavit dated January 28, 2013 (Doc. No. 153-4, PageID 6780-98). Dr. Roid reports that:

> the test results for Richard Bays, a 42 year old inmate on death row in Ohio were referred to me for review by Dr. Kevin McGrew of Minnesota, and the Office of the Federal Public Defender for the Southern District of Ohio, Capital Habeas Unit (Attorneys, Carol Wright and Erin Gallagher Barnhart, Counsel for Mr. Bays).

Id. at 6781. He does not aver when or how the question was referred to him. He concludes:

> After a careful study of the SB5 Record Form, as detailed in this report, I found sufficient evidence of scoring errors to conclude, in my scientific, professional, and expert opinion, with a reasonable degree of scientific certainty, that a reasonable estimate of the IQ of Mr. Bays is a score at or below an IQ of 70, qualifying as Intellectual Deficiency.

Id. Dr. Roid concludes further:

> The errors of scoring detailed above result in a reduction of the FSIQ score to a corrected observed score of 73, which must be further adjusted downward by 2 points to correct for norm obsolesce [sic], resulting in a final FSIQ score of 71. The confidence interval for this score is 66 to 76.
>
> Several reasons exist to assess the true IQ score for Mr. Bays at the low end of this confidence interval.
>
> * * * *
>
> For these multiple reasons, the conclusion can be drawn. The combination of the evidence from the reliable ABIQ, the failure to employ the drop-back rule, the possible 66 in FSIQ, and the presence of multiple scoring and administration errors, lead me to my scientific, professional, and expert opinion that there is a reasonable degree of scientific certainty that Mr. Bays; IQ is at or below 70, indicating intellectual deficiency.

Id. at 6791-92.

Counsel admit they had reason to "question the expert evaluations and conclusion from his initial *Atkins* proceedings," "[b]ut their client's *Atkins* claim did not become indisputable until they learned from Dr. Roid of the significant scoring errors that had incorrectly inflated the 2007 IQ score." (Reply Memo, Doc. No. 159, PageID 7416.) Counsel do not tell the Court when they had reason to question the prior evaluations or when they referred the matter to Dr. Roid.

Dr. Kevin McGrew's Affidavit dated March 15, 2013, concludes:

> I, Dr. Kevin S. McGrew, have reviewed Mr. Bays' complete set of intelligence test results (spanning 31 years) in the context of accepted scientific principles, clinical and professional methods and standards, and reliable principles of science. As a result of this process and the scientific information and professional principles outlined in this statement, it is my scientific, professional and expert opinion, that I provide with a reasonable degree of scientific certainty, that the best estimate of Mr. Bays' true general intelligence IQ score falls within the range of 65 to 75 IQ points, with the mid-point "average" for Mr. Bays being an IQ of 70. This

> range of scores is consistent with, and satisfies the diagnosis requirements of, the AAIDD's first prong of its mental retardation (MR) / intellectual disability (ID) test as it represents a score range that is at or below two standard deviations from the mean when compared to the general population. It is also my opinion that Mr. Bays' special education school records are consistent with placement in a program for individuals with mild MR/ID before the age of 18.

(Motion for Leave to Amend, Doc. No. 153, PageID 6703.) Dr. Roid's Affidavit was among the materials reviewed by Dr. McGrew. *Id.* at PageID 6702. Dr. McGrew reports that he is responding to a request from Carol Wright, but he does not say when that request was made. Counsel indicate they retained Dr. McGrew sometime before November 2012 and he then "alerted Bays that he found himself questioning some of the scoring [for Bays' 2007 test.]" (Reply Memo, Doc. No. 159, PageID 7419.) It is apparently on the basis of this questioning from Dr. McGrew of the 2007 scoring that counsel believe the statute runs from November 2012.

To establish that the referral to Dr. McGrew sometime before November 2012 constitutes due diligence, Bays relies on *Helmig v. Kemna*, 2005 WL 2346954 (E.D. Mo. 2005) for the proposition that a habeas petitioner does not have to "'scorch the earth' for any and all possible habeas grounds" and *Gapen v. Bobby,* Case No. 3:08-cv-280, unreported decision of March 8,2012, of Judge Walter Rice of this Court, for the proposition that a habeas petitioner "is not required to look for evidence he has no reason to know about." *Id.* at PageID 3052. Bays then notes that the newly-discovered evidence in *Helmig* was information given to the jury that had not been introduced in evidence (Reply, Doc. No. 159, PageID 7417). Similarly, on a knowing use of perjured testimony claim, there was no reason to know until the witness sent a recanting affidavit. *Id.* at PageID 7418, *citing Rivera v. Nolan*, 538 F. Supp. 2d 429 (D. Mass. 2008).

There is a profound difference between "scorching the earth" for all possible habeas claims and recognizing the possibility of a possible *Atkins* claim in this case. Bays' possible

mental retardation[7] was an issue at trial in 1995 and some of the evidence evaluated by Dr. McNew was introduced at trial along with expert testimony. It was the issue in Bays' first *Atkins* post-conviction proceeding and the evaluations by Drs. Hammer and Bergman were generated as part of that proceeding in 2007. Dr. Bergman was called as a witness by the State at the evidentiary hearing held in this case before *Cullen v. Pinholster,* 563 U.S. ___, 131 S. Ct. 1388 (2011), made it impossible to consider her testimony; she was extensively cross-examined by current counsel in 2011 on her mental retardation evaluation made of Bays in 2007. Bays' mental retardation *vel non* has been a potential habeas corpus claim of his since *Atkins* was decided over eleven years ago. There is a large conceptual distance between claims one has had to "scorch the earth" to find and ones which have been in a case for many years on which new evidence is uncovered once an investigation has been done. And in any event, Dr. Roid's opinion does not make Bays' *Atkins* claim "indisputable": reviewing all the evidence, including the Roid Affidavit, Dr. McNew rates his IQ as 70, presumptively not mentally retarded under *Lott*.

Any suggestion that delay is excused by the fact that Ms. Tkacz could not be expected to raise her own ineffectiveness is belied by the fact that an attorney with the Capital Habeas Unit of the Federal Defender's Office has represented Bays in a conflict-free status since Ms. Callais/Jackson left the Ohio Public Defender's Office and joined the Federal Defender, to wit, September 30, 2008, before the Petition was filed.

Counsel have not shown they exercised due diligence in investigating Bays' *Atkins* claim.

---

[7] The Magistrate Judge understands that there is now a consensus among psychologists that the term "mental retardation" should be avoided as a category and "intellectual disability" is now the preferred term. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 31 (5th Ed. 2013); American Association on Intellectual and Developmental Disabilities, Intellectual Disabilities; Definition, Classification, and Systems of Support, 3, 6, (11th Ed. 2010). This opinion continues to use the term "mental retardation" because that term is given legal significance by *Atkins*.

In any event, Dr. Roid's opinion on the scoring of the 2007 test is not the factual predicate for Bays' *Atkins* claim. Rather, the predicate for the Fourteenth Ground for Relief must be that Bays is mentally retarded.

Nor is Dr. Roid's opinion the factual predicate for the claim that Ms. Tkacz provided ineffective assistance in the *Atkins* post-conviction proceeding, the Fifteenth Ground for Relief. Present counsel asserts that ineffectiveness because Ms. Tkacz "did not determine that Bays' score needed to be adjusted to account for norm obsolesce [sic] (i.e. the Flynn Effect) and because she based her decision to voluntary [sic] dismiss the *Atkins* petition in part on an experienced expert's use of an inappropriate instrument to assess the adaptive-deficits prong." (Reply, Doc. No. 159, PageID 7416.) This begs the question of when present counsel learned about the Flynn Effect and examined the record with that problem in mind. Further, present counsel knew about Dr. Bergman's assessment and indeed cross-examined her about it in this Court on January 21, 2011 (Transcript, Doc. No. 92), more than two years before the instant Motion was filed.

The Motion to Amend is denied on the additional ground that both new Grounds for Relief are barred by the statute of limitations and would be subject to dismissal on that basis.

Bays' Dilatory Motive Also Bars the Amendment

The underlying merits of this case have already been decided by Judge Rose. Without the Second Motion to Amend, the only remaining matter would be the lethal injection claims added by the First Motion to Amend. Because a claim that Bays is mentally retarded could have been made as soon as the Capital Habeas Unit began representing Bays, the Court finds that

waiting from September 30, 2008, until May 24, 2013, to attempt to add the *Atkins* claims evinces a dilatory motive on the part of Bays' counsel and the Motion to Amend is denied on that basis as well.

Bays Has Not Established That He Is Actually "Innocent of the Death Penalty"

Bays asserts that, even if his new Grounds for Relief are untimely, he qualifies for the actual innocence exception to the statute of limitations (Reply, Doc. No. 159, PageID 7421-22). The Court acknowledges that, if Bays proves he is mentally retarded, he cannot lawfully be executed, a legal condition referred to infelicitously as being "innocent of the death penalty," as opposed to being actually innocent of the underlying crime. *See Sawyer v. Whitley,* 505 U.S. 333 (1992).

Bays argues that the Supreme Court has recognized actual innocence as an exception to the statute of limitations, rather than as a basis for equitable tolling of the statute. The controlling precedent on this point is now the Supreme Court's decision in *McQuiggin v. Perkins*, 569 U.S. ___, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013).

> [A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U. S., at 329, 115 S. Ct. 851, 130 L. Ed. 2d 808; see *House*, 547 U. S., at 538, 126 S. Ct. 2064, 165 L. Ed. 2d. 1 (emphasizing that the *Schlup* standard is "demanding" and seldom met). And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence"

> purporting to show actual innocence. *Schlup*, 513 U. S., at 332, 115 S. Ct. 851, 130 L. Ed. 2d. 808.
>
> * * *
>
> [A] federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.

McQuiggin v. Perkins, 569 U.S. ___, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019, 1035 (2013).

Bays asserts that if he can show mental retardation by clear and convincing evidence he will have satisfied the *Sawyer* test. In one portion of his Reply, he says this should be decided "after the factual record is fully developed in the pending state-court proceedings." (Reply, Doc. No. 159, PageID 7422.) In a later portion, he claims he has already shown his mental retardation. This Court agrees with the first position taken by Bays: nothing in this Decision should be seen as in any way impinging on the authority of the Greene County Common Pleas Court to decide the matter now pending before it, to wit, Bays' effort to reopen/refile his *Atkins* post-conviction action.

Bays' Asserted Mental Incompetence Is Not an "Extraordinary Circumstance" Warranting Tolling of the Limitations Period

Bays asserts that his mental incompetence qualifies him for equitable tolling of the statute of limitations, relying on *Ata v. Scutt*, 662 F.3d 736 (6th Cir. 2011)(Reply, Doc. No. 159, PageID 7523). *Ata* is inapposite. Muzaffer Aza was without counsel at the time he should have filed his habeas corpus petition. *Ata*, 662 F.3d at 740. Bays, in contrast, has been represented by experience habeas corpus counsel continuously since early 1998. His own mental incompetence, supposing it had been proved, would not excuse his delay.

Decision on Respondent's Procedural Default Defense Would Be Premature

The Warden asserts that Bays' proposed added Grounds for Relief are both unexhausted and procedurally defaulted. As the Magistrate Judge reads the motion papers, Bays is attempting to exhaust by moving to withdraw his voluntary dismissal or to file a successive Ohio Revised Code § 2953.23 petition. Since those proceedings have not yet been completed, the Court agrees that whatever remedy the Ohio courts might provide has not yet been exhausted.

With respect to procedural default, the Sixth Circuit requires that such a defense be shown by demonstrating that the state courts have actually enforced a procedural rule which bars their consideration on the merits of a habeas petitioner's claim. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), *citing County Court of Ulster County v. Allen*, 442 U.S. 140, 149, (1979). This requirement may be relaxed when it is very clear from past practice that an Ohio procedural rule would be enforced against a petitioner, but here the question is posed for decision by the Greene County Common Pleas Court, and it would hardly be an exercise in comity for this Court to presuppose what that court will do with the pending motion to strike or otherwise in the case.

Certification to the Ohio Supreme Court Would Not Likely Be Useful

Bays asserts "it is unclear if the State of Ohio provides a corrective process for claims of ineffective assistance of post-conviction *Atkins* counsel." (Motion, Doc. No. 153, PageID 6583.) If this Court decides that there is no such corrective process, Bays asks the Court to go ahead and decide the claim. In the alternative, Bays asks this Court to "stay these proceedings and certify

this question to the Ohio Supreme Court under Ohio S. Ct. R. Prac. 18.1. *Id.*

To the extent Bays proposes to assert a federal constitutional claim that he has a right to the effective assistance of counsel in post-conviction *Atkins* proceedings, the Court has decided that no such right exists as a predicate to deciding that an amendment to plead a ground for relief (Fifteen) based on such a right would be futile. To the extent Bays may wish to assert a non-federal right to such assistance, that it no concern of this federal habeas court and the Court should decline to certify any relevant question to the Ohio Supreme Court.

August 22, 2013.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

RICHARD BAYS,	:	Case No. 3:08-cv-76
	:	
Petitioner,	:	Judge Thomas M. Rose
	:	
v.	:	
	:	
WARDEN, Ohio State Penitentiary,	:	
	:	
Respondent.	:	

ENTRY AND ORDER OVERRULING OBJECTIONS (DOCS. 267, 270); ADOPTING SUBSTITUTED REPORT AND RECOMMENDATIONS (DOC. 265) AND SUPPLEMENT TO SUBSTITUTED REPORT AND RECOMMENDATIONS (DOC. 269); DISMISSING GROUNDS FOR RELIEF SIXTEEN, SEVENTEEN, EIGHTEEN AND NINETEEN PLEADED IN THE SECOND AMENDED PETITION; AND TERMINATING CASE

This case is before the Court on the Objections (Docs. 267, 270) filed by Petitioner Richard Bays ("Petitioner") to the Magistrate Judge's Substituted Report and Recommendations ("Report") (Doc. 265) and Supplement to Substituted Report and Recommendations (Doc. 270) ("Supplement"). In the Report and Supplement, Magistrate Judge Michael R. Merz recommended that the Court dismiss Grounds for Relief Sixteen, Seventeen, Eighteen and Nineteen pleaded in Petitioner's Second Amended and Supplemental Petition for a Writ of Habeas Corpus ("Second Amended Petition") (Doc. 247) for failure to state a claim upon which relief may be granted in habeas corpus.

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court made a *de novo* review of the record in this case. Upon said review, the Court finds that Petitioner's Objections (Docs. 267, 270) are not well-taken and are hereby **OVERRULED**. The Court **ADOPTS** the Report (Doc. 265) and Supplement (Doc. 270) in their entirety and, accordingly, rules as follows:

(1) The Warden's Motion to Dismiss (Doc. 250) is **GRANTED**;

(2) Petitioner's Sixteenth, Seventeenth, Eighteenth and Nineteenth Grounds for Relief are **DISMISSED** without prejudice to their consideration in *In re: Ohio Execution Protocol Litig.*, Case No. 2:11-cv-1016;

(3) Petitioner is **GRANTED** a certificate of appealability on his Fifth Ground for Relief as already ordered (Doc. 148) and as to his Sixteenth, Seventeenth, Eighteenth and Nineteenth Grounds for Relief;

(4) Petitioner is **DENIED** a certificate of appealability as to his Fourteenth and Fifteenth Grounds for Relief, as reasonable jurists would not disagree with the denial of those Grounds; and

(5) The Clerk is directed to enter final judgment and **TERMINATE** this case on the Court's docket.

DONE and **ORDERED** in Dayton, Ohio, this Friday, December 29, 2017.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

RICHARD BAYS,

Petitioner, : Case No. 3:08-cv-076

- vs - District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

WARDEN, Ohio State Penitentiary,
:
Respondent.

SUPPLEMENT TO SUBSTITUTED REPORT AND RECOMMENDATIONS

This capital habeas corpus case is before the Court on Petitioner's Objections (ECF No. 267) to the Magistrate Judge's Substituted Report and Recommendations (the "Substituted Report," ECF No. 265). The District Judge has recommitted the matter for reconsideration in light of the Objections (ECF No. 268). The Warden has decided not to file a response to the Objections and thus the matter is ripe on recommittal.

The Substituted Report recommends granting the Warden's Motion to Dismiss Lethal Injection Claims (ECF No. 250) in light of *In re Campbell,* 874 F.3d 454 (6th Cir. 2017), *cert. den. sub nom. Campbell v. Jenkins,* 2017 U.S. LEXIS 6891 (Nov. 14, 2017).

The Grounds for Relief in question appear in the Amended Petition filed July 24, 2017, (ECF No. 247) as follows:

> **SIXTEENTH GROUND FOR RELIEF:** The State of Ohio cannot constitutionally execute Petitioner because the only manner available under the law to execute him violates his Eighth Amendment rights.

> **SEVENTEENTH GROUND FOR RELIEF:** The State of Ohio cannot constitutionally execute Petitioner because the only manner available for execution violates the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment.
>
> **EIGHTEENTH GROUND FOR RELIEF**: The State of Ohio cannot constitutionally execute Petitioner because the only manner of execution available for execution under Ohio law violates the Equal Protection Clause of the Fourteenth Amendment.
>
> **NINETEENTH GROUND FOR RELIEF:** The State of Ohio cannot constitutionally execute Petitioner because Ohio's violations of federal law constitute a fundamental defect in the execution process, and the only manner of execution available for execution depends on state execution laws that are preempted by federal law.

(ECF No. 232-1, PageID 8583).

Bays concedes that "*Campbell* did conclude that *Glossip v. Gross*, 135 S.Ct. 2726 (2015), requires Eighth Amendment claims challenging lethal injection to be raised in a civil rights proceeding under 42 U.S.C. § 1983, and states that such claims are not cognizable in habeas corpus proceedings." (Objections, ECF No. 267, PageID 9022.) But Petitioner contends, "*Campbell* does not qualify as binding precedent on this issue, however, and as a result this Court should adhere to the Sixth Circuit's earlier holdings finding that such claims can be raised in a habeas corpus case." *Id.* at PageID 9022-23.

Bays argues a number of reasons why this Court should not follow *Campbell*.

1. Bays Claims *Campbell* Could Not Overrule *Adams III*

Bays asserts *Campbell* did not overruled *Adams III* , He relies first on *Davis v. Jenkins*, 2017 U.S. Dist. LEXIS 161152 (S.D. Ohio Oct. 2, 2017)(Sargus, Ch. J.). *Davis* held that *In re Tibbetts*, 869 F.3d 403 (6th Cir. 2017), *cert. pending sub nom. Tibbetts v. Jenkins*, Case No. 17-6449, did not

overrule *Adams v. Bradshaw*, 826 F.3d 306, 321 (6th Cir. 2016), *cert. denied sub. nom. Adams v. Jenkins,* 137 S.Ct. 814, 196 L. Ed. 2d 60 (Jan. 17, 2017) ("*Adams III")*, which had upheld the cognizability in habeas of lethal injection invalidity claims that were "general enough." This Magistrate Judge had himself concluded earlier in this case that *Tibbetts* and *Adams III* could stand together, however tenuously (ECF No. 256, PageID 8959). But *Davis* was decided three weeks **before** *Campbell* and thus could not take *Campbell* into account.

However, the *Campbell* court did not purport to overrule *Adams III* , but rather to explain why *Adams III* did not control the case before it. *Campbell* deals with *Adams III* as follows:

> After *Glossip* was decided, the *Adams* case returned to this Court. *Adams v. Bradshaw*, 826 F.3d 306 (6th Cir. 2016) (*Adams III*). *Adams III* came on appeal after our remand to the district court resulted in development of the facts. *Id.* at 309. The factual development revealed that Adams was protesting the "psychological toll" resulting from Ohio's recent changes to its lethal-injection protocol—facts not presented in *Adams II. Id.* at 320. We immediately responded to this revelation by holding that Adams "failed to present this claim to the state courts, nor did he raise it in his habeas petition." *Id.* This failure, as a matter of law, barred Adams from pursuing the claim in habeas. *Id.*; 28 U.S.C. § 2254(b); *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).
>
> Notwithstanding the procedural default, the panel proceeded to speculate in dicta about the viability of a psychological-torment claim. *Adams III*, 826 F.3d at 320. It ultimately found the claim unsupported by the substantive law. Even then, the panel proceeded to discuss—again in dicta—the holding of *Adams II* in light of *Glossip. Id.* at 321. It reiterated that "Adams's case is distinguishable from *Hill* [*v. McDonough,* 547 U.S. 573 (2006)] because Adams argues that lethal injection cannot be administered in a constitutional manner, and that his claim 'could render his death sentence effectively invalid.'" *Id.* at 321 (quoting *Hill*, 547 U.S. at 580). Therefore, "to the extent that [a petitioner] challenges the constitutionality of lethal injection in general and not a lethal-injection protocol, his claim is cognizable in habeas." *Id.*
>
> We think this dictum mischaracterizes both *Adams II* and *Glossip*. And, of course, dictum in a prior decision—as opposed to a *holding*—does not bind future panels, including this one. 6th Cir.

> R. 32.1(b); *United States v. Turner*, 602 F.3d 778, 785-86 (6th Cir. 2010) (explaining that statements which are "not necessary to the outcome" are not binding on later panels). The *Adams III* panel had already concluded that the petitioner's claim was both procedurally defaulted *and* forfeited. *Adams III*, 826 F.3d at 320. And although we may choose to excuse forfeiture in an exceptional case, we cannot ignore procedural default absent an express finding of cause and prejudice. *Wainwright*, 433 U.S. at 86-87. Thus, the statements "necessary" to the decision in *Adams III* ended when the panel acknowledged the default and forfeiture without any indication that an exception was present. *Adams III*, 826 F.3d at 320.
>
> Thus, to the extent that *Adams III* purported to permit *Baze*-style habeas claims that refuse to concede the possibility of an acceptable means of execution, it is not controlling. Since *Glossip*'s holding directly addressed that question, it *is* binding on us, and we follow it today. In doing so, we do not intend to diminish the importance or correctness of the holding in *Adams II* that § 1983 and habeas are not mutually exclusive *as a per se rule*. All *Baze* and *Glossip* require is that— in the peculiar context of method-of-execution claims—the death-row inmate must proceed under § 1983.

2017 U.S. App. LEXIS 21094 at *13-15.[1]

If the *Campbell* panel had recognized *Adams III* as **holding** lethal injection claims were cognizable in habeas, but refused to follow it on the grounds it was not correct law, our duty as a trial court would be clear: we would be required to follow *Adams III* despite *Campbell* because a later panel of the Sixth Circuit cannot overrule the published decision of a prior panel. *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *Darrah v. City of Oak Park,* 255 F.3d 301, 309 (6th Cir. 2001); *Salmi v. Secretary of HHS*, 774 F.2d 685, 689 (6th Cir. 1985).

But that is not what happened. Instead, *Campbell* characterized the key language in *Adams III* as dicta. That is part of the holding of *Campbell* because the *Campbell* court had to make that characterization in order to reach its ultimate conclusion that method-of-execution claims must be brought in § 1983, not habeas.

---

[1] Pinpoint citations for the published decision are not yet available.

Bays further complicates the matter by inviting this Court to treat as dictum what the *Campbell* court treated as holding because, Bays says, the "cognizability of lethal injection claims in habeas corpus proceedings was not even an issue before the Court in that case." (ECF No. 267, PageID 9023). Thus, he asserts, a district court may treat as a holding part of a prior published decision of the circuit court even though a later published decision of that court says the prior language was dicta.

This Magistrate Judge tried faithfully to follow *Adams I* and allowed lethal injection invalidity claims in habeas between when *Adams I* was decided in 2011 and when *Glossip* was decided in 2015. Then the undersigned read *Glossip* literally – method of execution claims must be brought in § 1983, not habeas. Judge Frost put that reading of *Glossip* most succinctly when he wrote "*Glossip* now undeniably upends that practice," referring to allowing lethal injection invalidity claims to be brought in habeas per *Adams I*. *Henderson v. Warden*, 136 F. Supp. 3d 847, 851 (S.D. Ohio 2015). "Not so," said the *Adams II* and *III* panels, and this Court dutifully reversed course again. Then in *Campbell* a different panel says that it, and we as its subordinate courts, must follow *Glossip* and remand method-of-execution claims to § 1983 remedies.

"Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). In the judgment of the undersigned, "following" means obeying what can be discerned as the intent of the superior court, rather than looking for ways to avoid that result by dissecting appellate court decisions. It is, of course, perfectly legitimate for counsel to argue for a construction of appellate decisions in ways that advance their clients' interests, but trial courts have no clients. We should be engaged with the appellate courts in "reasoned elaboration" of the law, not in seeking freedom to work

our own will in the interstices of appellate courts' words. As this Magistrate Judge and other judicial officers of this Court held in the interim between *Glossip* and *Adams III*, the best reading of *Glossip* is that method-of-execution claims must be brought in § 1983 actions. Bays has already done just that: he is a plaintiff in *In re: Ohio Execution Protocol Litig.*, Case No. 2:11-cv-1016, the consolidated § 1983 action challenging Ohio's method of execution.

2. Bays Claims *Campbell* Decided a § 2244(b) Question and Not the Underlying Merits

Bays next argues that *Campbell* is not binding precedent because the *Campbell* court was deciding only whether to grant Bays permission to proceed on a second-in-time habeas petition, and not the underlying merits. The Magistrate Judge believes this is a misreading of *Campbell*.

Campbell was before the circuit court on an order of Judge Rice affirming an order of the undersigned transferring the case to the Sixth Circuit as a second-or-successive habeas application. *Campbell v. Jenkins*, 2017 U.S. Dist. LEXIS 130803 (S.D. Ohio Aug. 16, 2017). Campbell's counsel from the Capital Habeas Unit of the Federal Public Defender's Office for this District resisted strongly this Court's characterization of Campbell's petition as second or successive. That is consistent with the position that office has taken in a whole series of second-in-time lethal injection invalidity claims in habeas.[2] Consistent with that position, they moved in the Sixth Circuit to remand *Campbell*, arguing the petition was not second-or-successive.

The *Campbell* court of course dealt thoroughly with that argument. It noted that, as Campbell argued, the Supreme Court has held a number of kinds of second-in-time habeas

[2] See *Smith v. Pineda*, Case No. 1:12-cv-196; *Sheppard v. Bagley*, Case No. 1:12-cv-196; *McGuire v. Robinson*, Case No. 3:12-cv-310; *Franklin v. Robinson*, Case No. 3:12-cv-312; *Landrum v. Robinson*, Case No. 2:12-cv-859; *Jones v. Warden*, Case No. 1:14-cv-440; *Henness v. Warden*, Case No. 2:14-cv-2580; *Tibbetts v. Warden*, Case No. 1:14-cv-602; *Fears v. Jenkins*, Case No. 2:17-cv-029; and *Wogenstahl v. Warden*, Case No. 1:17-cv-298.

applications are not second or successive. *Campbell,* 2017 U.S. App. LEXIS 21094 at *3-4, citing, *inter alia*, *Panetti v. Quarterman,* 551 U.S. 930 (2007).

Before reaching the second-or-successive issues, however, the *Campbell* court decided to clarify what kinds of claims can be made in habeas, concluding that "[a]ll *Baze* and *Glossip* require is that -- in the peculiar context of method-of-execution claims -- the death-row inmate must proceed under § 1983." *Id.* at *5-16. It then decided that Campbell's claims were not cognizable in habeas:

> We simply hold that, on these facts, Campbell has not presented any new *habeas* claims that (if meritorious) would require us to vacate his death sentence. As we noted in rejecting Campbell's first argument-even if we were to agree with Campbell on the substance here, Ohio would still be permitted to execute him. The proper method for Campbell to bring these claims is in a § 1983 action under *Baze*-as he has done in the district court. See *In re Ohio Execution Protocol Litig.* If he prevails on the merits[3], the district court will enjoin Ohio officials from executing Campbell by lethal injection. Again, his claim is newly ripe, but he is here attempting to seek relief in the wrong forum.

Campbell, 2017 U.S. App. LEXIS 21094 at *19-20. The *Campbell* court then decided Campbell's petition was second-or-successive and did not qualify for permission to proceed under 28 U.S.C. § 2244(b). *Id.* at *23-24.

While conceding the Sixth Circuit found Campbell's lethal injection invalidity claims were not cognizable in habeas, Bays argues "[t]his Court should find that the statements in *Campbell* relating to cognizability are entitled to little, if any, precedential weight." (ECF No. 267, PageID 9024.) As authority, Bays cites decisions from other circuits which he says disclaim application of second-or-successive decisions to the merits of habeas cases. (ECF No.

---

[3] Campbell did not prevail on the merits at the preliminary injunction stage. This Court denied preliminary injunctive relief. *In re: Ohio Injection Protocol Litig*., 2017 U.S. Dist. LEXIS 182406 (S.D. Ohio Nov. 3, 2017). Campbell did not appeal and seek a stay of execution before his scheduled execution date of November 15, 2017, but has appealed since his execution was stopped in process on that date.

267, PageID 9024-25, citing *In re Rogers*, 825 F.3d 1335, 1340 (11th Cir. 2016); *United States v. Seabrooks*, 839 F.3d 1326, 1349 (11th Cir. 2016) (Martin, J., concurring); *Rey v. United States*, 786 F.3d 1089, 1091 (8th Cir. 2015); *Walker v. United States*, CV 316-052, 2017 WL 957369, at *6 (S.D. Ga. Mar. 10, 2017); and *James v. Walsh*, 308 F.3d 162, 169 (2d Cir. 2002).)

Bays concedes that the Sixth Circuit "does sometimes address the merits of a petitioner's underlying claims when denying authorization to proceed under § 2244(b)" (ECF No. 267, PageID 9025, citing *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016), and *Brooks v. Bobby*, 660 F.3d 959 (6th Cir. 2011)). However, Bays says, the Sixth Circuit "does not appear to have considered the question of what type of precedential weight these decisions are entitled to apart from the jurisdictional issues that arise in the context of second or successive petitions." Because of that,

> This Court should conclude that rulings of this nature have limited precedential value with respect to the merits of the petitioner's underlying claims. The *Campbell* decision in particular was decided without full briefing or oral argument regarding the actual merits of the petitioner's case, and as a result it should not be relied upon to foreclose similar claims that are properly raised in a first federal habeas corpus petition.

Id.

Examining the case law cited by Bays, the Magistrate Judge finds no general disclaimer of the sort for which these cases are cited by Petitioner. *In re Rogers, supra*, declined to allow a second-or-successive application under § 2255 to raise a claim under *Johnson v. United States*, 135 S.Ct. 2551 (2015), because it found his second-in-time § 2255 motion did not state a claim under *Johnson,* i.e., it was without merit, where the prior conviction relied on to impose an Armed Career Criminal Act enhancement categorically qualified under the elements clause of the ACCA, and not under the residual clause declared unconstitutional by *Johnson*. In brief, it decided exactly the same question decided in *Campbell* – whether the second-in-time habeas application contained a cognizable claim. In passing the court noted it ordinarily does not have

time[4] or a full enough record to make that decision, but then it proceeded to do so.

United States v. Seabrooks, *supra,* is a decision on direct appeal and does not involve any second-or-successive decision; the cited concurring opinion of Judge Martin does not even contain any dictum about decisions under 28 U.S.C. § 2244(b).

Rey v. United States, *supra*, was an appeal from a dismissal of a second-in-time § 2255 motion as second or successive. Apparently the Eighth Circuit allows a district court to dismiss a second-in-time application that it finds to be second or successive, whereas Sixth Circuit practice requires transfer to the circuit court. In any event, the Eighth Circuit in *Rey* said nothing about the precedential value of § 2244(b) decisions.

Walker, supra, (also reported at 2017 U.S. Dist., LEXIS 34621), is another case under *Johnson v. United States, supra.* Walker received circuit court permission to file a second § 2255 application because the Supreme Court had held *Johnson* to apply retroactively and it was unclear which of Walker's prior convictions had been used to enhance his sentence. In granting permission, the Eleventh Circuit noted that its allowance of a second § 2255 motion involved only a *prima facie* determination of cognizability. At least according to Magistrate Judge Epps' Report, the Eleventh Circuit did not say its 2244(b) decisions could not ever reach the merits, but merely that it did not in this case.[5]

In *James v. Walsh*, *supra,* the Second Circuit found a prisoner's second-in-time § 2254 petition was not second or successive because his claim had not yet arisen when he filed his prior habeas petition. Because the petition was not second or successive, the Second Circuit

[4] Note the thirty-day time limit on deciding applications to pursue a second-or-successive application provided in 28 U.S.C. § 2244(b)(2)(D). Apparently some circuit courts treat that statutory language as precatory; the Sixth Circuit often takes more than thirty days to decide such applications.

[5] Counsel for Bays may know already or can quickly learn from the non-capital side of the Federal Defender's Office that the district courts received large numbers of *Johnson* claims after that case was decided, in large part because it was found to be retroactive by the Supreme Court. Persons still confined under long ACCA sentences or under the parallel Guidelines career offender classification had often filed an original § 2255 application before *Johnson* was decided.

transferred it to the district court, concluding it had no jurisdiction to consider the merits because it was not reviewing a judgment of a district court. This parallels the practice of the Sixth Circuit when it determines that a second application is not second or successive. *Jackson v. Sloan*, 800 F.3d 260, 261 (6th Cir. 2015), citing *Howard v. United States*, 533 F.3d 472 (6th Cir. 2008); *In re: Cedric E. Powell*, Case No. 16-3356, 2017 U.S. App. LEXIS 1032 (6th Cir. Jan. 6, 2017).

None of these out-of-circuit decisions has anything to say about whether a decision on a second or successive question provides any authority for deciding the cognizability of a particular constitutional claim in habeas corpus. In contrast, the *Campbell* court took considerable time to discuss the issue and plainly intended its decision to provide guidance to the district courts, whether or not it is binding precedent.

Bays cites two Sixth Circuit cases which he admits cut against his argument, *Moreland v. Robinson,* 813 F.3d 315 (6th Cir. 2016), and *Brooks v. Bobby*, 660 F.3d 959 (6th Cir. 2011). In *Moreland* the circuit decided that post-judgment motions to amend a habeas petition or for relief from judgment under Fed. R. Civ. P. 60(b)(6) are second-or-successive habeas applications if they meet the test of *Gonzalez v. Crosby,* 545 U.S. 524 (2005). It nevertheless affirmed this Court's denial of Moreland's motions on a finding that the new claims would be without merit. *Brooks* is a shadow-of-the-gallows decision denying on November 9, 2011, a stay of an execution set for and carried out on November 15, 2011. It does address the merits of a second-or-successive habeas application, finding it was second-or-successive and that the claims were barred by the law of the case.

Whether or Not It Is Binding, *Campbell* Was Correctly Decided

As set out at length in the Substituted Report (ECF No. 265, PageID 9010-13), counsel

for death row inmates in Ohio have had pending § 1983 cases challenging lethal injection protocols in Ohio since very shortly after the Supreme Court authorized bringing such challenges in § 1983 litigation in *Nelson v. Campbell,* 541 U.S. 637 (2004). That litigation is presently consolidated in *In re: Ohio Execution Protocol Litig.*, Case No. 2:11-cv-1016. As the *Campbell* majority notes, that form of litigation is ideally suited to prevent the unconstitutional execution of any person in Ohio. It provides ordinary civil discovery under the Federal Rules of Procedure in contrast to the very limited discovery allowed by the Rules Governing § 2254 Cases. It allows for full evidentiary hearings, both on preliminary injunction and at trial, in contrast to the very limited opportunity to take evidence in a habeas case. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). It is not subject to the second-or-successive gateway that applies in habeas. If successful, it provides complete relief from execution by any unconstitutional means. Why, then, do death row counsel insist on presenting substantively identical constitutional claims in both habeas and § 1983 simultaneously? Hope that the two cases will be assigned to different judges? Or is it just that complexity breeds delay which almost always serves the interest of death row inmates?

Whether or not *Campbell* creates binding precedent, it is clearly intended to provide guidance to the district courts by sorting out the appropriate forum in which to bring method-of-execution claims. Whether or not we are bound to follow Campbell, we should do so because it makes the appropriate allocation of those claims to § 1983 cases.

The Nineteenth Ground for Relief

The Nineteenth Ground for Relief alleges Bays' execution under Ohio's current execution protocol will be unconstitutional "because Ohio's violations of federal law constitute a fundamental defect in the execution process, and the only manner of execution available for execution depends on state execution laws that are preempted by federal law." (ECF No. 232-1, PageID 8583.)

In the original Report on Respondent's Motion to Dismiss, the Magistrate Judge recommended Ground Nineteen be dismissed "as noncognizable because it is based on federal statutory law instead of the Constitution (Report, ECF No. 256, PageID 8959-61). Bays objected at length (ECF No. 258). The Substituted Report recommended dismissal of Ground Nineteen on the same basis as Sixteen, Seventeen, and Eighteen, to wit, the holding in *Campbell* (ECF No. 265, PageID 9015-16).

Bays objects that *Campbell* applies only to *Baze/Glossip* Eighth Amendment method-of-execution claims and not to statutory claims such as he pleads in his Nineteenth Ground. This Supplement will deal first with the scope-of-*Campbell* objection and then those raised in Bays' prior set of Objections.

Bays Claims *Campbell* is Limited to Eighth Amendment Claims

Bays asserts *Campbell* does not apply to his Nineteenth Ground for Relief. He admits that Campbell pleaded a claim parallel to the Nineteenth Claim here and that the Sixth Circuit dismissed it, but because there is no discussion of that claim, concludes "the most likely

explanation is that the Sixth Circuit simply overlooked[6] the petitioner's statutory claim in conducting its analysis." (Objections, ECF No. 267, PageID 9026.) Bays is correct that there is no discussion of in the opinion of Campbell's Fourth Ground for Relief which is a verbatim copy of Bays' Nineteenth Ground for Relief.[7] There is also no discussion of the claim Campbell attempted to add under *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). Nevertheless, the Sixth Circuit dismissed Campbell's entire Petition. 2017 U.S. App. LEXIS at *24. The *Campbell* opinion does not speak to Campbell's Fourth Ground for Relief but did dismiss that claim and the *Hurst* claim *sub silentio*.

Previously Raised Objections

In the original Report on the instant Motion to Dismiss, the Magistrate Judge found that, because this is a case brought under 28 U.S.C. § 2254, the Court could grant relief only if a violation of the federal Constitution was shown (Report, ECF No. 256, PageID 8960). The Report distinguished the cases cited by Bays and concluded:

> In sum, Bays has cited no federal precedent for extending § 2254 relief to violations of federal statutes and particularly no precedent of the United States Supreme Court holding that the statutes cited in the Nineteenth Ground for Relief preempt state execution statutes and thus provide a constitutional basis for relief in a § 2254 case.

Id. at PageID 8961.

---

[6] Perhaps because at the time *Campbell* was handed down on October 25, 2017, Campbell was facing a November 15, 2017, execution date and the Court of Appeals was forced to act swiftly.

[7] **FOURTH GROUND FOR RELIEF:** The State of Ohio cannot constitutionally execute Petitioner because Ohio's violations of federal law constitute a fundamental defect in the execution process, and the only manner of execution available for execution depends on state execution laws that are preempted by federal law. (Case No. 2:15-cv-1702, ECF No. 47, PageID 897.)

Bays objects that the Magistrate Judge misread *Reed v. Farley*, 512 U.S. 339 (1994), as a case arising under 28 U.S.C. § 2255 whereas it arose under § 2254. This objection is well taken because *Reed* was a § 2254 case. Reed had been transferred from a federal prison to Indiana state custody under the Interstate Agreement on Detainers Act and was not tried within 120 days after transfer as provided in that Act. Thus he claimed Indiana violated his Sixth Amendment right to a speedy trial. In denying relief, the Supreme Court recognized that 28 U.S.C. § 2254(a) authorizes federal courts to grant habeas relief to a person held "in custody in violation of the Constitution or laws or treaties of the United States." *Id.* at 347. The Court noted, however, that it had limited habeas review under §2254(a) to those errors that qualify as "a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." *Id.* at 348, citing *Hill v. United States*, 368 U.S. 424 (1962). It found no such error in Reed's case where he failed to object at the time his trial date was set beyond the 120-day period provided for in the Interstate Agreement on Detainers.

Bays also relies on *Bashaw v. Paramo*, Case No. EDCV 13-829-MWK (KK), reported at 2014 WL 7331938 (C.D. Cal. Dec. 18, 2014), a case arising under § 2254. Bashaw's claims were pleaded only as constitutional claims, but Magistrate Judge Kato noted that "to the extent Petitioner's claim relies on the Americans with Disabilities Act or the Code of Federal Regulations, it lacks merit." *Id.* at *5. She applied the "fundamental defect" language from *Reed* and found that Bashaw had not established a fundamental defect. *Id.*

Thus the two cases relied on by Bays – *Reed* and *Bashaw* – establish in theory that habeas will lie for a federal statutory violation, although both courts found no right to habeas relief in the particular cases before them. Bays is correct that habeas under § 2254 will lie for federal statutory violations that create a fundamental defect in the process. The Magistrate

Judge's conclusion that only constitutional violations can be litigated in habeas was incorrect and is withdrawn.

Bays also objects that 28 U.S.C. § 2254(d) does not apply to his Nineteenth Claim because it was never presented to the state courts. To the extent the original Report could be read to imply a need to defer to a state court decision under § 2254(d), the Magistrate Judge agrees that implication would be incorrect. There is no relevant state court adjudication of this claim.

The question before the Court, then, is whether Bays' Nineteenth Ground pleads a violation of a federal statute that qualifies as a fundamental defect "which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." *Reed, supra*, at 347. The federal statutes Bays claims Ohio will violate in executing him are "various [unspecified] provisions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801, *et seq*., the Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. §§ 301 *et seq*., and federal regulations issued by the Drug Enforcement Agency (DEA) and Food and Drug Administration (FDA)." (Second Amended Petition, ECF No. 247, ¶ 607, PageID 8883-84.) Bays also asserts that Ohio's lethal injection statute, Ohio Revised Code § 2949.22(A) and the Execution Protocol adopted to carry out that statute are preempted by the same federal statutes and regulations. *Id.* at ¶ 610, PageID 8884.

The time horizon of these claims makes clear that they belong in a forward-looking § 1983 complaint and not in a habeas corpus petition.

Petitioner Bays was convicted in 1995 of the November 1993 murder of Charles Weaver.[8] The conviction was affirmed on appeal by both the Second District Court of Appeals

[8] The litigation history is recited at length in the Magistrate Judge's Report and Recommendations on the merits. (ECF No. 109.)

and the Ohio Supreme Court. His last state court proceeding tolling the habeas corpus statute of limitations concluded on November 9, 2007, when he voluntarily dismissed his petition for post-conviction relief under *Atkins v. Virginia,* 536 U.S. 304 (2002). He then filed his original Petition in habeas corpus in this Court a year later on November 6, 2008. Judge Rose adopted the Magistrate Judge's recommendations on the merits on August 6, 2012 (ECF No. 134), yet there is still no judgment in the case because of continued litigation over whether lethal injection invalidity claims can be litigated in habeas corpus.

Although Ohio has execution dates set through August 24, 2022, it has set none for Petitioner Bays. What will happen in Ohio execution law, policy, and practice between now and then? Projections are difficult to make, given the dynamic nature of this area of the law, but it is very likely there will be a great deal of change of various kinds. This Court stands ready to adjudicate in a § 1983 case the claims Bays' makes in his Nineteenth Ground for Relief when his execution is imminent and it is at least known what method Ohio then proposes to use. 42 U.S.C. § 1983, as noted above, provides the full range of federal civil remedies both pre- and post-hearing, to prevent an execution that would be unconstitutional. As also noted above, Bays is a plaintiff in just such a case, *In re Ohio Execution Protocol Litig.*, Case No. 2:11-cv-1016. But Bays claims that § 1983 remedy is not adequate to protect his rights. In addition, he seeks to have his conviction, now more than twenty years old, declared void on the basis of facts which may not yet have happened.

Although *Campbell* only expressly addressed Eighth Amendment claims under *Baze* and *Glossip*, its logic is fully applicable here. The *Campbell* court wrote:

> [T]he *Glossip* Court necessarily barred all habeas petitions challenging "a particular application of a particular protocol to a particular person" as unconstitutionally painful. *In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017). These challenges are properly

remedied by an injunction prohibiting the state from *taking certain actions*, rather than a writ of habeas corpus that vacates the sentence entirely.

A review of fundamental habeas and § 1983 principles confirms that this is the correct view of the law. Only when a serious error infects the very fact of a death sentence can the writ grant relief. *See Heck*, 512 U.S. 477, 481, 114 S. Ct. 2364, 129 L. Ed. 2d 383; *Buck v. Davis*, 137 S. Ct. 759, 777, 197 L. Ed. 2d 1 (2017). This principle arises because habeas relief does not exist to ferret out every constitutional violation, or even to directly prohibit the government from breaking the law; instead, it exists to relieve the *prisoner* of an unlawful sentence. *See, e.g., Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); *Gall v. Scroggy*, 603 F.3d 346, 353 (6th Cir. 2010). To that end, the writ necessarily "provides the petitioner the right to relief from *all* direct and collateral consequences of the unconstitutional [sentence]." *Gall*, 603 F.3d at 353 (emphasis added). Thus, if a petitioner's legal theory would not *inherently* require the nullification of his death sentence, he has no business proceeding in a habeas court. The Great Writ is not concerned with the piecemeal reformation of an imperfect criminal justice system.

In contrast, § 1983 is engineered to accomplish this lofty goal. The statute empowers a court to enjoin, "in equity," "the deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983 (emphasis added). When properly invoked, the statute can be used to compel the government to recognize that even the guilty have rights, and that even a conviction or death sentence does not deprive a person of their humanity. *See, e.g., Baze*, 553 U.S. at 52; *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Indeed, Ohio death-row inmates—including Campbell—are currently litigating the constitutionality of the protocol in a § 1983 action, seeking a declaration that Ohio's execution protocol is torturously painful. *See In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016 (S.D. Ohio). In fact, Campell's motion for a preliminary injunction to stay execution is set for hearing this very week. Ultimately, this is the relief that all method-of-execution claims seek: an order directed at state officials, declaring that the state's ends do not justify its means, and requiring the state to find another, less cruel way to enforce a judgment of death against the prisoner.

2017 U.S. App. LEXIS 21094, *11-13.

Following the guidance of *Campbell*, this Court should hold that method-of-execution claims, whether or not they are *Baze/Glossip* claims, belong in § 1983 litigation and not in habeas. The Nineteenth Ground for Relief should be dismissed without prejudice to its consideration on the merits in *In re Ohio Execution Protocol Litig*. Such merits adjudication would include deciding whether Bays' Nineteenth Ground for Relief as pleaded in the Fpourth Amended Complaint in Case No. 2:11-cv-1016 state a claim for relief. Defendants in that case have a pending Motion to Dismiss (ECF No. 1379) which will be ripe for decision within the month.

Bays' Claim Under *Atkins v. Virginia*

On January 3, 2014, the Court rejected Petitioner's Motion to add two Grounds for Relief related to his claim under *Atkins v. Virginia, supra* (ECF No. 173). However, no ruling has yet been made on whether to grant or deny a certificate of appealability on those claims. The Substituted Report recommended that the Court enter final judgment in the case, but Rule 11 of the Rules Governing § 2254 Cases requires that the appealability issue be decided when final judgment is entered. Instead of submitting argument on the issue, Bays asks for a deadline to move to expand the certificate of appealability (ECF No. 267, PageID 9028). However, the Magistrate Judge believes the issues were thoroughly vetted when the Motion to Amend was litigated. Because reasonable jurists would not disagree with the denial of Grounds Fourteen and Fifteen, a certificate of appealability should be denied on those grounds.

Conclusion

Having reconsidered the matter in light of the Objections, the Magistrate Judge again recommends that the Sixteenth, Seventeenth, Eighteenth, and Nineteenth Grounds for Relief be dismissed without prejudice to their consideration in the § 1983 case. Petitioner should be granted a certificate of appealability on Ground Five as already ordered (ECF No. 148) and as to Grounds Sixteen, Seventeen, Eighteen, and Nineteen because of the changes of course by the Sixth Circuit on the cognizability of lethal injection claims in habeas corpus.

December 6, 2017.

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

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral

hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).

No. 18-3101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

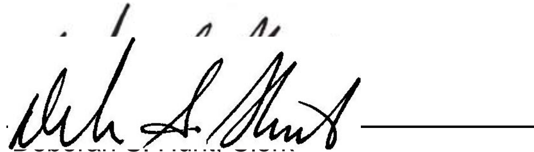
FILED
December 13, 2018
DEBORAH S. HUNT, Clerk

RICHARD BAYS,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION,	)	
	)	
Respondent-Appellee.	)	

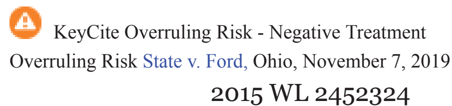
Before: GIBBONS, KETHLEDGE, and DONALD, Circuit Judges.

Richard Bays, an Ohio prisoner under sentence of death, petitions for rehearing en banc of this court's order entered on August 28, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied as to the issues raised in the rehearing en banc petition. The petition then was circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk


KeyCite Overruling Risk - Negative Treatment
Overruling Risk State v. Ford, Ohio, November 7, 2019

2015 WL 2452324

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Second District, Greene County.

STATE of Ohio, Plaintiff–Appellee
v.
Richard BAYS, Defendant–Appellant.

No. 2014–CA–24.
|
Decided May 15, 2015.

(Criminal Appeal from Common Pleas Court).

Attorneys and Law Firms

Stephen K. Haller by Elizabeth A. Ellis, Prosecuting Attorney's Office, Xenia, OH, for plaintiff-appellee.

Alphonse A. Gerhardstein, Cincinnati, OH, for defendant-appellant.

Opinion

HALL, J.

***1** {¶ 1} Richard Bays appeals from the trial court's judgment entry overruling (1) his May 16, 2013 motion to withdraw a November 9, 2007 notice of voluntary dismissal of a post-conviction relief petition pursuant to Civ.R. 41(A)(1), (2) his motion to amend or supplement the voluntarily-dismissed petition, and (3) his January 14, 2014 motion for Civ.R. 60(B) relief from his voluntarily-dismissed petition.

{¶ 2} Bays advances four assignments of error. First, he contends the trial court erred in overruling his motion to withdraw the notice of voluntary dismissal. Second, he claims the trial court erred in denying him relief under Civ.R. 60(B). Third, he asserts that the trial court erred in failing to rule on a successive petition for post-conviction relief that he filed and his motion for a hearing. Fourth, he maintains that the trial court erred in failing to grant him an evidentiary hearing.

{¶ 3} Bays' case has a lengthy procedural history that need not be repeated in detail here. *See generally State v. Bays,* 159 Ohio App.3d 469, 2005–Ohio–47, 824 N.E.2d 167 (2d Dist.). Briefly, he was convicted of aggravated murder and aggravated robbery in 1995 for robbing and killing a seventy-six-year-old man and using the stolen money to buy crack cocaine. *Id.* at ¶ 4, 824 N.E.2d 167. He received a death sentence for the aggravated murder and an additional ten to twenty-five years for the aggravated robbery. *Id.* He pursued direct appeals, which were unsuccessful. *Id.* Beginning in 1996, Bays also unsuccessfully pursued post-conviction relief under R.C. 2953.21, challenging his attorney's trial performance. *Id.* at ¶ 5–7, 824 N.E.2d 167.

{¶ 4} In April 2003, Bays filed a second post-conviction relief petition, this time seeking to vacate his death sentence based on *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *State v. Lott,* 97 Ohio St.3d 303, 2002–Ohio–6625, 779 N.E.2d 1011. Proceeding with the assistance of counsel, Bays alleged that he was mentally retarded and, therefore, could not be executed under *Atkins* and *Lott. Id.* at ¶ 7. The trial court denied Bays funding to retain a mental-retardation expert, finding that he already had been examined in connection with the criminal case. *Id.* at ¶ 8. The matter proceeded to a hearing at which Bays presented no evidence. *Id.* at ¶ 11. Based on mitigation-phase trial testimony from two experts who stated that Bays' I.Q. was above 70, the trial court denied post-conviction relief to vacate his death sentence. *Id.* On appeal, this court found Bays entitled to the requested funding and reversed, reasoning:

> There is a significant difference between expert testimony offered for mitigation purposes and expert testimony offered for *Atkins* purposes. Although the expert testimony presented at Bays's mitigation hearing regarding his intellectual limitations is relevant to Bays's *Atkins* claim, it was not developed either to prove or to disprove the issue presented by his *Atkins* claim—whether Bays is so impaired that his execution would constitute cruel and unusual punishment. *See State v. Carter,* 157 Ohio App.3d 689, 2004–Ohio–3372, 813 N.E.2d 78, at ¶ 22. The expert testimony offered at Bays's mitigation hearing was not presented or developed to establish Bays's mental retardation status for purposes of *Atkins,* using the test adopted in *Lott.* Nor can Bays fairly have been required to have used the vehicle of his guilt or punishment trials to have developed evidence on the issue of whether he meets the mental retardation test set forth in *Lott,* since his trials, conviction and sentence all predate the *Lott* decision.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

***2** The three-part test set forth in *Atkins,* and adopted by the Ohio Supreme Court in *Lott,* requires that the following three criteria be met to establish mental retardation: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott,* 97 Ohio St.3d 303, 2002–Ohio–6625, 779 N.E.2d 1011, at ¶ 12. Bays has the burden of proving, by a preponderance of the evidence, that he is mentally retarded under the three-part test. *See id.* at ¶ 21, 779 N.E.2d 1011. There is a rebuttable presumption that Bays is not mentally retarded if his I.Q. is above 70, but he must be allowed access to the resources that might permit him to rebut this presumption, in view of the fact that he is an indigent defendant with significant, documented cognitive deficits, as shown by his school records and the testimony of Drs. Burch and Jackson.

We conclude that the trial court abused its discretion when it denied Bays's request for funding for an expert on mental retardation for the purposes of attempting to prove his *Atkins* mental-retardation claim.

Bays, 159 Ohio App.3d 469, 2005–Ohio–47, 824 N.E.2d 167, at ¶ 23–25.

{¶ 5} On remand, the trial court granted Bays some funding. He retained Dr. David Hammer to evaluate him, and the State hired Dr. Barbara Bergman. Both experts evaluated Bays on October 1, 2007. Based on their evaluations, both experts opined that that he did not meet the criteria for a diagnosis of mental retardation. In light of these evaluations, Bays' counsel filed a Civ.R. 41(A)(1) notice of voluntary dismissal of the post-conviction *Atkins* petition on November 9, 2007. (Doc. # 452). The trial-court case sat dormant for the next five and one-half years until May 16, 2013, when Bays moved to withdraw his notice of voluntary dismissal and to supplement or amend his 2003 *Atkins* post-conviction relief petition with additional evidence regarding his mental retardation. (Doc. # 453). Bays also filed a January 14, 2014 motion seeking relief from judgment pursuant to Civ.R. 60(B) and *State v. Waddy,* Franklin C.P. No. 86–CR–10–3182 (July 20, 2005). The motion requested relief from judgment "so that he [could] withdraw the notice of voluntary dismissal of his *Atkins* petition." (*Id.* at 1).

{¶ 6} After briefing by the parties, the trial court denied Bays' motion to withdraw his notice of voluntary dismissal, his motion to supplement or amend his voluntarily-dismissed *Atkins* petition, and his motion for relief from judgment. (Doc. # 470, 471). The trial court found that Bays' Civ.R. 41(A)(1) dismissal in November 2007 left the parties in the same position as if no petition had been filed and deprived it of jurisdiction "to do anything further on the dismissed case." (Doc. # 470 at 5). The trial court also concluded that "since Bays' Rule 41(A) dismissal was his first voluntary dismissal, the dismissal was not a final judgment, order, or proceeding subject to review under Civ.R. 60(B)." *Id.* at 7. Even if Bays could proceed under Civ.R. 60(B), the trial court found that he had failed to establish grounds for relief or timeliness. (*Id.* at 7–9). In light of the foregoing determinations, the trial court refused to allow him to supplement or amend his voluntarily-dismissed *Atkins* petition. (*Id.* at 9). It concluded that "[a] new petition needs to be filed." (*Id.*). Bays timely appealed from the trial court's judgment entry denying his motions. (Doc. # 471, 474). [1]

***3** {¶ 7} In his first assignment of error, Bays claims the trial court erred in denying his motion to withdraw his November 9, 2007 notice of voluntary dismissal. He reasons that he had a constitutional right to effective assistance of counsel in connection with his *Atkins* petition, that his *Atkins* counsel rendered ineffective assistance by voluntarily dismissing his petition, and that the trial court was obligated to remedy the problem by allowing him to withdraw the voluntary dismissal and supplement or amend his petition. In support, he cites *Waddy,* supra, for the proposition that a notice of voluntary dismissal can be withdrawn in a post-conviction proceeding. (Appellant's brief at 12–18).

{¶ 8} Upon review, we see no error in the trial court's refusal to allow Bays to withdraw his notice of voluntary dismissal. In *Atkins,* the U.S. Supreme Court held that executing a mentally retarded criminal violates the Eighth Amendment. *Atkins* relegated to states the responsibility for developing ways to implement this prohibition. *Atkins* at 317. In *Lott,* the Ohio Supreme Court adopted the three-part "test" set forth above for defining mental retardation. *Lott* at ¶ 12. It also held that "[t]he procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework" for resolving *Atkins* claims brought by convicted defendants facing the death penalty. *Id.* at ¶ 13.

{¶ 9} The Ohio Rules of Civil Procedure apply to proceedings under Ohio's post-conviction relief statute except to the extent that, by their nature, they would be clearly inapplicable or would conflict with the statutory procedure. *State v. Mitchell,* 2d Dist. Montgomery No. 21096, 2006–Ohio–1601, ¶ 5;

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

State v. Hansbro, 2d Dist. Clark No.2001–CA–88, 2002 WL 1332297, fn. 1 (June 14, 2002), citing *State v. Aldridge,* 120 Ohio App.3d 122, 136, 697 N.E.2d 228 (2d Dist.1997); *see also* Civ.R. 1(C)(7) ("These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * in * * * special statutory proceedings[.]").

{¶ 10} Here Bays' counsel invoked Civ.R. 41(A)(1)(a) when voluntarily dismissing his post-conviction *Atkins* petition in November 2007. That rule provides, in relevant part, that "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * filing a notice of dismissal at any time before the commencement of trial [.]" Although the terminology in Civ.R. 41(A)(1)(a) does not fit perfectly with a post-conviction action, we see nothing in the nature of the rule itself that makes it clearly inapplicable to such a proceeding. But even without regard to Civ.R. 41(A), we see nothing to prevent Bays from simply discontinuing pursuit of his *Atkins* petition and waiving the issue, which is effectively what his attorney did. *Cf. State v. Frazier,* 115 Ohio St.3d 139, 2007–Ohio–5048, 873 N.E.2d 1263, ¶ 155 (holding that the appellant permissibly waived his *Atkins* claim by withdrawing his *Atkins* motion at trial when the evidence did not support it). For the foregoing reasons, we see no error, and certainly no reversible error, in the trial court's decision to give effect to the notice of voluntary dismissal. [2]

***4** {¶ 11} "[F]ollowing a Civ.R. 41 voluntary dismissal without prejudice, the parties are in the same position they were in before the action was filed." [3] *Nielsen v. Firelands Rural Elec. Coop., Inc.,* 123 Ohio App.3d 104, 109, 703 N.E.2d 807 (6th Dist.1997), citing *Zimmie v. Zimmie,* 11 Ohio St.3d 94, 464 N.E.2d 142 (1984). The action is treated as if it never had been commenced, the trial court loses jurisdiction over the dismissed matter, and "[j]urisdiction cannot be reclaimed by the court." *Zimmie* at 95, 464 N.E.2d 142; *see also State ex rel. Fifth Third Mtge. Co. v. Russo,* 129 Ohio St.3d 250, 2011–Ohio–3177, 951 N.E.2d 414, ¶ 17 ("The plain import of Civ.R. 41(A)(1) is that once a plaintiff voluntarily dismisses all claims against a defendant, the court is divested of jurisdiction over those claims. * * * The notice of voluntary dismissal is self-executing and completely terminates the possibility of further action on the merits of the case upon its mere filing, without the necessity of court intervention."); *Kaiser v. Ameritemps, Inc.,* 84 Ohio St.3d 411, 416, 704 N.E.2d 1212 (1999) ("Because Kaiser could properly dismiss his complaint pursuant to Civ.R. 41(A)(1)(a), the trial court was without jurisdiction[.]"); *State ex rel. Fogle v. Steiner,* 74 Ohio St.3d 158, 161, 656 N.E.2d 1288 (1995) ("When a case has been properly dismissed pursuant to Civ.R. 41(A)(1), the court patently and unambiguously lacks jurisdiction to proceed and a writ of prohibition will issue to prevent the exercise of jurisdiction."); *State ex rel. Ahmed v. Costine,* 99 Ohio St.3d 312, 2003–Ohio–3080, 790 N.E.2d 330, ¶ 5 (finding that a Civ.R. 41(A)(1)(a) notice of voluntary dismissal deprived the appellate court of jurisdiction to proceed on petitions for writs of prohibition and mandamus). [4] Based on the foregoing authority, we agree with the trial court that Bays' November 9, 2007 notice of voluntary dismissal deprived it of jurisdiction "to do anything further" on the dismissed *Atkins* petition. Therefore, the trial court did not err in denying Bays' motion to withdraw his notice of voluntary dismissal for purposes of supplementing or amending the petition.

{¶ 12} In any event, we also reject the premise underlying Bays' motion to withdraw his notice of voluntary dismissal. Therein, he argued that withdrawal of the notice of dismissal was *constitutionally mandated* because he had a right to effective assistance of counsel in connection with the *Atkins* petition, he had been deprived of that right, and no other avenue of relief existed for remedying the constitutional violation.

{¶ 13} Whether Bays in fact had a constitutional right to effective assistance of counsel in connection with his post-conviction *Atkins* petition is debatable. It has been recognized, of course, that a defendant pursuing post-conviction relief ordinarily has no such right. [5] *Smallwood v. Erwin,* 2d Dist. Greene No. 89–CA–16, 1989 WL 87575, *1 (Aug. 3, 1989), citing *State v. Mapson,* 41 Ohio App.3d 390, 535 N.E.2d 729 (8th Dist.1987). But even if we accept Bays' claim that this case is different, and that he did have a constitutional right to effective assistance of counsel, we are unpersuaded that he was deprived of that right.

***5** {¶ 14} The performance of counsel is constitutionally deficient if it is objectively unreasonable and it results in prejudice to the defendant. *State v. Thrasher,* 2d Dist. Greene No. 06CA0069, 2007–Ohio–674, ¶ 10, citing *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. King,* 2d Dist. Montgomery No. 18463, 2002 WL 1332565, *5 (June 14, 2002), citing *Strickland.*

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

{¶ 15} Here Bays claims his attorney acted objectively unreasonably by dismissing his *Atkins* claim without a full evaluation. With regard to prejudice, he asserts that he *is* mentally retarded and, therefore, that he likely would have prevailed and would have had the death penalty vacated if his attorney had acted competently.

{¶ 16} Having reviewed the record, we disagree that Bays' *Aktins* counsel acted objectively unreasonably in evaluating his claim of mental retardation. As set forth above, *Lott* adopted a three-part "test" defining mental retardation for *Atkins* purposes. The definition requires a showing of "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott* at ¶ 12. In *Lott,* the Ohio Supreme Court also established "a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.*

{¶ 17} Bays was evaluated in connection with his *Atkins* petition by two psychologists, Dr. Hammer (retained by Bays) and Dr. Bergman (retained by the State). After evaluating Bays, Hammer and Bergman both concluded that he did not meet *Lott's* definition of mental retardation. For his part, Hammer opined that Bays did not "meet the criteria for a diagnosis of mental retardation at any level." (Doc. # 453, Exh. B, Vol.II, Appx.451). He noted that Bays had a full-scale IQ score of 78, a verbal score of 76, and a non-verbal score of 83, none of which were "in the range of mental retardation." (*Id.*). Hammer added: "The major finding here was that the IQ scores were above the Mental Retardation range and they do not support the *Atkins* plea, in my professional opinion." (*Id.*). With regard to adaptive behavior, Hammer noted that Bays had scored 95 on a Street Survival Skills Questionnaire, which fell "in the normal range of adaptive behavior functioning." (*Id.*) He then added: "The findings on the Street Survival Skills Questionnaire also do not support the *Atkins* claim, although this particular adaptive behavior measure is not as well accepted by MRDD professionals as other standardized measures such as the Vineland, SIB–R, or ABAS–II. It is mostly used to determine whether someone has the basic skills appropriate for community employment." (*Id.*).

***6** {¶ 18} At the conclusion of her ten-page forensic-evaluation report, Bergman set forth the following opinions on each part of *Lott's* three-part definition:

> Present evaluation indicates that Mr. Bays does not meet the criteria specified in the *Atkins* decision to be considered "mentally retarded" as evidenced by the following:
>
> 1) Mr. Bays' Full Scale IQ score on the Stanford Binet–V was 78, which was well beyond the IQ score of 70. In addition, available scores on all past testing of intellectual functioning are consistent with present test results.
>
> 2) Mr. Bays' adaptive behavior, as measured by the Street Survival Skills Questionnaire, was in the average range.
>
> 3) Mr. Bays' intellectual functioning prior to age 18 years—as reflected in school records—was always in the Borderline range of intelligence. (IQ above 70).
>
> In conclusion, based on the present evaluation, it is the opinion of the undersigned psychologist, within a reasonable degree of psychological certainty, that Richard Bays DOES NOT meet the *Atkins* criteria to be considered "mentally retarded."

(*Id.* at Appx. 461).

{¶ 19} On appeal, Bays insists that his *Atkins* counsel, armed with the foregoing expert opinions, acted unreasonably and rendered ineffective assistance by dismissing his petition. In support, he first claims that "Dr. Hammer had told counsel that Dr. Bergman used the SSSQ for an adaptive-deficits assessment, which competent counsel would have determined was 'completely inappropriate' and 'scientifically unacceptable' under the circumstances." (Appellant's brief at 15). Notably, these descriptions of the SSSQ as "completely inappropriate" and "scientifically unacceptable" come from Bays' *new expert,* psychologist Stephen Greenspan, who provided an affidavit below in connection with Bays' effort to reopen his voluntarily-dismissed *Atkins* petition. (Doc. # 453 at Vol. I, Appx. 84). All Hammer himself told *Atkins* counsel about the SSSQ was (1) that Bays' score fell "in the normal range of adaptive behavior functioning," (2) that Bays' score did "not support the *Atkins* claim," and (3) that the SSSQ was "not as well accepted by MRDD professionals as other standardized measures[.]"[6] (Doc. # 453, Exh. B, Vol.II, Appx.451). But mere knowledge that other tests of adaptive behavior might be *better accepted* by psychologists would not reasonably have led *Atkins* counsel to conclude that the SSSQ discussed by Hammer and Bergman was "inappropriate" or "unacceptable."[7] Therefore, Bays has not shown that *Atkins* counsel acted objectively unreasonably in

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

relying on the adaptive-behavior findings made by Hammer and Bergman using the SSSQ. *Cf. State v. Leonard,* 104 Ohio St.3d 54, 2004–Ohio–6235, 818 N.E.2d 229, ¶ 150 ("Leonard has also not shown how Dr. Hawkins' use of the Minnesota Multiphasic Personality Inventory amounted to deficient performance by trial counsel. Dr. Hawkins was the expert in this area, and he determined which tests to administer."). That being so, *Atkins* counsel reasonably could have concluded that Bays would be unable to satisfy the second part of *Lott's* three-part mental-retardation definition. Because *Lott* required each part of the test to be satisfied, *Atkins* counsel acted objectively reasonably in concluding that the petition would fail and in dismissing it. This is true without regard to Bays' ability to satisfy the other two parts of *Lott's* mental-retardation definition. *Cf. State v. Jackson,* 141 Ohio St.3d 171, 2014–Ohio–3707, 23 N.E.3d 1023, ¶ 176–180 (finding no ineffective assistance in counsel's decision not to pursue an *Atkins* claim and noting that expert opinion about the defendant's lack of "significantly subaverage intellectual functioning" undermined the claim and made the other parts of the *Lott* test immaterial).

***7** {¶ 20} In any event, we also believe *Atkins* counsel acted objectively reasonably in relying on the IQ assessment performed by Hammer and Bergman. In arguing to the contrary, Bays claims *Atkins* counsel provided deficient representation by failing to verify that the full-scale score of 78 was valid "by determining whether it had been adjusted to compensate for obsolete norms, a phenomenon known as the Flynn Effect." (Appellant's brief at 16). Bays claims this adjustment was required, that it had not been made, and that it would have reduced his full-scale score to a 76. (*Id.*).

{¶ 21} We are unconvinced that counsel's duty included investigating whether the two experts had done their job competently by adjusting for the Flynn Effect. Even if we accept, arguendo, that counsel had a general obligation to be aware of the Flynn Effect, Bays cites nothing that reasonably should have alerted counsel the adjustment was not made. Absent such evidence, we are unpersuaded that counsel's professional duty encompassed micromanaging the experts' scoring of Bays' IQ test. We note too that giving Bays the benefit of the roughly two-point adjustment still would have resulted in a full-scale score of 76, six points above the threshold established by *Lott* for a presumption of no mental retardation. [8] *Cf. State v. Maxwell,* 139 Ohio St.3d 12, 2014–Ohio–1019, 9 N.E.3d 930, ¶ 172–176 (finding no ineffective assistance in failing to request an *Atkins* hearing where the defendant's two full-scale IQ scores were above 70, there was no evidence that he suffered from a significant limitation on two or more adaptive skills, and an expert determined that he was not mentally retarded); *Frazier v. Jenkins,* 770 F.3d 485, 501 (6th Cir.2014) ("Lawyers are permitted to rely upon qualified experts * * * and in this case, Frazier's own expert found him not to be mentally retarded. Fairminded jurists could find that counsel's reliance upon Dr. Smalldon's opinion was consistent with professional norms.").

{¶ 22} Finally, we reject Bays' assertion that his *Atkins* counsel acted unreasonably in dismissing his petition despite the fact that another defendant had prevailed on a post-conviction *Atkins* claim in 2006 with one IQ score of 79. In that case, *State v. Gumm,* 169 Ohio App.3d 650, 2006–Ohio–6451, 864 N.E.2d 133 (1st Dist.), the record contained substantial other evidence of mental retardation, including evidence of significantly subaverage intellectual functioning, that was strong enough to overcome the rebuttable presumption of no mental retardation created by an IQ score above 70. *Id.* at ¶ 24–29, 864 N.E.2d 133. Unlike *Gumm,* Bays' *Atkins* counsel reasonably could have determined that she lacked sufficient evidence of significantly subaverage intellectual functioning to overcome the rebuttable presumption created by his IQ score. As noted above, she also lacked evidence to satisfy *Lott's* adaptive-behavior definition. Therefore, we find *Gumm* distinguishable.

***8** {¶ 23} Having determined (1) that the trial court properly gave effect to Bays' notice of voluntary dismissal, (2) that the voluntary dismissal deprived the trial court of jurisdiction "to do anything further" on the dismissed *Atkins* petition, and (3) that the entire premise for Bays' request to withdraw his notice of voluntary dismissal lacked merit, we hold that the trial court did not err in denying his motion to withdraw his notice of voluntary dismissal for purposes of supplementing or amending the petition. The first assignment of error is overruled.

{¶ 24} In his second assignment of error, Bays claims the trial court erred in denying his Civ.R. 60(B) motion for relief from judgment. He argues that relief was warranted under Civ.R. 60(B)(4) and (5) "because his *Atkins* counsel had been ineffective and because his underlying *Atkins* claim was clearly meritorious." (Appellant's brief at 18). He insists that the voluntary dismissal of his petition did not preclude relief, that his *Atkins* counsel's ineffectiveness provided grounds for relief, and that his motion was timely. Alternatively, Bays

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

reiterates the argument we rejected above about voluntary dismissal not being available in post-conviction proceedings.

{¶ 25} Upon review, we see no error in the trial court's denial of relief from judgment under Civ.R. 60(B). We reach this conclusion for at least two reasons. First, no final judgment, order, or proceeding exists from which relief can be obtained. Bays filed a petition and later voluntarily dismissed it, leaving him in the same position as if nothing had been filed. His non-filing of a petition does not constitute a final judgment, order, or proceeding from which relief can be obtained. *Hensley v. Henry,* 61 Ohio St.2d 277, 400 N.E.2d 1352 (1980), syllabus ("Unless plaintiff's Civ.R. 41(A)(1)(a) notice of dismissal operates as an adjudication upon the merits under Civ.R. 41(A)(1), it is not a final judgment, order or proceeding, within the meaning of Civ.R. 60(B)."); *Thorton v. Montville Plastics & Rubber Co.,* 121 Ohio St.3d 124, 2009–Ohio–360, 902 N.E.2d 482, ¶ 24; *Huntington Natl. Bank v. Molinari,* 6th Dist. Lucas No. L–11–1223, 2012–Ohio–4993, ¶ 25; *Homecomings Fin. Network, Inc. v. Oliver,* 1st Dist. Hamilton No. C–020625, 2003–Ohio–2668, ¶ 9. Second, we find no grounds for relief under Civ.R. 60(B). Bays cites ineffective assistance of counsel, but we rejected that argument above. Accordingly, the second assignment of error is overruled.

{¶ 26} In his third assignment of error, Bays asserts that the trial court erred in failing to rule on (1) a successive petition for post-conviction relief that he filed, (2) his motion for an evidentiary hearing on that new petition, and (3) his argument under the *Waddy* case addressed in his first assignment of error.

{¶ 27} In essence, Bays contends the trial court overlooked his alternative request to treat his attempt to amend or supplement the previously dismissed *Atkins* petition as a new, successive petition. He also maintains that the trial court should have ruled on his motion for an evidentiary hearing in connection with his new petition. In response, the State asserts that Bays did not make clear that he wanted his filing to be treated as a new petition for post-conviction relief. The State also argues that he has not met the requirements for filing an untimely new petition. Upon review, we believe Bays adequately informed the trial court that if it denied his motion to supplement or amend the previously-dismissed *Atkins* petition, he wanted it to consider a new petition that he had filed. The record reflects that Bays made this request clear. [9]

***9** {¶ 28} Bays filed his new *Atkins* petition with volumes of supporting exhibits on May 16, 2013. (Doc. # 453). In that filing, he first asked the trial court to consider it as a supplement or amendment to the earlier petition he dismissed in November 2007. (*Id.* at i-ii). Alternatively, he stated: "Bays files a new *Atkins* petition, attached as Exhibit A, Supplemental *Atkins* Petition I, under the authority of *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *State v. Lott,* 97 Ohio St.3d 303, 779 N.E.2d 1011 (2002), and pursuant to Ohio Rev.Code sections 2953.21 and 2953.23." (*Id.* at ii). Bays also alerted the trial court on other occasions that he had filed a new petition for post-conviction relief as an alternative to his motion to supplement or amend his previously-dismissed petition. (*See* Doc. # 455 at 8) ("If the Court denies Bays's Motion to vacate and supplement or amend his *Atkins* pleading, Bays has already filed the petition attached as Exhibit A to his May 16th Motions. He meets the requirements for a successor post-conviction petition[.]"); (Doc. # 464 at 4, fn.1) ("As Bays has noted, even if the Court decides not to permit him to withdraw his prior notice of voluntary dismissal, he has already filed an alternative *Atkins* petition under Ohio Revised Code section 2953.23. *See* May 16, 2013 Motions at § V; July 22, 2013 Reply at § III."). Despite the State's claim on appeal that Bays did not make his alternative pleading clear, the prosecutor below acknowledged that he had filed a new petition for post-conviction relief. (Dec. 20, 2013 Tr. at 5).

{¶ 29} In its written decision denying Bays' motion to withdraw his notice of voluntary dismissal and his motion for Civ.R. 60(B) relief, however, the trial court failed to acknowledge that he alternatively had filed a new post-conviction relief petition with supporting evidentiary materials. In fact, the trial court opined that Bays "may have a meritorious claim" but concluded that "[a] new petition needs to be filed." (Doc. # 470 at 9). We agree with Bays that the trial court erred in failing to recognize that a new petition *already* had been filed and that a request for an evidentiary hearing had been made. (*See* Doc. # 463).

{¶ 30} Given that Bays already has filed all of the materials necessary for the trial court to consider his new petition for post-conviction relief with new supporting evidentiary materials and has given the trial court sufficient notice of that filing, we see no useful purpose in requiring him to overcome more delay and file the petition again. Because the trial court did not rule on Bays' new petition or his request for a hearing thereon, we conclude that those matters remain pending below. [10] The third assignment of error is

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

sustained insofar as Bays contends the trial court erred in failing to recognize their existence and finding a need for another petition to be filed. We express no opinion on any aspect of that new petition, which shall be addressed in the first instance by the trial court.

***10** {¶ 31} In his fourth assignment of error, Bays maintains that the trial court erred in failing to grant him an evidentiary hearing in connection with his new petition. In support, he argues that if the trial court implicitly denied his motion, then it abused its discretion. As explained in our analysis of the third assignment of error, however, Bays' new petition and motion for an evidentiary hearing thereon remain pending below. That being so, whether the trial court denied an evidentiary hearing on the new petition is not before us. Accordingly, the fourth assignment of error is overruled.

{¶ 32} Based on the reasoning set forth above, the trial court did not err in overruling (1) Bays' motion to withdraw his November 2007 notice of voluntary dismissal, (2) his motion to amend or supplement the voluntarily-dismissed petition, and (3) his motion for Civ.R. 60(B) relief from the voluntarily-dismissed petition. The trial court's judgment overruling these motions is affirmed. The cause is remanded, however, for the trial court to proceed to consider Bays' pending *Atkins* petition for post-conviction relief and his motion for an evidentiary hearing thereon.

DONOVAN, J., dissenting.

***10** {¶ 33} I disagree.

{¶ 34} Bays' claim presents both a substantive and procedural conundrum. However, the question of whether he should be executed requires heightened procedural safeguards. Recently the Court held in *Hall v. Florida* that the general understanding of medical experts will "inform[ ]" but not "dictate" whether a person has an intellectual disability that precludes his execution under the Eighth Amendment. *Hall v. Florida,* ––– U.S. ––––, 134 S.Ct. 1986, 2000, 188 L.Ed.2d 1007 (2014). *Hall* also mandated that the legal standard for determining subaverage intellectual functioning must account for the margin of error in IQ testing. *Id.* at 2001.

{¶ 35} I would remand the case for an evidentiary hearing on mental retardation and a decision on the merits of the *Atkins* claim. In my view, the trial court erred in refusing to permit Bays to withdraw his "Notice of Voluntary Dismissal pursuant to Civ.R. 41(A)". [11] The real difficulty is the *Atkins* claim is criminal in nature, but civil in form, thus forced into the post-conviction process. Criminal post-conviction proceedings in Ohio are governed by statute and have been held to be "quasi civil" in nature by the Supreme Court of Ohio. R.C. 2953.21; *State v. Nichols,* 11 Ohio St.3d 40, 42, 463 N.E.2d 375 (1984). Civ.R. 41(A)(1)(a) by its very language only applies to claims asserted by a plaintiff against a defendant which are dismissed before the commencement of trial. Bays has already stood trial and been sentenced to death. Accordingly, Civ.R. 41(A)(1)(a) cannot apply. Nothing in the statute provides for a voluntary dismissal nor should it.

{¶ 36} Although generally civil rules apply to post-conviction, since Civ.R. 41(A)(1)(a) has no applicability to Bays' petition, the Notice of Voluntary Dismissal constitutes a nullity. "The commencement of trial cuts off a plaintiff's ability to unilaterally dismiss claims without prejudice." *Schwering v. TRW Vehicle Safety Sys., Inc.,* 132 Ohio St.3d 129, 2012–Ohio–1481, 970 N.E.2d 865, ¶ 21. A claim can only be withdrawn after a trial commences by stipulation of all of the parties or by a motion for a court ordered dismissal pursuant to Civ.R. 41(A)(2). *Id.* at ¶ 22, 970 N.E.2d 865; *Chadwick v. Barba Lou, Inc.,* 69 Ohio St.2d 222, 229, 431 N.E.2d 660 (1982). If the withdrawal is by motion, the trial court will "determine the conditions to impose to protect the other parties and to ensure that they are not prejudiced upon refiling." *Schwering* at ¶ 22. *See also Chef's Garden, Inc. v. Reep,* 6th Dist. Erie No. E–10–048, 2011–Ohio–3407 (finding a voluntary dismissal of an action by notice after commencement of trial is a nullity and did not divest the trial court of jurisdiction). Thus, the trial court has not lost jurisdiction to entertain Bays' petition and the proposed amendment(s) thereto. Significantly, Civ.R. 1(C)(7) provides: "These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * in * * * special statutory proceedings." In fact, R.C. 2953.21(E) dictates that "unless the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issue."

***11** {¶ 37} Logically, and statutorily, the trial court should serve as gatekeeper and consider and rule upon the *Atkins* claim on its merit. This necessarily inures to the benefit of the State as well. This type of claim should not be placed in a position of repose. R.C. 2953.21 authorizes the summary dismissal of a post-conviction petition if the petition and the files and the records in the case show that the petitioner is not entitled to relief. However, this was not a summary dismissal of Bays' petition on a motion for summary judgment

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

by the State. In fact, a summary judgment motion filed by the State had not been ruled upon when the experts were ultimately funded. "Because post-conviction proceedings are statutorily created, the specific requirements set out by statute take priority where they conflict with civil rules." *State v. Greer,* 9th Dist. Summit No. 15217, 1992 WL 316350 (Oct. 28, 1992). The statute makes no provision for Civ.R. 41(A)(1)(a) dismissal, nor should it, as both the State and Bays have an interest in a timely determination of the *Atkins* claim. It is well settled that a court is not required to hold an evidentiary hearing on every petition for post conviction relief. *State ex rel. Jackson v. McMonagle,* 67 Ohio St.3d 450, 619 N.E.2d 1017 (1993); *State v. Jackson,* 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). However, when a petitioner has demonstrated sufficient operative facts to establish substantive grounds for relief, a court is required by R.C. 2953.21(E) to hold an evidentiary hearing.

{¶ 38} The State of Ohio had conceded in a responsive pleading that Bays had tested as low as 71 in an IQ test while in the seventh grade, well within a recognized margin of error, coupled with documented adaptive, educational and functional deficits. Bays' claim must proceed to an evidentiary hearing on its merits. Although there should be a procedural mechanism to allow a competent, effective attorney to move to dismiss a frivolous or spurious *Atkins* claim, Bays' case does not fall into that category. Specifically, a motion to dismiss analogous to Crim.R. 47 would necessitate a court order which would have allowed the State to weigh in on the *Atkins* issue in the legitimate interest of finality and would require the trial court, as gatekeeper, to rule on the merits of such a motion or proceed with an evidentiary hearing.

{¶ 39} Concerns regarding the fairness and appropriateness of capital punishment are particularly acute/compelling whenever the defendant in question suffers from a mental impairment or defect. As we noted in Bays' prior appeal, Bays has "significant, documented cognitive deficits as shown by his school records and the testimony of Drs. Burch and Jackson." *Bays,* 159 Ohio App.3d 469, 2005–Ohio–47, 824 N.E.2d 167, ¶ 24. Accordingly, I would find the notice of voluntary dismissal ineffective, a legal nullity, as the Franklin County Common Pleas Court did in *Waddy.*

***12** {¶ 40} Additionally, the majority suggests it is "debatable" whether Bays has a constitutional right to effective assistance of counsel in connection with his *Atkins* claim. I cannot concur with such an assertion. The courts have consistently recognized capital cases are different:

> "[I]n Capital cases the fundamental respect for humanity underlying the Eighth Amendment * * * requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." [*Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)].
>
> That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. *Id.* at 305, 96 S.Ct., at 2991. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

{¶ 41} Ohio recognizes this difference by providing the right to counsel on Bays' post-conviction petition. Although this right to counsel is afforded by statute, I agree with the reasoning of *Hooks* that it should be recognized as a federal constitutional right as well. This is Bays' first opportunity to litigate his *Atkins* claim, therefore, to suggest he has a right to counsel, but not effective counsel, renders his right to counsel meaningless and would only eviscerate his *Atkins* claim. As the court noted in *Hooks,* nothing seems more critical in a criminal proceeding than deciding whether the power of the State will take the life of one of its citizens. As noted in *U.S. v. Wilson,* E.D. New York No. 04–CR–1016 (NGG), 2013 WL 1338710 (April 1, 2013), fn. 8, quoting *Hooks* at 1184:

> Neither the Supreme Court nor the Second Circuit has addressed whether an *Atkins* proceeding (or a Government-requested examination conducted as part of an *Atkins* proceeding) is a "critical stage" such that the Sixth Amendment's right to counsel applies. But as the Tenth Circuit recently noted * * *, an *Atkins* proceeding is "inextricably intertwined with sentencing" and holds "significant consequences for the accused."

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

{¶ 42} Ineffective assistance of counsel creates the risk that a mentally retarded individual may be executed in violation of the Eighth Amendment's prohibition. Hence, Ohio's post-conviction relief statute recognizes an exception to the rule of *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), providing for the appointment of counsel where the post-conviction petition is the first opportunity for Bays to present a challenge to his death sentence based upon *Atkins.* Importantly, the Ohio Constitution has its own prohibition against cruel and unusual punishments. Section 9, Article I of the Ohio Constitution. The Ohio Constitution is a document of independent force and Section 9, Article I is and has always been a protection of the people that is independent of the protection provided by the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Arnold v. Cleveland,* 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. Thus, the State Constitution can be interpreted more broadly than the Sixth Amendment.

***13** {¶ 43} Furthermore, no one could reasonably suggest that Bays' *Atkins* petition and the scheduled hearing were not addressed to a critical stage of the proceedings to which Sup.R. 20 also has applicability. In relevant part, Sup. R. 20 III(B)(2) provides: "Attorneys accepting appointments shall provide each client with competent representation in accordance with constitutional and professional standards."

{¶ 44} In this instance, Bays' right to counsel, albeit statutorily created to implement *Atkins,* also has a foundation in the Sixth Amendment under the United States Constitution and the Ohio Constitution, as made applicable through the Fourteenth Amendment. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn. 14. The core purpose of the right to counsel is to guarantee that individuals such as Bays have competent assistance when confronted with the "intricacies of the law and the advocacy of the public prosecutor." *U.S. v. Ash,* 413 U.S. 300, 309, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). "The protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions." *Austin v. United States,* 509 U.S. 602, 608, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). The *Atkins* claim comes about exclusively through a capital criminal prosecution.

{¶ 45} Furthermore, in my view, the Due Process Clause of the Ohio Constitution demands effective assistance of counsel as a safeguard to ensure that a trial court's determination of Bays' *Atkins* petition is fundamentally fair. Bays' due process rights are guaranteed by the Ohio Constitution's Redress in Courts provision, Section 16, Article 1 falling within the language of "lands, goods, **person** or reputation." The Due Process Clause should not allow the State to provide fewer procedural safeguards in Bays' *Atkins* proceedings than in his initial guilt and penalty phase. It would be ludicrous to suggest that if he stood trial today, he is entitled to the effective assistance of counsel in the trial on its merits and in the penalty phase, but not in a pre-trial *Atkins* determination phase. Bays should be treated equally. Equal protection requires that there be a compelling interest to justify unequal treatment between individuals. *See Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To suggest otherwise is to lose sight of the fact that although designated a "civil petition," Bays' claim is truly a constitutional one arising out of a criminal prosecution which *Atkins* recognized as a substantive restriction upon execution. I reiterate, this is his sole opportunity at the State level to litigate the claim of mental retardation and Ohio Sup. R. 20 requires "competent representation."

{¶ 46} Bays' claim should not be permitted to fall through the cracks in the system, essentially depriving him of a timely *Atkins* decision on the merits. When his petition was subsequently taken up after a long delay occasioned by, in my view, ineffective assistance of counsel and the untimely death of his lawyer, the State now seeks to shift the burden to Bays, a man with acknowledged intellectual deficits by improperly imputing to him an affirmative duty to ensure that the State Court decides his eligibility for the death penalty promptly.

***14** {¶ 47} Death is different and this case illustrates that the essential ingredients of meaningful process of review did not occur. The process should be expeditious without sacrificing fairness. The law contemplates an entirely different kind of evidentiary hearing than your stereotypical PCR petition, wherein the argument normally is that trial counsel was ineffective. Such alleged ineffectiveness can normally be raised on initial direct appeal. The lack of a merit hearing or judicial determination of the *Atkins* claim advanced by Bays could not have been addressed on an initial direct appeal.

{¶ 48} In my view, at a minimum, Bays is entitled to effective assistance of counsel and active and reasonable judicial oversight. The proper course would have been to strike the

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Civ.R. 41(A) notice of dismissal. This did not occur, hence the trial court never lost jurisdiction. I recognize that generally, "[s]tate post-conviction review is not a constitutional right. * * *." *State v. Kinley,* 136 Ohio App.3d 1, 735 N.E.2d 921 (2d Dist.1999). However, clearly Bays has a constitutional right to full consideration of his non-frivolous *Atkins* claim.

{¶ 49} Although the majority suggests a voluntary dismissal of Bays' *Atkins* claim was reasonable because it would likely fail on the merits, this conclusion, in my view, is not apparent on the entirety of this record. I would reverse and remand for a full hearing on the amended petition.

FROELICH, P.J., concurring in judgment.

{¶ 50} I agree with Judge Hall's conclusion that Civ.R. 41 applies to petitions for post-conviction relief, and that this case must be remanded for the trial court's consideration of Bays's 2013 petition. At the same time, I agree with Judge Donovan's conclusion that Bays had a constitutional right to effective assistance of counsel in pursuing post-conviction relief based on *Atkins* and *Lott.*

{¶ 51} Post-conviction proceedings are generally treated as civil proceedings. Nevertheless, there are circumstances where the Supreme Court of Ohio has provided increased protections for the parties, despite the civil nature of the proceeding. For example, custody disputes are considered civil cases and are controlled by the Rules of Civil or Juvenile Procedure. Yet, with permanent changes in custody, respondents have a statutory right to counsel, *see* R.C. 2151.352, and if they cannot afford an attorney, one is appointed. Further, the Ohio Supreme Court has consistently held that there is a constitutional right to assistance of counsel in permanent custody cases and that the same standards apply as in criminal cases. This is perhaps a logical conclusion from the court's reference to the termination of parental rights being the family law equivalent of the death penalty in a criminal case. *E.g., In re B.C.,* 141 Ohio St.3d 55, 2014–Ohio–4558, 21 N.E.3d 308, ¶ 19, quoting *In re Smith,* 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54 (6th Dist.1991); *In re Hayes,* 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

***15** {¶ 52} Pushing this analogy further, there is a statutory right to counsel in death penalty post-conviction relief petitions, R.C. 2953.21(I)(1), and as the permanent custody cases reinforce, such a right without the concurrent right to effective assistance of counsel is, at best, illusory. R.C. 2953.21(I)(2)'s language that purports to eviscerate this right by seemingly condoning "ineffectiveness or incompetence of counsel" cannot impact a constitutional right.

{¶ 53} Judge Hall concludes that Civ.R. 41 applies to post-conviction relief proceedings and thus the 2003 *Atkins*-based petition for post-conviction relief is considered, legally, as if it had never been filed. He therefore further concludes that the 2003 petition cannot be supplemented, and there is no final judgment to be subject to a Civ.R. 60 motion. In contrast, Judge Donovan concludes that Civ.R. 41 does not apply and, without a court's dismissing the petition, Bays's 2003 petition for post-conviction relief is still pending, and thus can be supplemented. The immediate bottom line does not appear to be different; that is, in either scenario, Bays would receive a consideration of his petition.

{¶ 54} It may matter, however, as to whether the petition before the trial court is considered a timely petition. [12] If, as Judge Donovan suggests, the voluntary dismissal were a nullity, the 2003 petition, as supplemented, remains pending before the trial court. On the other hand, if Civ.R. 41 is applicable, the 2003 petition is treated as if it had never been filed, and the 2013 amended petition could conceivably be considered, legally, to be the first *Atkins* petition before the trial court. At the time Bays filed his *Atkins* petitions, R.C. 2953.21(A)(2) required a petition for post-conviction relief in a death penalty case to be filed within 180 days of the filing of the trial transcript in the supreme court; [13] the only exception (other than the recognition of a new federal or state right) was if the petitioner were "unavoidably prevented" from timely filing his petition for post-conviction relief. R.C. 2953.23(A)(1)(a).

{¶ 55} Assuming that Civ.R. 41 applies, the delay between the 2003 and 2013 petitions could be found to be "unavoidable" if the dismissal under Civ.R. 41 was the result of ineffective assistance of counsel. This would not graft an unlimited "saving statute" onto R.C. 2953.21(A)(2)'s time rule. That is, if the Civ.R. 41 dismissal—which occasioned the delay—were the result of counsel's ineffectiveness, a trial court would have to decide whether the time between the dismissal under Civ.R. 41 and the re-filed (2013) petition was "unavoidable," which is the same fact-sensitive process in deciding any petition for post-conviction relief filed beyond the statutory time limit.

{¶ 56} Judge Donovan's position that Civ.R. 41 does not apply and that there should be a Motion to Dismiss or Withdraw filed by the petitioner so that the trial court can act as a

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

gatekeeper is enticing. But it could result in an evidentiary hearing in every such situation, which not only would limit counsel's legitimate strategic decisions, but could present a bar—in the res judicata or collateral estoppel sense—to a re-filed or successive petition.

***16** {¶ 57} I agree with Judge Hall that Bays's dismissal of his 2003 petition under Civ.R. 41 was effective. In the "usual" denial of a petition for post-conviction relief, there can be an appeal. Here, with a Civ.R. 41 dismissal, there is no final appealable order to be reviewed by the appellate court.

{¶ 58} However, Bays filed a Motion to Withdraw his Civ.R. 41 dismissal in the trial court, which was summarily denied. Judge Hall states that Civ.R. 41 dismissal was self-executing and completely terminated the possibility of further action by the trial court and that, as a result, the trial court could not consider the motion to withdraw the Civ.R. 41 dismissal. In the unique circumstances before us, I would find that the trial court could consider whether the Civ.R. 41 dismissal was the result of ineffective assistance of counsel and, if so, vacate that dismissal.

{¶ 59} In denying the motion to withdraw the Civ.R. 41 dismissal, the trial court did consider whether Bays's counsel acted deficiently in voluntarily dismissing the 2003 petition, and the court found no basis to set aside the voluntary dismissal based on ineffective assistance of counsel. The trial court stated:

> Without going into too much detail about the underlying ineffective assistance of counsel claim, the court has great difficulty finding that a lawyer who had two expert opinions against his client is ineffective in voluntarily dismissing the case so that she may in the next several months find an expert supporting her position. Had counsel gone forward with her original petition, it would have been lost and such adjudication would have barred another petition in the future. Bays would have this Court find that prior trial counsel was ineffective because she didn't have sufficient psychological knowledge to know that the two retained experts were wrong. The Court does not believe Bays has ground to set aside the voluntary dismissal.

Based on the record before us, I would affirm the trial court's ruling on that issue.

{¶ 60} Because the trial court properly concluded that the Civ.R. 41 dismissal of the 2003 petition was not the product of ineffective assistance, I agree with Judge Hall that the trial court should proceed to consider the 2013 petition.

All Citations

Not Reported in N.E.3d, 2015 WL 2452324, 2015 -Ohio-1935

Footnotes

1 In its appellate brief, the State objects to Bays' citation to evidentiary materials he submitted below in support of his motion to withdraw his notice of voluntary dismissal, his motion to amend or supplement the voluntarily-dismissed petition, and his motion for Civ.R. 60(B) relief. (Appellee's brief at 6). Broadly speaking, those materials consist of new evidence regarding Bays' alleged mental retardation. (*See* Doc. # 453 and accompanying materials). Because Bays filed those materials below and the trial court did not strike them, we will accept them as part of the record. For purposes of the legal issues now before us, however, we need not discuss those evidentiary materials in detail.

2 In light of our analysis above, we are unpersuaded by the reasoning in *Waddy,* an unpublished Franklin County Common Pleas Court decision cited by Bays. (*See* Appellant's brief at 18). In *Waddy,* the defendant filed a Civ.R. 41(A)(1)(a) notice of voluntary dismissal of his *Atkins* claim on July 15, 2004. Five days later,

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

he filed a motion to withdraw the notice of voluntary dismissal. With little analysis, the common pleas court reasoned that the Ohio Rules of Civil Procedure did not apply because post-conviction proceedings are governed by statute. Therefore, it found the Civ.R. 41(A) notice ineffective, treated it as a motion for dismissal, and denied the motion. (*See* Copy of *Waddy* decision accompanying Doc. # 464). Although *Waddy* was appealed, resulting in reversal and a remand, the Tenth District did not address this procedural aspect of the case. *See* *State v. Waddy,* 10th Dist. Franklin No. 05AP–866, 2006–Ohio–2828.

3 This dismissal in Bays' case was without prejudice because it was his first such dismissal. *Cf. State ex rel. Jackson v. Ohio Adult Parole Auth.,* 140 Ohio St.3d 23, 2014–Ohio–2353, 14 N.E.3d 1003, ¶ 16 (recognizing that a second voluntary dismissal under Civ.R. 41(A)(1) operates as an adjudication on the merits and, therefore, is with prejudice).

4 An exception exists with regard to a collateral issue, such as a motion for sanctions, that exists separate and apart from the dismissed matter. *State ex rel. J. Richard Gaier Co., L.P.A. v. Kessler,* 97 Ohio App.3d 782, 784–85, 647 N.E.2d 564, 565 (2d Dist.1994); *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 395, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

5 The Revised Code provides indigent defendants sentenced to death with a *statutory* right to counsel in post-conviction proceedings. *See* R.C. 2953.21(I)(1) ("If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel."). Notably, however, R.C. 2953.21(I)(2) provides that "[t]he ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal." *But see* *Hooks v. Workman,* 689 F.3d 1148, 1183–1184 (10th Cir.2012) (finding a federal constitutional right to effective assistance of counsel in post-conviction Atkins proceedings).

6 Bays asserts "that no expert had administered a standardized adaptive-behavior instrument" to him. (Appellant's brief at 17). In an e-mail to Bays' *Atkins* counsel, however, Hammer specifically identified the SSSQ test as a "standardized adaptive behavior scale[.]". (Doc. # 453, Exh. B, Vol.II, Appx.451).

7 Bergman subsequently defended her use of the SSSQ test in a March 2011 deposition. A transcript of that deposition is among the evidentiary materials filed by Bays below in connection with his motion to withdraw his notice of voluntary dismissal and motion to supplement or amend his prior *Atkins* petition. During her March 2011 deposition, Bergman explained why she believed in Bays' case that no better assessment tool existed and that the adaptive-skills evaluation she performed was "[a]s valid as [she] could do under the circumstances." (Doc. # 453, Exh. B, Vol.I, Appx.169–171).

8 Although Bays claims other scoring errors were made as well, he apparently does not attempt to hold his *Atkins* counsel responsible for not detecting them. (Appellant's brief at 16).

9 As for Bays' claim that the trial court erred in failing to consider the applicability of the Franklin County Common Pleas Court's decision in *Waddy,* we see no basis for reversal. Although the trial court did not mention *Waddy,* its persuasiveness as legal authority is something we can determine ourselves. We considered and rejected Bays' *Waddy*-based legal argument in our resolution of his first assignment of error.

10 Although we often presume that a trial court implicitly has overruled an unaddressed motion, that principle does not apply here, where the trial court's ruling makes clear that it did not rule on the new petition. *See, e.g., State v. Ryerson,* 12th Dist. Butler No. CA2003–06–153, 2004–Ohio–3353, ¶ 54 ("Generally, a reviewing court will presume that a lower court overruled a motion on which it did not expressly rule, in instances where it is clear from the circumstances that that is what the lower court actually intended to do.").

11 The "dismissal" did not contain a stipulation of all parties nor a court order in accordance with Civ.R. 41(A)(1)(b) or Civ.R. 41(A)(2).

12 Bays's 2003 *Atkins* petition was filed four months after *Lott,* but ten months after *Atkins* was decided.

13 R.C. 2953.21(A)(2) was amended, effective March 23, 2015, to provide 365 days, rather than 180 days. *See* Sub.H.B. 663 (2014). Other modifications to Ohio's post-conviction relief proceedings in death penalty cases have recently been proposed in the Ohio legislature. *See* S.B. 139 (2015).

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0183n.06

No. 18-3101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 30, 2020
DEBORAH S. HUNT, Clerk

RICHARD BAYS,

Petitioner-Appellant,

v.

WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: GIBBONS, KETHLEDGE and DONALD, Circuit Judges.

JULIA S. GIBBONS, Circuit Judge. In December 1995, Bays was convicted of aggravated murder and aggravated robbery and sentenced to death by a three-judge panel in Greene County, Ohio. After exhausting his state remedies, in 2008 Bays filed a habeas corpus petition with the United States District Court for the Southern District of Ohio. The district court denied Bays's petitions on all claims but granted Bays a certificate of appealability on five issues.

On appeal to this court, Bays argues that his confession was involuntary and his lethal injection claims are cognizable in a habeas corpus proceeding. We disagree. First, the officer's accurate recitation of potential penalties faced by Bays did not constitute an implied promise of leniency that might cause Bays to involuntarily confess, and the Supreme Court of Ohio's factual determinations regarding his confession were not unreasonable. Second, this court's precedent in

In re Campbell, 874 F.3d 454 (6th Cir. 2017), forecloses Bays's argument that his lethal injection claims are cognizable in habeas rather than as a claim under 42 U.S.C. § 1983.

We affirm the district court's denial of Bays's petition.

I.

In 1995, Bays was convicted of aggravated robbery and aggravated murder of Charles Weaver. A three-judge panel in Greene County, Ohio sentenced him to death. On direct appeal, *State v. Bays*, 716 N.E.2d 1126, 1131–33 (Ohio 1999), the Ohio Supreme Court made the following findings of fact:

> On November 15, 1993, appellant, Richard Bays, robbed and murdered Charles Weaver. Bays was convicted of aggravated murder with a death specification and sentenced to death.
>
> Seventy-six-year-old Charles Weaver lived in Xenia with his wife Rose. On November 15, 1993, Weaver's daughter, Betty Reed, went to her parents' house to see if they needed anything. Betty Reed and Rose Weaver decided to do some shopping and left the house together sometime between noon and 12:30 p.m. Between 1:30 and 2:30 that afternoon, Iris Simms (who lived near the Weavers' house) saw a slim man in his late twenties, with shoulder-length brown hair, walk onto Weaver's porch and approach the door.
>
> Howard Hargrave, an acquaintance of Richard Bays, was standing around with two other people on Xenia's Main Street that afternoon when Bays approached him, out of breath, and asked whether Hargrave "knew anyone that had any drugs." According to Hargrave, Bays appeared "nervous" and "kept looking around." Hargrave noticed a red stain on Bays's T-shirt that looked like blood.
>
> Betty Reed drove her mother home at about 5:30 p.m., accompanied by her son Michael. Dusk had fallen, and Betty noticed that no lights were on in the house, not even "a flicker of a television set." This was unusual enough that she and her son decided to escort Mrs. Weaver inside.
>
> Michael Reed went in first. Turning on a light, he saw his grandfather's wheelchair standing empty. He then entered the kitchen. There he found Mr. Weaver lying on the floor. Michael told his mother to call 911.
>
> Paramedics arrived in response to the 911 call, found Mr. Weaver dead, and summoned Xenia police officers to the scene. Officers found a shattered plastic tape recorder and a large, square-shaped battery charger with blood on it. The bedroom was in extreme disarray—a "total shambles," Betty Reed later testified—with drawers pulled out and their contents dumped on the floor. The bedroom had

not been in that condition when Betty Reed and Mrs. Weaver left the house that afternoon.

Weaver's body was taken to the Montgomery County Coroner's Office. The ensuing autopsy showed that Weaver had suffered two stab wounds to the chest and three incised wounds on the neck. He also had several contusions, abrasions, and lacerations on top of his head, consistent with blows from a square, blunt object. The deputy coroner conducting the autopsy concluded that Weaver died of "a stab wound to the chest and blunt impact injuries to the head."

On November 16, the day after the murder, Xenia police detective Daniel Savage decided to interview Richard Bays.

At first, Bays told Savage that he had not been at Weaver's house on the day of the murder. However, Savage told Bays that someone had seen him there and that "if his [Bays's] prints matched the ones on Mr. Weaver's front door, then I [Savage] would be asking him to explain it." Bays then admitted that he had been at Weaver's house around 2:00 p.m. on November 15. He said he had coffee with Weaver, chatted, and left by 2:15.

However, an inconsistency in Bays's statement aroused Savage's curiosity. Bays told Savage that Weaver had been sitting in his wheelchair during Bays's visit and had not taken out his wallet. Yet Bays had also said that Weaver had the wallet in his back pocket during the visit. If Weaver was sitting in the wheelchair, Savage wondered, how could Bays have known that the wallet was in Weaver's back pocket?

On November 19, an informant told Savage that Weaver's killer had dropped the wallet, along with some clothing he had worn during the crime, into a storm sewer near Bays's house. Based on this information, Savage and Detective Daniel Donahue interviewed Bays again on November 19. During this interview, Bays confessed to killing Weaver.

Bays told the detectives that he went to Weaver's house after smoking some crack. He asked Weaver to lend him $30, but Weaver said he had no money. So Bays picked up the battery charger and hit Weaver on the head with it twice. When the battery charger's handle broke off, Bays started to run away, but then Weaver shouted that he was going to call the police. Bays then picked up a portable tape recorder and went back to hit Weaver on the head with it. The blow shattered the recorder, so Bays dropped it and attacked Weaver with a sharp kitchen knife. Bays admitted that he cut Weaver's throat and thought that he stabbed him in the chest.

Weaver fell out of his wheelchair, and Bays took the wallet from Weaver's back pocket. Weaver's wallet contained $25 cash and $9 worth of food stamps. Bays then went into the bedroom and dumped out the contents of the drawers. Then he fled. He subsequently bought crack with Weaver's $25.

Bays told the detectives that he threw Weaver's wallet down the storm sewer at the northwest corner of Second and Monroe Streets, along with the T-shirt

> and glove he had worn during the murder. At the end of Bays's statement, Savage placed him under arrest.
>
> When detectives searched the storm sewer at Second and Monroe, they found the T-shirt, glove, and wallet, just as Bays had said. Betty Reed, who had given that wallet to her father, identified it in court.
>
> While held in the county jail, Bays discussed his crime with another inmate, Larry Adkins. Adkins testified that Bays had told him that he "hit [Weaver] with a battery charger" and when Weaver fell from his chair, Bays "took his wallet and * * * stabbed him in the chest. Then he was almost on his way out and he turned around and cut [Weaver's] throat * * * to make sure he wasn't alive."

The Ohio Supreme Court affirmed Bays's conviction and sentence and held that his confession to police was voluntary. *Bays*, 716 N.E.2d at 1137. Bays filed several post-conviction petitions for relief. *See State v. Bays*, No. 2014-CA-24, 2015 WL 2452324 (Ohio Ct. App. May 15, 2015).

In 2008, Bays filed his first habeas corpus petition under 28 U.S.C § 2254. The petition raised numerous claims including, as relevant to this appeal, that Bays's confession was involuntary and should have been suppressed. A magistrate judge held an evidentiary hearing and determined that the petition should be denied. The district court granted Bays's certificate of appealability ("COA") on his claim that his confession was involuntary. Bays filed for leave to file a second amended habeas petition. The district court granted the motion, and Bays filed an amended petition raising four claims challenging the constitutionality of Ohio's lethal injection protocol. The district court denied Bays's lethal injection claims, finding them precluded by *In re Campbell*, 874 F.3d 454 (6th Cir. 2017), but it expanded the COA to include these claims. We denied Bays's request to expand the COA.

II.

"We review a district court's denial of a habeas petition de novo." *Mitchell v. MacLaren*, 933 F.3d 526, 531 (6th Cir. 2019) (citing *Cleveland v. Bradshaw*, 693 F.3d 626, 631 (6th Cir. 2012)). "The district court's findings of fact are reviewed for clear error, and its legal conclusions

on mixed questions of law and fact are reviewed de novo." *Id.* (citing *Gumm v. Mitchell*, 775 F.3d 345, 359–60 (6th Cir. 2014)).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), "a court considering a habeas claim must defer to any decision by a state court concerning the claim, unless the state court's judgment: (1) resulted in a decision that was contrary to clearly established federal law as determined by the United States Supreme Court; (2) involved unreasonable application of clearly established federal law as determined by the United States Supreme Court; or (3) was based on an unreasonable determination of the facts in light of the evidence presented in the state court." *Schreane v. Ebbert*, 864 F.3d 446, 450 (6th Cir. 2017) (citing 28 U.S.C. § 2254(d)(1), (2)). "A state court's decision involves an unreasonable application of federal law if the state-court decision identifies the correct governing legal principle in existence at the time, but unreasonably applies that principle to the facts of the [petitioner's] case." *Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017) (internal quotations omitted) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)). "A state court decision involves 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding' only if it is shown that the state court's presumptively correct factual findings are rebutted by 'clear and convincing evidence' and do not have support in the record." *Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007) (first quoting 28 U.S.C. § 2254(d)(2), then quoting *id.* § 2254(e)(1)).

III.

On appeal, Bays challenges the district court's denial of his habeas petition. His claims before this court are: (1) his inculpatory statements were improperly admitted at trial; (2) Ohio cannot constitutionally execute him because the only manner available under the law to execute him violates his Eighth Amendment, Due Process Clause or the Privileges or Immunities Clause

of the Fourteenth Amendment, or Equal Protection Clause rights; and (3) Ohio cannot constitutionally execute him because Ohio's violations of federal law constitute a fundamental defect in the execution process, and the only manner of execution available for execution depends on state execution laws that are preempted by federal law. For the following reasons set forth below, we find no basis for granting habeas relief.

A.

Bays argues that the Ohio Supreme Court's decision was based on unreasonable factual determinations. Bays also challenges the admissibility of his confession on the grounds that the police's implied promises of leniency coerced him into making an involuntary statement in violation of the Due Process Clause of the Fourteenth Amendment.

1.

Bays first argues that the Ohio Supreme Court's decision was based on an unreasonable determination of the facts and therefore should receive no deference by this court under 28 U.S.C. § 2254(d)(2). Specifically, Bays points to the court's (1) conclusion that Savage's statements were not implied promises of leniency; and (2) finding that Bays did well in school until he began engaging in substance abuse. Bays has not provided clear and convincing evidence that these factual findings are unsupported by the record. *Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007).

The conclusion that Savage did not promise leniency is reasonable. Bays points to statements by Savage informing Bays that he was facing "a possible death penalty case" and that "withholding the truth . . . could only hurt him and not benefit him." CA6 R. 26, Appellant Br., at 19 (quoting DE 152-1, PageID 5839–40). Despite Bays's contention, it is not clear that the detective's statements regarding the different penalties constituted an implied promise of leniency

and, even if it did, "promises to recommend leniency and speculation that cooperation will have a positive effect do not make subsequent statements [by the defendant] involuntary." *United States v. Binford*, 818 F.3d 261, 271 (6th Cir. 2016) (quoting *United States v. Delaney*, 443 F. App'x 122, 129 (6th Cir. 2011)). Further, courts have repeatedly held that it is not coercive for police to inform the defendant accurately of the potential penalties that he faces. *See United States v. McNeal*, 862 F.3d 1057, 1064 (10th Cir. 2017) (collecting cases). Here the record supports the state court's determination that Savage did not promise that Bays would not receive the death penalty in return for a confession. The state court's view of the facts was not unreasonable.

The Ohio Supreme Court's finding that Bays "did well in school until be began engaging in substance abuse" is also reasonable. Specifically, this finding is supported by Dr. Burch's testimony as an expert during Bays's mitigation hearing and expert report. Burch testified that, based on Bays's academic records, he did well in school until about fourth grade when he began to drink alcohol. There is no testimony prior to this line of questioning consistent with Bays's argument that Burch's testimony was limited or modified such that Bays only did well in school for someone who suffered from cognitive deficits. The court's finding that Bays "did well in school until he began engaging in substance abuse" is reasonable in light of Burch's report and testimony.

2.

The primary issue before us is whether the Ohio Supreme Court unreasonably applied federal law to conclude that Bays voluntarily confessed. The Ohio Supreme Court based its conclusion that the confession was voluntary on its assessment of the totality of the circumstances. *State v. Bays*, 716 N.E.2d 1126, 1136–37 (Ohio 1999). The district court correctly denied Bays's habeas petition because it was not contrary to, or an unreasonable application of, clearly

established federal law for the Ohio Supreme Court to hold that Bays voluntarily confessed. Upon weighing the totality of the circumstances surrounding the confession, it was objectively reasonable for the Ohio Supreme Court to hold that investigators did not overbear Bays's will when obtaining his confession.

Under clearly established Supreme Court law, "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *see also Rogers v. Richmond*, 365 U.S. 534, 540–45 (1961). The "tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." *Miller*, 474 U.S. at 110. To determine whether the will of the defendant was overborne at the time he confessed, courts must consider the totality of the circumstances surrounding the confession, "both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226–27 (1973); *Withrow v. Williams*, 507 U.S. 680, 693–94 (1993). "Factors considered in assessing the totality of the circumstances include the age, education, and intelligence of the defendant; whether the defendant has been informed of his *Miranda* rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as deprivation of food or sleep." *McCalvin v. Yukins*, 444 F.3d 713, 719 (6th Cir. 2006) (citing *Schneckloth*, 412 U.S. at 226); *see also Withrow*, 507 U.S. at 693–94 (collecting factors).

Bays argues that the state court acted contrary to established precedent by failing to consider his limited intellectual capacity when determining whether his confession had been influenced by an implied promise of leniency. Contrary to Bays's contention, the Ohio Supreme

Court correctly analyzed the voluntariness of Bays's confession under the totality of the circumstances and reasonably held that Bays's confession was voluntary. As the Ohio Supreme Court noted:

> Bays went to the station voluntarily. He was interrogated for only twelve minutes before confessing. He was in his late twenties and had been arrested before. There was no evidence of physical abuse or deprivation. Savage did raise his voice when he thought Bays was lying and may have hit the table as well, but there was no evidence of any direct threats. Bays heard his *Miranda* rights, acknowledged that he understood them, and signed a waiver, the validity of which is not challenged here. Savage testified that Bays was calm and did not seem nervous.

Bays, 716 N.E.2d at 1137. The court also noted the factors weighing against voluntariness, including the fact that Bays was misled "as to the strength of the evidence" and had a "low IQ and childhood head injuries," the court concluded that "the factors pointing to voluntariness far outweigh those negating voluntariness." *Id.* The court analyzed the totality of the circumstances, including Bays's limited intellectual capacity in determining whether his statement was voluntary. Under the deference required by AEDPA, and given the factors supporting a finding that Bays's confession was voluntary, the decision of the Ohio Supreme Court was a reasonable application of federal law.

B.

Bays's other claims for relief relate to the alleged unconstitutionality of Ohio's lethal injection protocol. Bays argues that the district court erred in holding that his lethal injection claims were not cognizable in a writ of habeas corpus. The government contends that Bays's claims are foreclosed by this circuit's precedent in *In re Campbell*, 874 F.3d 454 (6th Cir. 2017). We agree.

This court has considered at length which procedural vehicle plaintiffs must use to bring method-of-execution claims. In *Adams III*, an Ohio death row inmate challenged Ohio's lethal injection protocol under the Eighth Amendment. *Adams v. Bradshaw (Adams III)*, 826 F.3d 306,

308 (6th Cir. 2016). The court resolved *Adams III* on procedural grounds as Adams failed to include this claim in his initial habeas petition, but the court proceeded to discuss, in dicta, the appropriate vehicle to bring the claim. *Id.* at 320–21. Adams generally argued that "[d]eath by lethal injection constitutes cruel and unusual punishment and denies due process under the state and federal constitutions" because shifting protocols "engender[] fear and mental anguish . . . ." *Id.* at 318–19. The court distinguished *Hill v. McDonough*, 547 U.S. 573 (2006), explaining that "Adams's case is distinguishable from *Hill* because Adams argues that lethal injection cannot be administered in a constitutional manner, and his claim 'could render his death sentence effectively invalid.'" *Id.* at 321. Thus, the court concluded that "to the extent that Adams challenges the constitutionality of lethal injection in general and not a particular lethal-injection protocol, his claim is cognizable in habeas." *Id.*

In *Campbell*, a state prisoner challenged the constitutionality of Ohio's lethal injection protocol as erratic and unpredictable and alleged that any method of execution was unconstitutional in light of his deteriorating physical condition. 874 F.3d at 464–65. The court recognized that "the law on this subject is not clear and has been the subject of several recent, published decisions by this Circuit and the Supreme Court," and therefore, "pause[d] at the outset to clarify the standard." *Id.* at 460. Noting that, in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), "the Court expressly refused to countenance the possibility that a state could be left without any lawful means of execution," *Campbell* held that "[n]o longer can a method-of-execution claim impair a death sentence itself." *Id.* at 462. *Campbell* concluded that, because *Glossip* "barred all habeas petitions challenging 'a particular application of a particular protocol to a particular person' as unconstitutionally painful," such method-of-execution claims are cognizable only under § 1983 *Id.* (citing *In re Tibbetts*, 859 F.3d 403, 406 (6th Cir. 2017)). As to Campbell's second challenge,

the court rejected Campbell's analogy to competency claims and held that "*Glossip* makes clear that a prisoner cannot invalidate his death sentence simply by asserting that *every* method offered by state statute will be unconstitutionally painful." *Id.* at 465–67.

While Bays contends that we should follow *Adams III*'s approach, *Campbell* forecloses Bays's habeas claims regarding the alleged unconstitutionality of Ohio's lethal injection protocols. *Campbell* correctly noted that *Adams III*'s holding rested on procedural default and its subsequent discussion of the substantive claim was not necessary to that holding and, thus, not binding. *Id.* at 463–64. *Campbell*'s holding is binding and decisively disposes of Bays's claims for relief. *Campbell* explains that, although Ohio may only permit execution by lethal injection today, "[t]he Ohio legislature could, tomorrow, enact a statute reinstating the firing squad as an alternative method of execution." *Id.* at 465. A court order "would not impair the validity of Campbell's death sentence," and therefore, a method-of-execution claim is not cognizable in habeas. *Id.* Bays's argument that his claims attack his death sentence itself because Ohio does not currently allow other methods of execution is unavailing under *Campbell*'s reasoning. Bays's claims challenging the application of lethal injection as causing an unconstitutional amount of severe pain and suffering are method-of-execution claims properly brought under § 1983, not habeas.

Bays's argument distinguishing *Campbell*'s procedural posture is similarly unavailing. *Campbell* indicated that "all method-of-execution claims" challenging a particular application of a particular protocol to a particular person should be pursued under § 1983, 874 F.3d at 462–63, and the procedural posture of *Campbell* does not limit its application only to method-of-execution claims brought in subsequent habeas proceedings.

IV.

We affirm the district court's denial of Bays's habeas petition.

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

RICHARD BAYS

Petitioner,

-v-

WARDEN, Ohio State Penitentiary

Respondent.

Case No. 3:08-cv-076

Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

ENTRY AND ORDER OVERRULING BAYS' OBJECTIONS (Doc. #127) TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS (Doc. #109) AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS (Doc. #109) IN ITS ENTIRETY

This matter comes before the Court pursuant to Petitioner Richard Bays' ("Bays'") Objections (doc. #127) to Magistrate Judge Michael R. Merz's Report and Recommendations (doc. #109) regarding Bays' Petition for a Writ of Habeas Corpus. The Report and Recommendations was issued on February 21, 2012. On June 7, 2012, Bays filed objections (doc. #127) and on July 20, 2012, the Warden filed a Response to Bays' objections (doc. #131). On July 30, 2012, with leave of Court, Bays filed a reply to the Warden's Response. (Doc. # 132.) Bays' Objections are, therefore, ripe for decision.

As required by 28 U.S.C. §636(b) and Federal Rules of Civil Procedure Rule 72(b), the District Judge has made a de novo review of the record in this case and particularly of the matters raised in Bays' Objections, the Warden's Response and Bays' Reply. Upon said review, the Court finds that Bay's Objections to the Magistrate Judge's Report and Recommendations are not well taken and they are OVERRULED.

Bays' Petition for a Writ of Habeas Corpus is denied and dismissed with prejudice. The Court recognizes that Bays has filed an Amended Petition (doc. #122) and a Motion for Certificate of Appealability (doc. #128). These will presumably be the subject of one or more future Report and Recommendations.

DONE and **ORDERED** in Dayton, Ohio, this Sixth Day of August, 2012.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATED DISTRICT JUDGE

Copies furnished to:

Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

RICHARD BAYS, :

Case No. 3:08-cv-076

Plaintiff,

-vs-

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

WARDEN,
Ohio State Penitentiary,

Defendant. :

REPORT AND RECOMMENDATIONS

This is a habeas corpus action brought by Petitioner Richard Bays pursuant to 28 U.S.C. § 2254 and seeking relief from both his conviction for aggravated murder with death specifications and his resulting death sentence.

Mr. Bays is represented in this proceeding by appointed counsel who did not represent him in any direct appeal proceedings.

Statement of Facts

The Supreme Court of Ohio described the facts and circumstances leading to Mr. Bay's indictment, trial, convictions, and adjudged sentence of death as follows:

> On November 15, 1993, appellant, Richard Bays, robbed and murdered Charles Weaver. Bays was convicted of aggravated murder with a death specification and sentenced to death
>
> Seventy-six-year-old Charles Weaver lived in Xenia with his wife Rose. On November 15, 1993, Weaver's daughter, Betty Reed, went to her parents' house to see if they needed anything. Betty Reed and Rose Weaver decided to do some shopping and left the house

together sometime between noon and 12:30 p.m. Between 1:30 and 2:30 that afternoon, Iris Simms (who lived near the Weavers' house) saw a slim man in his late twenties, with shoulder-length brown hair, walk onto Weaver's porch and approach the door.[FN1]

FN1. Simms did not identify Bays in court; however, her description of the man on the porch is consistent with Bays's appearance.

Howard Hargrave, an acquaintance of Richard Bays, was standing around with two other people on Xenia's Main Street that afternoon when Bays approached him, out of breath, and asked whether Hargrave "knew anyone that had any drugs." According to Hargrave, Bays appeared "nervous" and "kept looking around." Hargrave noticed a red stain on Bays's T-shirt that looked like blood.

Betty Reed drove her mother home at about 5:30 p.m., accompanied by her son Michael. Dusk had fallen, and Betty noticed that no lights were on in the house, not even "a flicker of a television set." This was unusual enough that she and her son decided to escort Mrs. Weaver inside.

Michael Reed went in first. Turning on a light, he saw his grandfather's wheelchair standing empty. He then entered the kitchen. There he found Mr. Weaver lying on the floor. Michael told his mother to call 911.

Paramedics arrived in response to the 911 call, found Mr. Weaver dead, and summoned Xenia police officers to the scene. Officers found a shattered plastic tape recorder and a large, square-shaped battery charger with blood on it. The bedroom was in extreme disarray-a "total shambles," Betty Reed later testified- with drawers pulled out and their contents dumped on the floor. The bedroom had not been in that condition when Betty Reed and Mrs. Weaver left the house that afternoon.

Weaver's body was taken to the Montgomery County Coroner's Office. The ensuing autopsy showed that Weaver had suffered two stab wounds to the chest and three incised wounds on the neck. He also had several contusions, abrasions, and lacerations on top of his head, consistent with blows from a square, blunt object. The deputy coroner conducting the autopsy concluded that Weaver died of "a stab wound to the chest and blunt impact injuries to the head."

On November 16, the day after the murder, Xenia police detective Daniel Savage decided to interview Richard Bays.

At first, Bays told Savage that he had not been at Weaver's house on the day of the murder. However, Savage told Bays that someone had seen him there and that "if his [Bays's] prints matched the ones on Mr. Weaver's front door, then I [Savage] would be asking him to explain it." Bays then admitted that he had been at Weaver's house around 2:00 p.m. on November 15. He said he had coffee with Weaver, chatted, and left by 2:15.

However, an inconsistency in Bays's statement aroused Savage's curiosity. Bays told Savage that Weaver had been sitting in his wheelchair during Bays's visit and had not taken out his wallet. Yet Bays had also said that Weaver had the wallet in his back pocket during the visit. If Weaver was sitting in the wheelchair, Savage wondered, how could Bays have known that the wallet was in Weaver's back pocket?

On November 19, an informant told Savage that Weaver's killer had dropped the wallet, along with some clothing he had worn during the crime, into a storm sewer near Bays's house. Based on this information, Savage and Detective Daniel Donahue interviewed Bays again on November 19. During this interview, Bays confessed to killing Weaver.

Bays told the detectives that he went to Weaver's house after smoking some crack. He asked Weaver to lend him $30, but Weaver said he had no money. So Bays picked up the battery charger and hit Weaver on the head with it twice. When the battery charger's handle broke off, Bays started to run away, but then Weaver shouted that he was going to call the police. Bays then picked up a portable tape recorder and went back to hit Weaver on the head with it. The blow shattered the recorder, so Bays dropped it and attacked Weaver with a sharp kitchen knife. Bays admitted that he cut Weaver's throat and thought that he stabbed him in the chest.

Weaver fell out of his wheelchair, and Bays took the wallet from Weaver's back pocket. Weaver's wallet contained $25 cash and $9 worth of food stamps. Bays then went into the bedroom and dumped out the contents of the drawers. Then he fled. He subsequently bought crack with Weaver's $25. Bays told the detectives that he threw Weaver's wallet down the storm sewer at the northwest corner of Second and Monroe Streets, along with the T-shirt and glove he had

> worn during the murder. At the end of Bays's statement, Savage placed him under arrest.
>
> When detectives searched the storm sewer at Second and Monroe, they found the T-shirt, glove, and wallet, just as Bays had said. Betty Reed, who had given that wallet to her father, identified it in court.
>
> While held in the county jail, Bays discussed his crime with another inmate, Larry Adkins. Adkins testified that Bays had told him that he "hit [Weaver] with a battery charger" and when Weaver fell from his chair, Bays "took his wallet and * * * stabbed him in the chest. Then he was almost on his way out and he turned around and cut [Weaver's] throat * * * to make sure he wasn't alive."
>
> The Greene County Grand Jury indicted Bays on one count of aggravated murder under former R.C. 2903.01(A) and one under former R.C. 2903.01(B). Each count carried a felony-murder death specification under R.C. 2929.04(A)(7). The indictment also charged aggravated robbery.
>
> Bays waived a jury and was tried to a three-judge panel. On Bays's motion, with the state's acquiescence, the trial court dismissed the count charging aggravated murder under R.C. 2903.01(A). At trial, Bays offered no evidence in the guilt phase. The panel found Bays guilty of aggravated murder, R.C. 2903.01(B), and aggravated robbery. After a penalty hearing, the panel sentenced Bays to death. Bays appealed this judgment to the court of appeals, which affirmed the convictions and sentence.

State v. Bays, 87 Ohio St.3d 15, 15-17 (1999).

State Court Proceedings

On or about June 14, 1994, the Greene County Grand Jury indicted Mr. Bays on one count of aggravated murder under [former] Ohio Revised Code § 2903.01(A), one count of aggravated murder under [former] Ohio Revised Code § 2903.01(B), and one count aggravated robbery under Ohio Revised Code 2911.02(A)(2). Appendix to Return of Writ, Vol. 1 at 58-60 (Doc. 35, 36)(hereinafter "App."). Mr. Bays waived his right to trial by jury. App. Vol. 4 at 208; Trial Transcript Vol. 2 at 4-7 (hereinafter "Tr."), and was tried by a three-judge panel. App. Vol.

4 at 209; Tr. Vol. 2 at 7.

The three-judge panel commenced the guilt phase of Mr. Bays' trial on December 6, 1995. *Id.* On Mr. Bays' motion and with the state's acquiescence, the trial court dismissed the count charging Mr. Bays with aggravated murder under Ohio Revised Code § 2903.01(A). See Tr. Vol. 3 at 361. Mr. Bays did not present any evidence during the guilt phase of his trial. Tr. Vol. 3 at 342. On December 8, 1995, the three-judge panel found Mr. Bays guilty of aggravated murder in violation of Ohio Revised Code § 2903.01(B) as charged in count one of the Indictment, guilty of the specification related thereto, and guilty of aggravated robbery in violation of Ohio Revised Code § 2911.02(A)(2) as charged in count two of the Indictment. Tr. Vol. 3 at 361-62; App. Vol. 4 at 216-17.

On December 11, 1995, the three-judge panel held the mitigation phase of Mr. Bays' trial. Tr. Vol. 3 at 364. The panel announced on December 15, 1995, that it found the aggravating circumstances in the specification in count one of the indictment outweighed the mitigating factors. *Id.* at 489. The panel then sentenced Mr. Bays to death on count one (aggravated murder) and to an indefinite term of ten to twenty-five years on count two of the indictment (aggravated robbery) with the ten-year minimum term being actual incarceration. *Id.* 489-90. Also on December 15, 1995, The panel issued its written findings of fact and conclusions of law as required by Ohio Revised Code § 2929.03(F). App. Vol. 4 at 220-27.

Mr. Bays appealed to the Green County Court of Appeals and raised the following assignments of error:

> A. THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE DO NOT SUPPORT APPELLANT'S CONVICTION FOR AGGRAVATED ROBBERY AND AGGRAVATED MURDER AS CHARGED, IN VIOLATION OF APPELLANT'S

CONSTITUTIONAL RIGHTS.

B. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY OVERRULING APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE BY APPELLANT.

C. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY OVERRULING APPELLANT'S MOTION TO CONTINUE THE TRIAL DATE IN ORDER TO CONDUCT A SUPPLEMENTAL SUPPRESSION HEARING.

D. THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S PURPORTED WAIVER OF HIS RIGHT TO A JURY TRIAL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

E. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY FAILING TO COMPEL DISCLOSURE TO APPELLANT OF THE IDENTITY OF AN INFORMANT.

F. APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE COMPOSITION AND THE BIAS OF A MEMBER OF THE THREE-JUDGE PANEL.

G. THE INTRODUCTION OF "OTHER BAD ACTS" OF APPELLANT WAS PREJUDICIAL AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

H. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY IMPROPERLY FINDING THAT THE AGGRAVATING CIRCUMSTANCE OUTWEIGHED THE MITIGATING FACTORS PRESENTED BEYOND A REASONABLE DOUBT.

I. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF LEGAL COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

(1) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Timely Present Evidence Of Appellant's Mental Deficiencies In Relation To The

Suppression Of Appellant's Inculpatory Statements.

(2) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Ensure a Knowing, Intelligent and Fully Voluntary Waiver By Appellant Of His Right To A Jury Trial.

(3) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Timely Object To The Composition Of The Three-Judge Panel.

(4) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Object To Highly Inflammatory Testimony Of The Murder Act.

(5) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure to Raise The Issue Of Appellant's Competency And/Or Sanity.

(6) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Obtain And Use The Services Of An Investigator.

(7) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Present An Opening Statement And Any Other Evidence In The "Guilt" Phase Of The Trial.

(8) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Adduce Important Evidence In The "Mitigation" Phase Of The Trial.

(9) Appellant Was Denied Effective Assistance Of Counsel By Counsel's Failure To Challenge The Constitutionality Of Ohio's Death Penalty As Applied To Appellant.

(10) Appellant Was Denied Effective Assistance O[f] Counsel By Counsel's Failure To Obtain And Adduce DNA Evidence Favorable To Appellant.

J. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY REFUSING TO SUSTAIN APPELLANT'S RULE 29 MOTIONS.

K. THE CUMULATIVE EFFECT OF NUMEROUS ERRORS

OCCURRING DURING THE PROCEEDINGS RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL.

L. THE DEATH PENALTY PROVISIONS OF O.R.C.. 2929.02 ET SEQ., 2929.03 AND 2929.04 ARE UNCONSTITUTIONAL.

App. Vol. 5 at 105-224. On its own motion, the court of appeals directed the parties to brief the issue of the proportionality of Mr. Bays' sentence. App. Vol. 6 at 104-05. Mr. Bays filed an addendum to his brief in which he raised this additional assignment of error:

ISSUE. WHETHER THE COURT ERRED IN SENTENCING DEFENDANT TO DEATH WHEN THE FACTS AND CIRCUMSTANCES SHOW THIS TO BE A DISPROPORTIONAL SENTENCE TO THAT IN OTHER CAPITAL CASES IN THIS JURISDICTION IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EXCESSIVE PUNISHMENT UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION[S] 2, 9, 10, AND 16 OF THE OHIO STATE CONSTITUTION.

Id. at 108-31. On January 30, 1998, the court of appeals affirmed the trial court's decision. *State v. Bays,* No. 95-CA-118, 1998 WL 32595 (Ohio App. 2nd Dist. Jan. 30, 1998); App. Vol. 6 at 153-223).

Mr. Bays appealed to the Ohio Supreme Court and raised the following propositions of law:

PROPOSITION OF LAW NO. I

WHERE A CRIMINAL DEFENDANT EXPRESSES UNCERTAINTY AS TO HIS WAIVER OF TRIAL BY JURY AND THE TRIAL COURT FAILS TO FULLY INFORM THE DEFENDANT OF THE IMPLICATIONS OF SUCH A WAIVER, THERE HAS BEEN NO KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF THIS CONSTITUTIONAL RIGHT. U.S. CONST. AMENDS. VI AND XIV.

PROPOSITION OF LAW NO II

A CONFESSION MUST BE SUPPRESSED WHEN, CONSIDERED IN THE TOTALITY OF THE CIRCUMSTANCES, IT IS COERCED, THEREBY VIOLATING THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. III

REVERSIBLE ERROR OCCURS WHEN THE THREE-JUDGE PANEL'S SENTENCING OPINION FAILS TO WEIGH ALL OF THE MITIGATION TOGETHER AGAINST THE SINGLE AGGRAVATING CIRCUMSTANCE AND PLACES THE BURDEN ON THE DEFENDANT TO SHOW THAT THE MITIGATION OUTWEIGHS THE AGGRAVATING CIRCUMSTANCE. U.S. CONST. AMENDS. VIII AND XIV.

PROPOSITION OF LAW NO. IV

AN APPELLATE COURT DEPRIVES A DEFENDANT OF RIGHTS GUARANTEED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN, DURING INDEPENDENT REVIEW OF STATUTORY AGGRAVATING AND MITIGATING FACTORS AS MANDATED BY R.C. § 2929.05(a), IT RELIES UPON LITERATURE OUTSIDE THE RECORD.

PROPOSITION OF LAW NO. V

THE DEATH PENALTY IS INAPPROPRIATE AND DISPROPORTIONATE WHEN THE MITIGATING FACTORS OUTWEIGH THE SINGLE AGGRAVATING CIRCUMSTANCE AND THE OFFENSE IS DISSIMILAR TO CASES INVOLVING AGGRAVATED ROBBERY WHERE THIS COURT HAS UPHELD A DEATH SENTENCE.

PROPOSITION OF LAW NO. VI

THE IDENTITY OF AN INFORMANT MUST BE REVEALED TO CRIMINAL DEFENDANT WHEN INFORMANT'S TESTIMONY IS VITAL TO ESTABLISHING ELEMENT OF CRIME OR WOULD BE HELPFUL OR BENEFICIAL TO ACCUSED IN PREPARING OR MAKING DEFENSE TO CRIMINAL

CHARGES. STATE V. WILLIAMS, 73 OHIO ST.3D 153, 652 N.E.2D 721(1995)(FOLLOWED). FAILURE TO DISCLOSE SUCH IDENTITY VIOLATES CRIMINAL DEFENDANTS [sic] RIGHTS TO A FAIR TRIAL AS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 2, 10 AND 14 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. VII

A PROBATE JUDGE IS NOT QUALIFIED TO SIT ON A THREE-JUDGE PANEL PRESIDING IN A CAPITAL TRIAL. R.C. §§ 2931.02, 2949.06 [sic]. U.S. CONST. AMENDS. VI AND XIV.

PROPOSITION OF LAW NO. VIII

INFLAMMATORY TESTIMONY ABOUT OTHER "BAD ACTS" IRRELEVANT TO THE CHARGES BEFORE THE COURT VIOLATE A CAPITAL DEFENDANT'S DUE PROCESS RIGHTS. U.S. CONST. AMEND. XIV.

PROPOSITION OF LAW NO. IX

INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF AGGRAVATED MURDER IS PRESENTED WHERE THE STATE RELIES ENTIRELY ON THE DEFENDANT'S COERCED CONFESSION. U.S. CONST. AMEND. XIV.

PROPOSITION OF LAW NO. X

THE ACCUSED'S RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS DENIED WHEN COUNSEL'S ERRORS AND OMISSIONS UNDERMINE CONFIDENCE IN THE RESULT OF THE TRIAL. U.S. CONT. AMEND. VI AND XIV.

PROPOSITION OF LAW NO. XI

THE CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE OF BAYS'S TRIAL VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. XII

THE APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL IN THE COURT OF APPEALS.

PROPOSITION OF LAW NO. XIII

THE ACCUSED'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED WHEN THE STATE IS PERMITTED TO CONVICT AND SENTENCE UPON A STANDARD OF PROOF BELOW PROOF BEYOND A REASONABLE DOUBT.

PROPOSITION OF LAW NO. XIV

OHIO REVISED CODE ANN. § 2929.03(D)(1)(ANDERSON 1996) RENDERS R.C. §§ 2929.04(A) AND (B) UNCONSTITUTIONALLY VAGUE. U.S. CONST. AMEND. VIII, XIV.

PROPOSITION OF LAW NO. XV

OHIO'S DEATH PENALTY LAWS ARE UNCONSTITUTIONAL. THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, 10 AND 16, ARTICLE 1 OF THE OHIO CONSTITUTION ESTABLISH THE REQUIREMENTS FOR A VALID DEATH PENALTY SCHEME, OHIO REV. CODE ANN. SECTIONS 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 AND 2020.05 (ANDERSON 1996). OHIO'S DEATH PENALTY STATUTE DOES NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT BAYS.

App. Vol. 7 at 24-144. The Ohio Supreme Court affirmed Mr. Bays' conviction and sentence. *Bays,* 87 Ohio St.3d 15; App. Vol. 7 at 273-87. Mr. Bays filed a motion for reconsideration, *Id.* at 316-22, which the Ohio Supreme Court denied. *Id.* at 323; *State v. Bays,* 87 Ohio St.3d 1454 (1999)(table). The United States Supreme Court denied Mr. Bays' petition for certiorari. *Bays v. Ohio,* 529 U.S.

1090 (2000); App. Vol. 7 at 326.

On July 29, 1996, Mr. Bays filed a petition for postconviction relief in the Greene County Common Pleas Court in which he raised nine grounds for relief:

FIRST CAUSE OF ACTION

> The conviction and sentence against the Petitioner are void or avoidable [sic] because Petitioner Bays did not knowingly, intelligently, and voluntarily waive his right to a jury trial in violation of Petitioner's rights as guaranteed by the fifth, sixth, eight [sic] and fourteenth Amendments of the United States Constitution, and Sections 2, 9, 10, and 16, Article I of the Ohio Constitution.

SECOND CAUSE OF ACTION

> The conviction and sentence against the Petitioner is void or voidable because he was denied the right of effective assistance of counsel regarding his decision to waive a jury.

THIRD CAUSE OF ACTION

> The Judgments and Sentences agains Petitioner are void or voidable because Petitioner's rights were violated as guaranteed by the fifth, sixth, eighth and fourteenth Amendments of the United States Constitution, and Section[s] 2, 9, 10, and 16, Article I of the Ohio Constitution. [This claim was based on counsel's alleged failure to timely file a new motion to suppress related to Mr. Bays' alleged diminished capacity to understand].

FOURTH CAUSE OF ACTION

> Judgment against Petitioner Bays is void or voidable because he was denied his right to the effective assistance of counsel in preparing and presenting his defense, as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution and O.R.C. § 2929.02.2 due to the omissions of his trial counsel in not retaining the services of a private investigator.

FIFTH CAUSE OF ACTION

> Petitioner Bays was denied the effective assistance of counsel, in

preparing and presenting his defense, as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution, Section 16, Article I of the Ohio Constitution due to the omissions of his trial counsel, in not filing a motion to determine the competence of the Defendant to stand trial.

SIXTH CAUSE OF ACTION

The Judgments and Sentences against the Petitioner are void or voidable because Petitioner's rights were violated as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution, because of the omissions of trial counsel in not presenting any witnesses or evidence on behalf of the Defendant in the guilt phase.

SEVENTH CAUSE OF ACTION

Petitioner's judgment and sentence are void or voidable because of the omissions by Defense counsel in the mitigation stage of the proceedings causing his counsel to be ineffective in violation of the Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Section 2, 9, 10, and 16 of Article I of the Ohio Constitution.

EIGHTH CAUSE OF ACTION

Petitioner's conviction and sentence are void or voidable because the three judge panel consisted of a retired judge; a judge who had reassigned the case because he was too busy and the Probate Judge in Greene County, who does not experience criminal cases on a daily basis, all in violation of the Defendant's rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Section[s] 2, 9. 10, and 16 of Article I of the Ohio Constitution. [In addition, Mr. Bays' lead trial counsel was not Rule 65 certified to be lead counsel and his co-counsel was not Rule 65 certified].

NINTH CAUSE OF ACTION

Petitioner's conviction and sentence are void or voidable because of the cumulative effects of the errors and omissions as presented in this Petition in paragraphs 1 through 113. The Cumulative effect has been prejudicial to the Petitioner, and has denied the Petitioner his

> rights as secured by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16 of Article I of the Ohio Constitution.

App. Vol. 8 at 57-80. The trial court denied Mr. Bays' petition on August 21, 1996. App. Vol. 9 at 1-10. Mr. Bays subsequently filed in the trial court a motion to amend his postconviction petition and a motion to vacate the August 21, 1996, judgment, *Id.* at 11-26; 161-63, both of which the court denied. *Id.* at 184-93.

Mr. Bays appealed raising the following assignments of error:

> ASSIGNMENT OF ERROR NO. I
>
> THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING.
>
> ASSIGNMENT OF ERROR NO. II
>
> THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S FIRST CAUSE OF ACTION AS APPELLANT'S PETITION WITH THE SUPPORTING AFFIDAVITS CONTAINED SUFFICIENT OPERATIVE FACTS TO DEMONSTRATE THE LACK OF VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF JURY.
>
> ASSIGNMENT OF ERROR NO III
>
> THE TRIAL CORT ERRED IN RULING THERE WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL AS APPELLANT'S PETITION WITH THE SUPPORTING AFFIDAVITS, CONTAINED SUFFICIENT OPERATIVE FACTS TO DEMONSTRATE THE LACK OF COMPETENT COUNSEL AND THAT APPELLANT WAS PREJUDICED BY COUNSEL'S INEFFECTIVENESS.
>
> ASSIGNMENT OF ERROR NO. IV
>
> THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A MOTION TO AMEND PETITION FILED BY THE APPELLANT.

App. Vol 10 at 46-73. The court of appeals sustained Mr. Bays' Assignment of Error No. III, reversed the trial court's judgment denying Mr. Bays' petition without a hearing, and remanded the matter to the trial court for further proceedings. *State v. Bays*, No. 96-CA-118, 1998 WL 31514 (Ohio App. 2nd Dist. Jan. 30, 1998); App. Vol. 10 at 135-50. The state appealed to the Ohio Supreme Court raising the following proposition of law:

PROPOSITION OF LAW NO 1

> IN REVIEWING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, AN APPELLATE COURT SHOULD NOT FIND PREJUDICE ARISING FROM DEFENSE COUNSEL'S TACTICAL DECISION NOT TO PRESENT ANY EVIDENCE, WHERE A DEFENDANT HAS GIVEN A COMPLETE CONFESSION, AND WHERE PHYSICAL EVIDENCE LINKS THE DEFENDANT TO THE CRIME.

App. Vol. 11 at 5-19. The Ohio Supreme Court dismissed the state's appeal as not involving any substantial constitutional question. *State v. Bays,* 82 Ohio 3d 1141 (1998); App. Vol. 11 at 63.

On October 25, 2001, the trial court held an evidentiary hearing. See Tr. Vol. 4.[1] In addition to a post-hearing brief, Mr. Bays filed a motion for leave to amend his postconviction petition which the court denied. App. Vol. 12 at 167. On December 12, 2002, the court denied Mr. Bays' petition for postconviction relief. *Id.* at 195-98.

Mr. Bays appealed the trial court's decision and raised the following assignments of error:

ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

NO. I

THE TRIAL COURT ERRED BY NOT GRANTING RELIEF ON

[1] The pages in Tr. Vol. 4 are not numbered sequentially, but a hand count indicates that the evidentiary hearing transcript begins on the nineteenth page of the Volume.

> APPELLANT'S POSTCONVICTION PETITION, WHERE THE EVIDENCE ADDUCED AT THE EVIDENTIARY HEARING, IN CONJUNCTION WITH HIS POSTCONVICTION PETITION EXHIBITS, SHOWED THAT APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

NO. II

> THE TRIAL COURT ERRED BY LIMITING THE SCOPE OF THE EVIDENTIARY HEARING AND BY NOT ALLOWING RELEVANT TESTIMONY FROM APPELLANT'S EXPERT WITNESS, WHO WOULD HAVE SUPPORTED APPELLANT'S GROUNDS FOR RELIEF, AND, FURTHER, BY ALLOWING IMPROPER IMPEACHMENT ON CROSS-EXAMINATION, THUS VIOLATING APPELLANT'S RIGHT TO AN ADEQUATE STATE CORRECTIVE PROCESS.

NO. III

> THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING PETITIONER TO CONDUCT COMPLETE DISCOVERY BEFORE THE EVIDENTIARY HEARING.

NO. IV

> THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING PETITIONER TO AMEND HIS POSTCONVICTION PETITION SO THAT IT CONFORMED TO THE EVIDENCE AFTER THE EVIDENTIARY HEARING.

NO. V

> CONSIDERED TOGETHER, THE CUMULATIVE ERRORS SET FORTH IN APPELLANT'S SUBSTANTIVE GROUNDS FOR RELIEF MERIT REVERSAL OR REMAND FOR A PROPER POSTCONVICTION PROCESS.

App. Vol. 13 at 38-79. The court of appeals affirmed the trial court's denial of Mr. Bays' postconviction petition. *State v. Bays,* No. 2003 CA 4, 2003 WL 21419173 (Ohio App. 2nd Dist. June 20, 2003); App. Vol. 13 at 176-84. Mr. Bays appealed to the Ohio Supreme Court and raised

the following propositions of law:

PROPOSITION OF LAW NO. 1

WHEN A PETITIONER PRESENTS UNCONTRADICTED EVIDENCE OF HIS TRIAL COUNSEL'S PREJUDICIAL INEFFECTIVENESS THROUGH AFFIDAVITS AND TESTIMONY AT THE EVIDENTIARY HEARING, HE IS ENTITLED TO RELIEF FOR THE VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

PROPOSITION OF LAW NO. 2

AN EVIDENTIARY HEARING MUST ENCOMPASS ALL RELEVANT ISSUES AND ALLOW FOR THE PRESENTATION OF ALL RELEVANT EVIDENCE IF IT IS TO MEET THE REQUIREMENTS OF DUE PROCESS TO WHICH THE PETITIONER IS ENTITLED. THE TRIAL COURT ERRED BY LIMITING THE SCOPE OF THE EVIDENTIARY HEARING AND BY NOT ALLOWING RELEVANT TESTIMONY FROM APPELLANT'S EXPERT WITNESS, WHO WOULD HAVE SUPPORTED APPELLANT'S GROUNDS FOR RELIEF, AND, FURTHER, BY ALLOWING IMPROPER IMPEACHMENT ON CROSS-EXAMINATION, THUS VIOLATING APPELLANT'S RIGHT TO AN ADEQUATE STATE CORRECTIVE PROCESS.

PROPOSITION OF LAW NO. 3

THE LOWER COURTS ERRED BY DISMISSING APPELLANT'S OTHER POSTCONVICTION PETITION CLAIMS, WHERE HE PRESENTED SUFFICIENT OPERATIVE FACTS AND SUPPORTING EXHIBITS TO MERIT AN EVIDENTIARY HEARING AND DISCOVERY.

PROPOSITION OF LAW NO. 4

A STATE POSTCONVICTION PROCEEDING THAT DOES NOT ALLOW FOR NECESSARY DISCOVERY PROVIDES AN INADEQUATE CORRECTIVE PROCESS AND VIOLATED THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

PROPOSITION OF LAW NO. 5

THE CIVIL RULES OF PROCEDURE APPLY TO POSTCONVICTION PROCEEDINGS, THUS, THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING PETITIONER TO AMEND HIS POSTCONVICTION PETITION SO THAT IT CONFORMED TO THE EVIDENCE AFTER THE EVIDENTIARY HEARING.

PROPOSITION OF LAW NO. 6

CONSIDERED TOGETHER, THE CUMULATIVE ERRORS SET FORTH IN APPELLANT'S SUBSTANTIVE GROUNDS FOR RELIEF MERIT REVERSAL OR REMAND FOR A PROPER POSTCONVICTION PROCESS.

App. Vol. 14 at 7-55. The Ohio Supreme Court declined jurisdiction and dismissed Mr. Bays' appeal. *State v. Bays,* 100 Ohio St.3d 1433 (2003) (table); App. Vol. 14 at 108.

On April 4, 2003, while he was litigating his original postconviction petition, Mr. Bays filed a successive postconviction petition pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002) which the trial court dismissed. App. Vol. 15 at 57-63; 143-47. Mr. Bays appealed the trial court's decision and raised the following assignment of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED BY DENYING FUNDS FOR EXPERT SERVICES TO AN INDIGENT CAPITAL PETITIONER WHO PRESENTED PRIMA FACIE EVIDENCE OF HIS MENTAL RETARDATION.

App. Vol. 16 at 26-44. The court of appeals reversed the trial court for abusing its discretion in denying funding for an expert on mental retardation and remanded the matter for further proceedings. *State v. Bays,* 159 Ohio App.3d 469 (2nd Dist. 2005); App. Vol. 16 at 151-60.

On remand, the trial court granted funds for Mr. Bays to retain a mental retardation expert. App. Vo. 17 at 58. However, on November 9, 2007, Mr. Bays voluntarily dismissed his *Atkins* petition. *Id.* at 61.

Proceedings in this Court

On March 6, 2008, Mr. Bays filed a Motion for Leave to Proceed in Forma Pauperis, a Motion to Appoint Counsel, and Notice of Intention to file Habeas Petition (Doc. 6). On November 6, 2008, Mr. Bays filed his Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in which he raised the following claims:

First Ground for Relief

Defense counsel violated Bays's Sixth Amendment right to effective assistance of counsel when he failed to present cogent evidence to support a motion to suppress Bays's inculpatory statement to the police.

A. Defense counsel failed to conduct a timely and reasonable investigation into relevant issues surrounding Bays's involuntary waiver of his Fifth Amendment rights

B. The evidence adduced at the state-court evidentiary hearing shows that Bays did not make a knowing, intelligent, or voluntary waiver of his rights and, thus, was prejudiced by his defense counsel's failure to present the trial court with relevant and available evidence on the motion to suppress.

C. Police detectives used coercive tactics to pressure Bays into making an incriminating statement.

Second Ground for Relief

Trial counsel violated Bays's Sixth Amendment right to effective assistance of counsel by advising him to waive a jury trial and then failing to ensure that his waiver was made knowingly, intelligently, and voluntarily.

Third Ground for Relief

Trial counsel failed to present a defense on behalf of Bays, violating his Sixth Amendment right to effective assistance of counsel.

A. Defense counsel failed to rebut the testimony of the State's jailhouse informant, which would have cast doubt on Bays's alleged jailhouse confession.

B. Defense counsel failed to present available witnesses who would have raised reasonable doubt over Bays's alleged involvement in the crime.

Fourth Ground for Relief

[limited to alleged failure to investigate family history for purposes of mitigation; see Doc. 34]

Trial counsel violated Bays's Sixth Amendment right to effective assistance of counsel at the penalty phase. Counsel's mitigation presentation was deficient and deprived the three-judge panel of evidence that was worthy of weight and effect.

Fifth Ground for Relief

When a capital defendant has cognitive deficits and is coerced by police into making an inculpatory statement, the trial court errs under the Fifth and Fourteenth Amendments when it rules the statement admissible at trial. Further, a trial court must consider all relevant evidence and the totality of the circumstances before determining whether the statement was made voluntarily.

A. The trial court violated due process of law when it failed to suppress a confession obtained from Bays that was coerced by promises of lenient treatment.

B. Promises of lenient treatment render a confession coerced and thus inadmissible against a defendant.

C. The trial court denied Bays his right to due process when, after evidence of his mental disabilities was presented to the court, the judge refused to reopen the suppression hearing.

D. Under the totality of the circumstances, when a confession is obtained from a defendant like Bays, who has mental disabilities, and is based on promises of lenient treatment, the confession must be suppressed, and a conviction stemming from the State's use of that

confession at trial must be set aside.

Sixth Ground for Relief

A capital defendant such as Bays cannot make an intelligent, knowing, and voluntary waiver of his Sixth Amendment right to a trial by jury when he expresses to the court his uncertainty over the waiver and is not fully informed of the consequences of it. Accepting a waiver under those circumstances violated Bays's right to due process under the Fourteenth Amendment.

Seventh Ground for Relief

The trial court violated Bays's Fourteenth Amendment right to due process when it sustained his conviction on evidence that was insufficient to prove his guilt beyond all reasonable doubt.

Eighth Ground for Relief

The trial court violated Bays's Sixth and Fourteenth Amendment right to a fair trial when it denied his motion to disclose the identity of the police informant used against him.

Ninth Ground for Relief
[dismissed; see Doc. 34]

The state appellate courts' arbitrary refusal to review life sentences imposed in similar cases as a part of a statutorily mandated proportionality review denied Bays due process of law under the Fourteenth Amendment.

Tenth Ground for Relief
[dismissed; see Doc. 34]

Bays's execution will violate the eighth and Fourteenth Amendments because he will be unable to rationally understand the connection between his acts and the punishment to be inflicted.

Eleventh Ground for Relief

Petitioner Bays's convictions and death sentence are invalid because the cumulative effect of the constitutional errors set forth in this Habeas Corpus Petition violated his rights under the Fifth,

Sixth, Eighth, and Fourteenth Amendments.

(Doc. 16).

In his Petition, Mr. Bays included a "Notice of Intention to Challenge Presumption of Correctness of All State Court Fact-Findings." PageID 113. However, Mr. Bays does not raise in his Petition any specific arguments as to any alleged incorrectness of the state court's findings of facts although in his Traverse, (Doc. 108), he does challenge some factual findings.

On January 5, 2009, the Respondent filed a Motion to Dismiss Procedurally Defaulted Claims in which he sought dismissal of part of Mr. Bays' Fourth Ground for Relief and all of Grounds Nine and Ten. (Doc. 19). After the parties briefed the issues, I issued a Report and Recommendations, (Doc. 23), and after the parties filed and briefed Objections to that Report, I issued a Supplemental Report and Recommendations, (Doc. 30), to which the parties filed Objections. On June 9, 2009, District Judge Thomas Rose adopted in part my Report and adopted my Supplemental Report. (Doc. 34). As a result, Mr. Bays' failure to investigate claim in his Fourth Ground is limited to his claim that his counsel were ineffective for failure to investigate family history for mitigating evidence, his Ninth Ground is dismissed because it is procedurally defaulted, and his Tenth Ground is dismissed without prejudice to renewal after exhaustion in state court. *Id.*

After granting in part and denying in part Mr. Bays' motion for discovery, (Doc. 41), this Court held an evidentiary hearing on January 20 and 21, 2011. (Doc. 91, 92). On April 4, 2011, the United States Supreme Court decided *Cullen v. Pinholster,* 563 U.S. ___, 131 S.Ct. 1388 (2011), and the parties subsequently briefed the effect of *Pinholster* on the present case. On July 6, 2011, this Court issued a Decision and Order granting Respondent's April 8, 2011, Motion to Vacate the Pending Evidentiary Hearing and Discovery, to Reconsider its Prior Grant of an Evidentiary Hearing

and Discovery, in light of *Cullen v. Pinholster,* 563 U.S. ___ (2011) [ ] and Decide this Case Based Solely on the State Court Record. (Doc. 93; 103).

Standard of Review

I. Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA") applies to all habeas cases filed after April 24, 1996. *Herbert v. Billy,* 160 F.3d 1131 (6th Cir. 1998), *citing, Lindh v. Murphy,* 521 U.S. 320 (1997). Since Mr. Bays filed his Petition well after the AEDPA's effective date, the amendments to 28 U.S.C. § 2254 embodied in the AEDPA are applicable to his Petition.

Title 28 U.S.C. § 2254, as amended by the AEDPA, provides:

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

28 U.S.C. § 2254.

The AEDPA also provides that a factual finding by a state court is presumed to be correct, and a petitioner must rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). In addition, pursuant to the AEDPA, before a writ may issue on a claim that was evaluated by the state courts, the federal court must conclude that the state court's adjudication

of a question of law or mixed question of law and fact was "contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

A state court's decision is contrary to the Supreme Court's clearly-established precedent if: (1) the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law; or (2) the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A state court's decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal rule [from Supreme Court cases] but unreasonably applies it to the facts of the particular state prisoner's case", "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply[,] or [if the state court] unreasonably refuses to extend that principle to a new context where it should apply." *Williams,* 529 U.S. at 407-08. For a federal court to find a state court's application of Supreme Court precedent unreasonable, the state court's decision must have been more than incorrect or erroneous; it must have been "objectively unreasonable." *Wiggins v. Smith,* 539 U.S. 510, 520-21 (2003); *Williams,* 529 U.S. at 407, 409. An *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Id.* at 410 (emphasis in original). In sum, Section 2254(d)(1) places a new constraint on the power of a federal court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. *Id.* at 412 (Justice O'Connor, concurring).

A state court decision is not "contrary to" Supreme Court law simply because it does

not specifically cite Supreme Court cases. *Early v. Packer,* 537 U.S. 3 (2002). Indeed, "contrary to" does not even require awareness of Supreme Court cases, so long as neither the reasoning nor the result of the state-court decision contradicts them. *Id.* at 8. The AEDPA prohibits the overturning of state decisions simply because the federal court believes that the state courts incorrectly denied the petitioner relief:

> By mistakenly making the "contrary to" determination and then proceeding to a simple "error" inquiry, the Ninth Circuit evaded Section 2244(d)'s requirement that decisions which are not "contrary to" clearly established Supreme Court law can be subjected to habeas relief only if they are not merely erroneous, but "an unreasonable application" of clearly established federal law, or based on "an unreasonable determination of the facts".

Id. at 11.

For the purposes of the AEDPA, the court reviews the last state court decision on the merits. *Howard v. Bouchard,* 405 F.3d 459, 469 (6th Cir. 2005), *cert. denied,* 546 U.S. 1100 (2006).

The AEDPA standard of review applies only to "any claim that was adjudicated on the merits in State court proceedings." *Danner v. Motley,* 448 F.3d 372, 376 (6th Cir. 2006). A state court's failure to articulate reasons to support its decision is not grounds for reversal under the AEDPA. *Williams v. Anderson,* 460 F.3d 789, 796 (6th Cir. 2006), *citing, Harris v. Stovall,* 212 F.3d 940 (6th Cir. 2000), *cert. denied,* 432 U.S. 947 (2001). Where the state court fails to adjudicate a claim on the merits, the habeas court conducts an independent review of a petitioner's claims. *Williams*, *supra.* That independent review, however, is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA. *Williams, supra.*

II. <u>Procedural Default</u>

The standard for evaluating a procedural default defense is as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 749 (1991); *see also, Simpson v. Jones,* 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a state's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million*, 201 F. 3d 711, 716 (6th Cir. 2000); *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright,* 433 U.S. at 87.

The Sixth Circuit Court of Appeals requires a four-part analysis when determining whether a habeas claim is barred by procedural default. *Reynolds v. Berry*, 146 F. 3d 345, 347-48 (6th Cir. 1998), *citing Maupin v. Smith*, 785 F. 2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F. 3d 594 (6th Cir. 2001), *cert. denied,* 534 U.S. 1147 (2002).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
> . . .
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.

> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

*Maupin,*785 F. 2d at 138.

Analysis

Mr. Bays' First, Second, Third, and Fourth Grounds for Relief are claims of ineffective assistance of counsel which are generally governed by *Strickland v. Washington*, 499 U.S. 688 (1984).

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, (1970) (citations omitted). "The Supreme Court set forth the test for ineffective assistance of counsel in *Strickland ...* ". *Eley v. Bagley,* 604 F.3d 958, 968 (2010).

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

Strickland, 466 U.S. at 687. In other words, "[t]o establish ineffective assistance, a defendant 'must show both deficient performance and prejudice.' " *Berghuis v. Thompkis,* ___ U.S. ___, ___, 130 S.Ct. 2250, 2255 (2010), *quoting, Knowles v. Mirzayance,* 556 U.S. ___, ___, 129 S. Ct. 1411, 1413

(2009).

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

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

Strickland, 466 U.S at 689, *quoting, Michel v. State of Louisiana,* 350 U.S. 91, 101 (1955).

As to the second prong, the Supreme Court said:

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

Strickland, 466 U.S. at 694; *see also*, *Darden v. Wainwright,* 477 U.S. 168 (1986); *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998).

Ground One

In his First Ground for Relief, Mr. Bays argues that his trial counsel were ineffective for failing to present cogent evidence to support his motion to suppress his confession. In Subclaim A, Mr. Bays alleges that his counsel failed to conduct a timely and reasonable investigation into relevant issues surrounding his involuntary waiver of his Fifth Amendment rights. In Subclaim B,

Mr. Bays alleges that his counsel failed to present the trial court with relevant and available evidence which would establish that he did not make a knowing, intelligent, or voluntary waiver of his rights. In Subclaim C, Mr. Bays claims that detectives used coercive tactics to pressure him into making an incriminating statement and his counsel failed to provide the court with sufficient evidence to assess the impact of the police coercion.

Mr. Bays raised this claim in his postconviction petition and the court of appeals rejected it as follows:

> Bays claims that trial counsel was ineffective in addressing several issues at his suppression hearing and at trial: his drug use and borderline intellect as affecting the voluntariness of his confession, his drug use shortly before his confession, coercion of his wife to get him to confess, and the credibility of an inmate who testified against him. General evidence regarding Bays' drug use and borderline intellect has been thoroughly addressed in prior proceedings. We will briefly address each of the other issues raised under this assignment of error.
>
> At the hearing on the petition for postconviction relief, Bays' stepson, Ryan Scott Pleukharp, testified that he had seen Bays using crack cocaine in the bathroom at their house just before the police arrived to take him in for questioning on November 19, 1993. Bays confessed to Weaver's murder a short time later. Bays' wife partially corroborated Pleukharp's testimony by testifying that Pleukharp had told her of his observation the next day. Martha Bays also testified that she had later found drug paraphernalia on the ledge above the bathroom door. Martha Bays claimed that she had relayed all of this information to Bays' attorney at their first meeting but that he had not used it at the suppression hearing.
>
> The trial court found the testimony of Pleukharp and Martha Bays to be lacking in credibility, and, in our view, this conclusion was a reasonable one. On cross-examination, Martha Bays appeared to concede that, in an unrelated case, she had encouraged her son to deny involvement in a crime to which he had already confessed. Moreover, it had been determined in earlier proceedings in this case that the police had not engaged in coercive conduct and that any alleged impairment on Bays' part was not apparent to the officers. See

> *Bays,* 87 Ohio St.3d 15, 23, 1999-Ohio-216. Even if Bays had used crack cocaine at the time alleged, the voluntariness of his confession was not implicated if the police officers did not know of and take advantage of that fact. *State v. Smith*, 80 Ohio St.3d 89, 112, 1997-Ohio-335, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473.

Bays, 2003 WL 21419173 at *2.

In addressing his Fifth Ground for Relief, *infra,* this Report recommends rejecting Mr. Bays' substantive claims with respect to his confession and its admission into evidence. Briefly, the Court has determined that Mr. Bays' confession was not coerced, the investigating officers did not make offers of leniency in exchange for his confession, Mr. Bays' confession was voluntary, and that the at the time of the hearing on Mr. Bays' motion to suppress, the trial court was aware of Mr. Bays' drug use. Because Mr. Bays' underlying claim related to this claim of ineffective assistance of counsel is meritless, his ineffective assistance of counsel claim is meritless as well. In other words, even assuming that Mr. Bays' counsel's representation was deficient, Mr. Bays is not able to establish prejudice as required by *Strickland*.

Mr. Bays' First Ground for Relief is without merit and should be rejected.

Ground Two

In his Second Ground for Relief, Mr. Bays argues that his trial counsel were ineffective by advising him to waive his right to a jury trial and then failing to ensure that he made that waiver knowingly, intelligently, and voluntarily.

Mr. Bays brought this claim in his postconviction petition (See App. Vol. 8 at 57-80) and pursued it on appeal of the trial court's denial of that petition (App. Vol. 9 at 46-73). The court

of appeals noted that Mr. Bays had raised the same claim on direct appeal and that it would address the claim in that direct appeal. *Bays,* 1998 WL 31514 at *5. The court of appeals did so and subsequently, Mr. Bays raised the claim on direct appeal in the Ohio Supreme Court.

The Ohio Supreme Court addressed Mr. Bays claim and rejected it as follows:

> In his tenth proposition, Bays claims that his trial counsel rendered ineffective assistance. To demonstrate ineffective assistance, Bays must show that, in light of all circumstances, counsel's performance fell below an objective standard of reasonable representation. He must also show prejudice, *i.e.*, a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Strickland v. Washington* (1984), 466 U.S. 668, 687-694, 104 S.Ct. 2052, 2064-2068, 80 L.Ed.2d 674, 693-698; *State v. Bradley* (1989), 42 Ohio St.ed 136, 142-143, 538 N.E.2d 373, 380, and paragraphs two and three of the syllabus.
>
> Bays cites six instances of allegedly ineffective assistance.
>
> (1) When the trial court asked Bays why he wanted to waive the jury, Bays said, "My Counsel feels it's best." On being asked whether he waived jury trial of his own free will, Bays replied, "I don't know which way I want to go really. With the Jury, I don't figure it was a fair pick."
>
> Bays contends that "[i]f counsel had advised Bays to waive his rights because of perceived bias by the jury, counsel had a duty to raise an objection with the court." However, the record does not show whether this was counsel's reason for advising Bays to waive a jury. What the record does show is that counsel *did* "raise an objection with the court"; on December 6, 1995, counsel filed a motion to dismiss the venire, alleging that it was not randomly selected. (Bays waived jury trial later that day, rendering the motion moot.)
>
> Bays notes that the record does not reflect that counsel advised him of the consequences of waiving the jury. However, it is Bays's burden to show that counsel rendered ineffective assistance. *Strickland*; *Bradley, supra*. The fact that counsel did not advise Bays on the record hardly suggests that counsel failed to advise him at all. It is a normal practice for lawyers to advise their clients in private, rather

> than on the record. Bays has failed to affirmatively show that his lawyer did not advise him.
>
> Bays further contends that his counsel had a duty to ensure that the trial court advised him of the consequences of waiver, inquired more deeply into the voluntariness of his waiver, and used simpler language. However, such a colloquy is not required for a valid jury waiver. *State v. Jells, supra,* 53 Ohio St.3d at 25-26, 559 N.E.2d at 468.

Bays, 87 Ohio St.3d at 27-28.

In addressing Mr. Bays' Sixth Ground for Relief, *infra,* this Report recommends concluding that the state court properly determined that Mr. Bays knowingly, intelligently, and voluntarily waived his Sixth Amendment right to a jury trial. In support of his Sixth Ground, Mr. Bays raised essentially the same arguments that he raises in support of the present ground for relief that his counsel were ineffective with respect to his jury trial waiver. However, since his underlying claim is meritless, his claim that his counsel were ineffective with respect to his jury waiver is also meritless. Stated differently, even if Mr. Bays' counsel's performance was deficient, he is not able to establish prejudice as *Strickland* requires.

Accordingly, the Ohio Supreme Court's finding that Mr. Bays failed to establish that his trial counsel were ineffective with respect to his jury waiver is not contrary to nor an unreasonable application of, clearly established federal law. Therefore, Mr. Bays' Second Ground for Relief should be rejected.

Ground Three

In his Third Ground for Relief, Mr. Bays first alleges that his trial counsel were

ineffective because of their alleged failures to introduce evidence to rebut the testimony of the jailhouse informant. Mr. Bays raised this claim in his postconviction petition and the Ohio appeals court rejected it as follows:

> ... Bays contends that his attorney was ineffective in failing to present the testimony of Richard Henson, Jr. about a fellow inmate, Larry Adkins. Adkins had testified at Bays' trial that Bays had admitted to Adkins his involvement in Weaver's murder. At the evidentiary hearing, Henson testified that Adkins had talked with him about his plan to get a deal from the state in exchange for testifying against Bays. Henson further testified that he had not been interviewed by Bays' attorney prior to trial and, although present at the courthouse, had not been called to testify on Bays' behalf. Even if we assume for the sake of argument that Bays' attorney should have interviewed Hanson and did not do so, we would nonetheless conclude that counsel did not act ineffectively. Henson's testimony did not suggest that Adkins' statements were untruthful, only that he hoped to get a favorable deal from revealing his conversations with Bays. In other words, Henson's testimony related to Adkins' motivation in coming forward but not the truthfulness of his statements. As such, we are confident that Henson's testimony would not have affected the outcome of the trial.
>
> The first assignment of error is overruled.

Bays, 2003 WL 21419173 at * 2-3.

Larry Adkins testified at Mr. Bays' trial that he became acquainted with Mr. Bays when they were in the Greene County Jail in November, 1993, they were in the same cell block and were right next to each other, and that each day he was there, Mr. Bays went on a little bit more about the crime with which he was charged. Tr. Vol. 2 at 88-90. Mr. Adkins testified further:

> He [Mr. Bays] had told how he thought about doing it and — how he had thought about doing it. He wanted — he told me that he wanted his step-son to help him at first, because he didn't have nobody to help him really, and then he had told me at one time he was mad because he got ripped off on a drug deal on the street and he went there to get money. ...

> [H]e knocked on the door. Mr. Weaver had answered the door. He asked him ife could borrow some money. Mr. Weaver told him no. He more or less was moving to shut the door, and Bays said that's when he hit him, hit him with a battery charger and then, you know, had a scuffle with him and did what de did. ...
>
> He told me that he had hit him with a battery charger, and more or less, he fell out of the chair, he was in a wheelchair. ...
>
> And he had took his wallet and he had stabbed him in the chest. Then he was almost on his way out and he turned around and cut his throat. ...

Id. at 90-91. Mr. Adkins also testified that nobody connected with the courts or law enforcement told him that if he cooperated and helped out with this case he would get any kind of benefit. *Id.* at 92.

On cross-examination, Mr. Adkins testified that at the time he was initially incarcerated, his bond was $5,000, and two days after he spoke with Det. Savage about Mr. Bays, his bond was reduced to an O.R. bond. *Id.* at 98-99. Mr. Adkins testified further that although the prosecutor recommended that he serve a prison term for the offense with which he was charged, he did not go to prison but went to a behavior modification program, he violated his probation twice, did not go to prison for the violations, and that he served one month in jail, one year on house arrest, and attended the Monday Program. *Id.* at 99-100.

Richard Henson, Jr. testified at Mr. Bays' October 25, 2001, postconviction evidentiary hearing that he was an inmate in the Greene County jail during April, 1994, at which time he met Larry Adkins who was also an inmate. Tr. Vol. 4 at 52-53.[2] Mr. Henson also testified that in April or May, 1994, he had a conversation with Mr. Adkins and Mr. Henson described the

---

[2] As previously noted in n.1, the pages in Tr. Vol. 4 are not numbered sequentially. The transcript of the October, 2001, postconviction hearing begins after the page identified as "Bays Apx. Vol. 12 Page 147". The pages of the hearing transcript are sequentially numbered.

conversation as follows:

> I was sitting on a bench in the rec area, the range, and he come up and asked me, you know, what was I in for and I had told him and then, you know, I asked him what he was in for and he stated he was in for counterfeiting off of the computer, and we started talking and then the Defendant come out of his cell as he said, "You see that guy right there?" I said, "Yeah." And he said, "Do you know him?" And I said, "Yes." He said, "Well, I'm going to tell on him to get my sentence knocked out." And I just said, you know, "Do what?" And he said, "Yeah. I'm going to tell on this guy right here to get me out of trouble."

Id. at 54. Mr. Henson testified further that he received a subpoena to testify at Mr. Bays' trial, he sat outside the courtroom for four or five hours waiting to testify, and that eventually, one of Mr. Bays' lawyers told him, "I don't need you." and he did not testify. *Id.* at 55-56.

The decision to call or not to call certain witnesses is exactly the type of strategic decision that the courts expect attorneys to make. *Boykin v. Webb,* 541 F.3d 638, 649 (6th Cir. 2008).

As noted above, when Mr. Adkins testified at Mr. Bays' trial, Mr. Bays' counsel cross-examined him about his motivation for testifying against Mr. Bays. Specifically, although Mr. Adkins testified on direct examination that he did not ask for any favors in exchange for his testimony and that that nobody connected with the courts or law enforcement told him that if he cooperated and helped out with this case he would get any kind of benefit, he admitted on cross-examination that following his meeting with Det. Savage, his $5000 bond was reduced to an O.R. bond. Mr. Adkins also testified that he did not receive a prison sentence and although he violated his probation twice he was never sent to prison. This testimony certainly raises suspicions as to Mr. Adkins' reasons for testifying against Mr. Bays. In other words, this testimony undermines the validity of Mr. Adkins' stated reason for testifying against Mr. Bays, to wit: that he was morally outraged at Mr. Bays, and raises the suspicion that Mr. Adkins testified in exchange for receiving

preferential treatment from law enforcement. Mr. Henson's postconviction hearing testimony does little more than raise the issues of Mr. Adkins' credibility and motive for testifying. Mr. Bays' counsel put those issue before the three-judge panel during his cross-examination of Mr. Adkins. Mr. Henson's testimony does not in any way suggest that Mr. Adkins' testimony was not truthful.

Because Mr. Henson's testimony does not raise a question as to the truthfulness of Mr. Adkins' testimony and because the three-judge panel already had evidence before it that put Mr. Adkins' credibility and motivation for testifying into question, Mr. Bays is unable to establish that his counsel were ineffective for failing to call Mr. Henson to testify at trial.

Mr. Bays also argues in his Third Ground for Relief that his counsel were ineffective for failing to call witnesses who allegedly had information implicating a man named Terry Byrd in the killing of Mr. Weaver.

Mr. Bays raised this claim in his postconviction petition and the court of appeals rejected it saying:

> Bays's final allegation supported by evidence *dehors* the record is his contention that his trial counsel was ineffective in failing to present witnesses and other evidence during the defendant's case-in-chief. In support of this contention, Bays attached two affidavits to his petition for post-conviction relief. The first affidavit was of Bays's wife, Martha. Martha Bays stated, in relevant part, as follows:
>
> > 38. During the course of the trial there were several witnesses who were prepared to testify and waiting outside in the Court Room hall. The witnesses were as follows: There was Pluma Thomas, who is a character witness. There was James Dalton who would testify about seeing a man who he knew come (*sic.*) out of the victim's house later in the afternoon after Rick had left. There was Richard Neil Hanson who would testify that Adkins (who testified about the alleged jailhouse confession) said he would do anything to get out of trouble. Henson was in jail with Adkins and Rick. There was also Cindy Nelson who was a character witness. There was Hope

> Purdue, who had heard Terry Bird, the man that James Dalton had seen, tell her that Bays got busted for something that he did. There was also Carrie Moore who would testify about a confession from Terry Bird.
>
> 39. All of the above, except Hope Purdue, were ready to testify and were released by [Bays's trial counsel].
>
> 40. When I asked [Bays's trial counsel] why he didn't put on a defense, his explanation was that the Judges didn't want to hear it.

In addition to Martha Bays's affidavit, Bays attached an affidavit from James Dalton, which stated as follows:

> On November 15th 1993, I James Dalton was sitting on the porch when Richard Bays come (*sic.*) out at about 2:15 pm afternoon & walked Corrier with no blood or anything else that looked unusual about Richard Bays[.] *[A]bout* 30 min. after Richard Bays came out of Mr. Weaver's house, I saw Teri Byrd come out & he looked around & then ran down Hiveling & cut through the alley next to the house I was at. That's what I saw. /s/ James Dalton.

On the basis of these affidavits, the panel should have held an evidentiary hearing at which Bays would have had the opportunity to prove his allegation that his trial counsel erroneously failed to call witnesses that were crucial to his defense. The Dalton and Martha Bays affidavits indicate that several exculpatory witnesses were available to testify that Bays may not have committed the crimes charged or did not commit the crimes alone, raising the possibility that he was not the principal offender. Although it would have been for the panel to determine, following a hearing, what weight and credibility to assign the testimony of these witnesses, it was error for the panel to dismiss Bays's allegation without an evidentiary hearing in light of the affidavits attached to the petition. In fact, after reviewing the panel's decision, we note that the panel did not expressly address the averments contained in the Martha Bays and James Dalton affidavits, but instead focused on the affidavits pertaining to the impeachment of Larry Adkins. The record corroborates Martha Bays's claim that Carrie Moore and James Dalton were subpoenaed and were prepared to testify at trial, but were not called by Bays's counsel. Accordingly, the record does not rebut Bay's claims, and an evidentiary hearing was the proper forum

> in which to consider those claims, pursuant to R.C. 2953.21(C). See *Williams,* 8 Ohio App.2d, at paragraph one of the syllabus.

Bays, 1998 WL 31514 at *7. The court of appeals then remanded the case to the trial court for a hearing. However, at the hearing, Mr. Bays did not introduce any evidence related to James Dalton, Hope Purdue, Carrie Moore, or Terry Byrd. See Tr. Vol. 4 at 1-109. In appealing the trial court's denial of his postconviction petition after hearing, Mr. Bays did not raise any claims related to James Dalton, Hope Purdue, Carrie Moore, or Terry Byrd. See App. Vol. 13 at 38-79; see also, *Bays,* 2003 WL 21419173. Similarly, when Mr. Bays appealed to the Ohio Supreme Court, he failed to raise any claims as to any of those individuals. See App. Vol. 14 at 7-55.

On these facts, Respondent could have advanced a claim of procedural default, but has not done so. Therefore, this Court addresses the claim *de novo.*

Mr. Bays' argument is that his counsel were ineffective because they failed to call witnesses whose testimony would have created reasonable doubt about who killed Mr. Weaver. Allegedly, Mr. Dalton would have testified that he saw Mr. Bays come out of Mr. Weaver's house at about 2:15 p.m. and that he did not see any blood on Mr. Bays. Mr. Dalton would have allegedly testified further that he saw Terry Byrd come out of Mr. Weaver's house about thirty minutes after Mr. Bays came out. Carrie Moore would have allegedly testified about hearing Mr. Byrd "confess" to killing Mr. Weaver. Finally, although it is not clear that she was "ready" to testify, Hope Purdue would allegedly have testified that Mr. Byrd told her that Mr. Bays "got busted" for something Mr. Byrd had done.

Even assuming that the testimony referenced above was admissible, this Court cannot say that it would have led to a different result in this case. First and foremost, Mr. Bays gave a

detailed confession to the investigating detectives which was properly obtained and introduced at trial. See, *infra.* Second, included in Mr. Bays' confession was information about where he disposed of Mr. Weaver's wallet as well as the tee shirt and glove he had worn during the murder. Based on that information, the detectives found those items precisely where Mr. Bays said he had dumped them. Third, Mr. Bays discussed with Mr. Adkins the details of how he had killed Mr. Weaver and taken his wallet. Finally, Cindy Dean, a forensic chemist, testified that hairs retrieved from Mr. Weaver's hand were microscopically indistinguishable from known hairs taken from Mr. Bays. *Id.* at 216-37.

In view of this overwhelming evidence of Mr. Bays' guilt, even assuming that Mr. Bays' counsel should have called Mr. Dalton, Ms. Moore, and Ms. Purdue to testify, their failure to do so did not result in prejudice to Mr. Bays because there is not a reasonable probability that their testimony would not have let the three-judge panel to reach a different result.

The Ohio Supreme Court's decision finding that Mr. Bays' trial counsel were not ineffective for failing to call Mr. Henson to testify is not contrary to nor an unreasonable application of clearly established federal law. In addition, Mr. Bays' claim that his counsel were ineffective for calling certain witnesses whose testimony would have allegedly raised reasonable doubt over his (Mr. Bays') involvement in Mr. Watson's killing is meritless. Accordingly, Mr. Bays' Third Ground for Relief should be denied.

Ground Four

In his Fourth Ground for Relief, Mr. Bays alleges that his trial counsel were ineffective in their presentation during the mitigation phase of his trial. As noted, this Court has previously limited this claim to the failure to investigate Mr. Bays' family history and background for mitigation evidence. See Doc. 34.

Mr. Bays raised this claim on direct appeal and both the court of appeals and the Ohio Supreme Court rejected the claim. *Bays,* 1998 WL 31595 at 30-31; *Bays,* 87 Ohio St.3d at 29. Nevertheless, Mr. Bays raised the claim again during postconviction and the state courts addressed the claim on the merits. The last reasoned state court decision on this claim was issued by the first postconviction court of appeals which rejected it as follows:

> Second, Bays claims that his trial counsel was ineffective in failing to investigate fully his family history for mitigating factors that might have persuaded the panel not to impose the death penalty. As evidence, Bays attached an affidavit from his father, Virgil Bays, to his petition for post-conviction relief. In the affidavit, Virgil Bays describes his personal family history leading up to the birth of his son, Richard. Virgil also states that neither he nor his wife ever abused their children. With respect to Bays, Virgil states that his son had difficulty learning as a child, particularly in school. and that Bays quit school around the age of fifteen. Finally, Virgil states that while Bays was growing up, he worked from 1:00 p.m. until 11:30 p.m. and was not aware of what Bays was doing during that time.
>
> Virgil Bays testified during the mitigation phase of trial. At trial Virgil testified that Bays had academic problems during school. Virgil stated that he worked from 2:30 p.m. until 10:30 p.m. while Bays was growing up. Virgil also testified that neither he nor his wife ever struck Bays and they had a good relationship.
>
> Based on Virgil Bays's testimony at trial, the panel could properly conclude that the affidavit attached to Bays's petition for post-conviction relief did not contain sufficient operative facts to warrant an evidentiary hearing. Virgil Bays's affidavit was substantially duplicative of his testimony at trial. Moreover, there is little if any additional information provided in the affidavit that would qualify as mitigating circumstances–certainly not enough to suggest substantive grounds for relief based upon ineffective assistance of trial counsel.

> See *Scott,* 63 Ohio Ap..3d at 307, 578 N.E.2d 841. Accordingly, the panel properly denied Bays's request for an evidentiary hearing on this issue.

Bays, 1998 WL 31514 at *6.

Virgil Bays, Petitioner's father, testified during the mitigation phase of Mr. Bays' trial that there were some complications with Mr. Bays' birth, during his childhood he had some falls, he had problems academically in school and was in some individual special classes, and that Mr. Bays treated him (Virgil) and his (Mr. Bays') mother just fine. Tr. Vol. 3 at 429-32. Virgil Bays also testified that neither he nor Mr. Bays' mother ever struck Mr. Bays and that after his mother died, Mr. Bays was "a little different" and "kind of lost". *Id.* at 432-33.

Mr. Bays submitted Virgil Bays' July 28, 1996, affidavit in support of his postconviction petition. App. Vol. 8 at 179-81. In that affidavit, Virgil Bays testified that Mr. Bays "had a lot of problems as a baby", apparently also had some brain damage, had a very hard time learning, did not want to do his homework or go to school, quit school around the age of fifteen, and that on the day of Mr. Weaver's killing, he (Virgil Bays) had given Mr. Bays $50.00. *Id.*

Virgil Bays' affidavit testimony is essentially the same as his trial testimony. The three-judge panel heard Virgil Bays' testimony that there were some complications with Mr. Bays' birth, during his childhood he had some falls, he had problems academically and was in some individual special classes, that Mr. Bays treated him well and that. after his mother died, Mr. Bays was "a little different" and "kind of lost". Virgil Bays' affidavit testimony that Mr. Bays had difficulties (undefined or explained) as a baby, allegedly had some brain damage, that he had a hard time learning, did not want to do his homework, and did not want go to school, does not add

anything substantive to his trial testimony. In other words, Virgil Bays' affidavit does not support Mr. Bays' claim that his counsel were ineffective for failing to investigate his family history and background for mitigation evidence.

Mr. Bays also points to his wife's affidavit in support of his allegation that his counsel failed to investigate his family history and background for mitigation evidence.

Mr. Bays submitted his wife's July 28, 1996, affidavit in support of his postconviction petition. App. Vol. 8 at 124-29. In that affidavit, Martha Bays testified to a number of arguably mitigating factors about Mr. Bays. These include Mr. Bays' getting drunk and high because he wanted to be accepted by his peers, others making fun of and ridiculing Mr. Bays because he was "slow", Mr. Bays being easily influenced by others, Mr. Bays having difficulty getting and keeping a job because he "was really too slow to really become involved in any long time employment", and Mr. Bays using alcohol and marijuana as a way to fit in with other people. *Id.* Mrs. Bays also testified that she "had explained all of this to Rick's attorney...". *Id.*

While Mrs. Bays' affidavit references what could be described as mitigating factors, it also makes it clear that she gave that information to Mr. Bays' trial counsel. Accordingly, that affidavit does not support Mr. Bays' position that his counsel failed to investigate his family history.

A review of the transcript of the mitigation phase of Mr. Bays' trial reveals that the three-judge panel heard substantial evidence about Mr. Bays' family history. Dr. Kathleen Burch, a clinical psychologist who had interviewed and examined Mr. Bays, testified about Mr. Bays as follows: overall, his test results were strongly consistent with the presence of a moderate level of neuropsychological dysfunction; at birth, he had an absent Moro reflex, irregular respirations, and a coarse tremor which are suggestive of some brain damage; at age six, he displayed certain

neurological signs that would be indicative of cerebral concussion; his parents' marriage was intact and there was no significant family disharmony while he was growing up; he denied that his parents abused substances; his parents were not abusive to him or his sisters; he presented no evidence that there was family discord; there were no problems in the home environment while he was growing up; he did not express any negative feelings or attitudes about any of his immediate family; he inferred he thought his parents cared less about him than his two sisters; he did well in school until about age ten when he started using substances; he married at the age of twenty and quit drinking when his wife threatened to end the marriage; his employment has been extremely limited; his marriage was stable; and he was in the borderline range of intellectual functioning. Tr. Vol. 3 at 368-401. In addition to Dr. Burch's testimony, the three-judge panel admitted into evidence her report which reflects her testimony. App. Vol. 18 at 146-51.

Another psychologist, Dr. Harvey Siegal, a substance abuse specialist, testified at the mitigation phase of Mr. Bays' trial. Tr. Vol. 3 at 402-28. Dr. Siegal testified that Mr. Bays began using marijuana at the age of nine, by age twelve or thirteen, he was drinking alcohol consistently, and that the age of about twenty-seven, which was about the time his mother died, he began using crack cocaine. *Id.* Dr. Siegal also testified that Mr. Bays was dependent on several different drugs, perhaps at different times. *Id.*

A third psychologist, Dr. Newton Jackson, testified during the mitigation phase of Mr. Bays' trial that Mr. Bays began to abuse marijuana at a very early age, probably somewhere around the age of nine, it wasn't until his fourth grade year in school that he started to be referred for special assistance in the schools, he had a history of early trauma all the way back to birth, and that there was no information Dr. Burch reported about Mr. Bays' background that was contrary

to his findings. Tr. Vol. 3 at 430-40; 464; 466.

The above cited testimony placed before the three-judge panel information about Mr. Bays' upbringing as well as his: family of origin; relationships with his parents; early childhood physical traumas; stable marriage; substance abuse issues; intellectual deficits; and his neuropsychological impairments. While some of that evidence was introduced by way of Virgil Bays, other evidence was introduced by way of the psychologists who examined and tested Mr. Bays. With this review of the mitigation phase testimony in mind, this Court concludes that Mr. Bays' counsel investigated Mr. Bays' family history for mitigation evidence and that Mr. Bays simply has not established that they were constitutionally ineffective for failing to do so.

The Ohio court's decision that Mr. Bays' counsel were not ineffective for failing to investigate his family background is not contrary to nor an unreasonable application of, clearly established federal law. Therefore, Mr. Bays' Fourth Ground for Relief should be rejected.

Ground Five

In Subclaims A, B, and D of his Fifth Ground for Relief, Mr. Bays challenges the admissibility of his confession. Mr. Bays' position is that the trial court erred by finding that his confession was voluntary. Mr. Bays raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> In his second proposition of law, Bays asserts that the trial court should have suppressed his November 19 confession to Detective Savage as involuntary. He contends that his will was overborne

and the confession extracted by deceit, intimidation, and implied promises of leniency.

Findings of Fact

In ruling on the motion, the trial court made detailed findings of fact, in accordance with Crim.R. 12(E). Since the record supports those findings, they bind us. See, *e.g.*, *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972, 981. Hence, we set them forth here, along with the supporting testimony.

The trial court found that, on November 19, 1993, Savage received an anonymous call. The caller knew details of the murder that had not been released to the press, and he implicated Bays in the crime. "The police returned to Mr. Bays's home [the trial court found] and he again voluntarily accompanied the police to the police station. At the station Detective Donahue read Mr. Bays his rights and he again initialed the Pre-Interview form [acknowledging that he understood his rights]."

The trial court found that Bays signed the form at 7:08 p.m. and gave the detectives a taped statement at 7:20 p.m. During the intervening twelve minutes, the detectives told Bays that they knew he committed the murder. Detective Savage stated that "withholding the truth could only hurt [Bays] and not benefit him." Then the detectives told Bays how the murder happened. Bays admitted that the detectives' scenario was correct, then went over the details with them and reenacted the murder on videotape.

The trial court further found that, during the interrogation, Savage "stated the different penalties for different crimes including the death sentence." At the hearing, Savage testified that he told Bays, "[I]t looked like a death penalty case." Savage then recited to Bays the possible penalties for aggravated murder, murder, manslaughter, and involuntary manslaughter.

The trial court found that Savage had "raised the volume of his voice," but "[t]here was no evidence of screaming or of threats being made." Donahue testified that Savage raised his voice "a couple of times where Mr. Savage would say something to him and [Bays] would deny it, and he would say Ricky, we know better than that, you know, the lab has the results * * * or something like that."

Savage testified that he "may have" struck the table with his hand, but he couldn't recall. He also testified that he told Bays that "his hair was at the scene in Mr. Weaver's hand [and] that somebody had seen him up on the porch that day and confirmed that he was there." These statements exaggerated the strength of the evidence against Bays, since the witness did not identify Bays on the porch and the hairs

were never conclusively matched to Bays.

The trial court found that "Mr. Bays is 28 years old, he has a tenth grade education and has demonstrated that he can read and write. Mr. Bays has prior criminal experience * * * ."

The trial court concluded that Detective Savage's statements regarding the different penalties for different levels of homicide did not constitute a promise of leniency, nor did his statement that withholding the truth could only hurt Bays and not benefit him. Accordingly, the court found Bays's confession voluntary and overruled his motion to suppress it.

Analysis

"In deciding whether a defendant's confession is involuntarily induced, the court should considerthe totality of the circumstances * * *." *State v. Edwards* (1976), 49 Ohio St.2d 31, 3 O.O.3d 18,358 N.E.2d 1051, paragraph two of the syllabus, judgment vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155. Circumstances to be considered include "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement."

Several circumstances militate strongly in favor of finding the confession voluntary. Bays went to the station voluntarily. He was interrogated for only twelve minutes before confessing. He was in his late twenties and had been arrested before. There was no evidence of physical abuse or deprivation. Savage did raise his voice when he thought Bays was lying and may have hit the table as well, but there was no evidence of any direct threats. Bays heard his *Miranda* rights, acknowledged that he understood them, and signed a waiver, the validity of which is not challenged here. Savage testified that Bays was calm and did not seem nervous.

Savage did mislead Bays as to the strength of the evidence against him. See *Frazier v. Cupp* (1969), 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684; *State v. Wiles* (1991), 59 Ohio St.3d 71, 81, 571 N.E.2d 97, 112. However, "[a] defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is." *Ledbetter v. Edwards,* (C.A.6, 1994), 35 F.3d 1062, 1070.

Bays also points to his low IQ and childhood head injuries. Although this was not raised in the suppression hearing (see discussion below), the penalty-phase record shows that Bays's IQ was seventy-four, placing him in the least intelligent five percent of the population. On the other hand, Bays had a tenth grade education, and the record

> indicates that he "did well in school" until he began engaging in substance abuse. There was no evidence that he was under the influence of any substances during the interrogation.
>
> We think that the factors pointing to voluntariness far outweigh those negating voluntariness. We therefore conclude that, under the totality of the circumstances, Bays's statement was voluntary.
>
> However, Bays also contends that, whatever the totality-of-the-circumstances analysis may show, his confession was involuntary because (as the trial court found) Savage informed him of the penalties for various degrees of homicide. According to Bays, these statements rendered his confession inadmissible, because they amounted to an implied promise of leniency.
>
> We cannot agree. A promise of leniency, while relevant to the totality-of-the-circumstances analysis, does not require that the confession be automatically suppressed. *Edwards,* 49 Ohio St.2d at 40-41, 3 O.O.3d at 23-24, 358 N.E.2d at 1058-1059.
>
> Moreover, Savage's recitation did not constitute a promise of leniency. All Savage did was to state the penalties for the various levels of homicide. An interrogator may inform the suspect of the penalties for the offense of which he is suspected. *State v. Arrington* (1984), 14 Ohio App.3d 111, 115, 14 OBR 125, 130, 470 N.E.2d 211, 216, citing *United States v. Ballard* (C.A.5, 1978), 586 F.2d 1060, 1063, and *United States v. Bera* (C.A. 11, 1983), 701 F.2d 1349, 1364. We therefore reject Bays's contention that Savage, by informing him of the possible penalties he faced, rendered Bays's otherwise voluntary confession inadmissible.

Bays, 87 Ohio St.3d at 21-23.

The issue of "voluntariness" of a confession is a legal question for federal court, not a factual question on which state conclusion is presumed to be correct. See *Miller v. Fenton*, 474 U.S. 104, 110 (1985)(citations omitted). Apart from being voluntary, the *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] waiver must also be "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Smith v. Mitchell*, 567 F.3d 246, 257 (6th Cir. 2009), quoting *Colorado v. Spring,* 479 U.S. 564, 573 (1987).

In *Garner v. Mitchell*, the Sixth Circuit summarized the federal law governing federal habeas corpus claims arising out of the United States Supreme Court's decision in *Miranda* as follows:

> [A habeas petitioner] has the burden of establishing that, under the totality of the circumstances, he did not knowingly and intelligently waive his rights before speaking to the police. *Clark v. Mitchell*, 425 F.3d 270, 283 (6th Cir. 2005). "We are also mindful that in a habeas proceeding the petitioner 'has the burden of establishing his right to federal habeas relief . . . .'" *Caver v. Straub*, 349 F.3d 340, 351 (6th Cir. 2003) (quoting *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001)). Under this inquiry, we examine "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Edwards v. Arizona*, 451 U.S. 477, 482 (1981). The relevant question is not whether the "criminal suspect [knew] and [understood] every possible consequence of a waiver of the Fifth Amendment privilege," but rather whether the "suspect [knew] that he [could] choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Colorado v. Spring*, 479 U.S. 564, 574 (1987).
>
> . . .
>
> It is well-established [sic], in this circuit and others, that mental capacity is one of many factors to be considered in the totality of the circumstances analysis regarding whether a *Miranda* waiver was knowing and intelligent. Thus, diminished mental capacity alone does not prevent a defendant from validly waiving his or her *Miranda* rights. [Citations omitted.] Rather, that factor must be viewed alongside other factors, including evidence of the defendant's conduct during, and leading up to the interrogation.

Garner v. Mitchell, 557 F.3d 257, 260-61, 264-65 (6th Cir. 2009). The court explained that the original purpose of the *Miranda* decision was to '"reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation.'" *Id*. at 262, *quoting New York v. Quarles*, 467 U.S. 649, 656 (1984). As the Seventh Circuit Court of Appeals has explained:

> The relevant constitutional principles are aimed not at protecting people from themselves but at curbing the abusive practices by public officers . . . . [T]he knowledge of the police is vital. If they have no

> reason . . . to think that the suspect doesn't understand them, there is nothing that smacks of abusive behavior. It would seem to follow that the question is not whether if [a defendant] were more intelligent, informed, balanced, and so forth he would not have waived his Miranda rights, but whether the police believed he understood their explanation of those rights; more precisely, whether a reasonable state court judge could have found that the police believed this.

Rice v. Cooper, 148 F.3d 747, 750-51 (7th Cir. 1998), *citing Connelly*, 479 U.S. at 161-62. The Sixth Circuit has softened the harshness of *Connelly*, however, suggesting that if it is apparent that because of illness, insanity, or mental retardation a suspect is incapable of rationally waiving his *Miranda* rights, an officer's calculated, conscious effort to extract a waiver from him would be an abusive practice. *Garner*, 557 F.3d at 263 n.1. However, "[t]he underlying police-regulatory purpose of *Miranda* compels that [the] circumstances [surrounding the waiver of rights] be examined, in their totality, primarily from the perspective of the police." *Garner*, 557 F.3d at 263.

The fact that police misrepresent evidence against a defendant, while relevant to the totality of the circumstances test, is insufficient to make an otherwise voluntary confession inadmissible. *Frazier v. Cupp.* 394 U.S. 731, 739 (1969). Under some circumstances, promises of leniency may be coercive. See *United States v. Johnson,* 351 F.3d 254, 261 (6th Cir. 2003).

Mr. Bays challenges the admissibility of his confession on essentially two grounds: first, that it was coerced by promises of lenient treatment and second, that he has mental disabilities which interfered with his ability to voluntarily waive his rights. However, the transcript of the suppression hearing and the recordings of Detective Savage's interviews of Mr. Bays do not support Mr. Bays' arguments. Indeed, when the totality of the circumstances are considered, it is clear that Mr. Bays voluntarily waived his *Miranda* rights and voluntarily confessed to killing Mr. Weaver.

Det. Savage testified at the February 24, 1994, motion to suppress hearing as follows.

On November 16, 1993, he went to Mr. Bays' home to ask him to come to the police department to answer questions about Mr. Weaver's death and he transported Mr. Bays to the department in a police car. Tr. Vol. 1 at 4-5. Det. Savage did not place Mr. Bays under arrest, he did not put handcuffs on Mr. Bays, Mr. Bays willingly went to the department, and Mr. Bays was free to leave at any time. *Id.* Prior to questioning Mr. Bays, Det. Savage advised Mr. Bays of his rights, Mr. Bays said that he understood his rights, and Mr. Bays signed a Constitutional Pre-Interview Form. *Id.* at 5-6; App. Vol. 18 at 2. At that time, Mr. Bays told Det. Savage that he had been at Mr. Weaver's home, had smoked a couple of cigarettes, had a cup of coffee, and left. Tr. Vol. 1 at 7. After Mr. Bays spoke to other officers about working with a task force on drug cases, Det. Savage took Mr. Bays home. *Id.*

On November 19, 1993, after receiving a tip from an anonymous source about Mr. Bays' involvement in Mr. Weaver's murder, Det. Savage and Det. Daniel Donahue went to Mr. Bays' home to speak with him and bring him to the police station. *Id.* at 8. Det. Donahue informed Mr. Bays of his *Miranda* rights which Mr. Bays stated he understood. *Id.* at 9-10. At 7:09 p.m., Mr. Bays signed a Constitutional Rights Pre-Interview Form on which he indicated he understood and waived his rights, that he was able to read and write, and that he had a tenth grade education. *Id.* at 10; App. Vol. 18 at 3, 108 [duplicate]; see also, App. Vol. 18 at 4. Det. Savage then told Mr. Bays that he knew that Mr. Bays had committed a murder but that he did not want Mr. Bays to confess to anything that he didn't do and that withholding the truth could only hurt him and not benefit him. Tr. Vol. 1 at 10-11. During the interrogation, Det. Savage described to Mr. Bays the possible penalties for different crimes such as aggravated murder, murder, manslaughter, and involuntary manslaughter. Tr. Vol. 1 at 10-11; 23-24. Det. Savage did not tell Mr. Bays that if he cooperated

and confessed he would not face the death penalty or that he could possibly get parole after serving eight years. *Id.* at 24-25.

Det. Donahue testified at the suppression hearing as follows. Det. Donahue participated in the November 19, 1993, interrogation of Mr. Bays, that prior to interrogating Mr. Bays he advised Mr. Bays of his rights which Mr. Bays stated he understood and waived, and that Mr. Bays signed the Constitutional Rights Pre-Interview Form. *Id.* at 42-44. Mr. Bays signed the Form at 7:08 p.m. and he and Det. Savage recorded Mr. Bays confession beginning at 7:20 p.m. *Id.* at 45; see also, App. Vol. 18 at 4. Neither Det. Donahue nor Det. Savage promised Mr. Bays anything if he confessed or cooperated and neither of them threatened Mr. Bays if he did not cooperate. Tr. Vol. 1 at 46-47. Det. Savage raised his voice and slammed his had on the table while interrogating Mr. Bays, but he did not yell at Mr. Bays or threaten him. *Id.* at 47-48. Det. Savage did discuss with Mr. Bays the different levels or degrees of homicide. *Id.* at 50.

At the time Dets. Savage and Donahue interrogated him, Mr. Bays was twenty-eight years old, had a tenth grade education, and had prior experience with the police because he had been arrested on previous occasions, *Id.* at 16, 18. In addition, Mr. Bays did not exhibit any signs that he was under the influence of alcohol, depressants, or any type of drug or any signs that he was impaired whatsoever, and he was able to articulate the facts of the crime. *Id.* at 20.

Mr. Bays, who had prior involvement with the police, stated that he understood his *Miranda* rights and waived them both verbally and in writing on two occasions during the investigation of Mr. Weaver's murder, but more importantly, on November 19, 1993, prior to his interrogation and subsequent confession. The length of the interrogation that led to Mr. Bays' confession was very short—about twelve minutes—as reflected by the facts that Mr. Bays signed

the Constitutional Rights Pre-Interview Form at 7:08 p.m. and began his taped confession at 7:20 p.m.. During the interrogation, neither Det. Savage or Det. Donahue used any methods of coercion and neither of them threatened Mr. Bays. Although Det. Savage admittedly reviewed with Mr. Bays the penalties for the various types of homicides, neither he nor Det. Donahue made any promises of leniency in exchange for Mr. Bays' confession. Although Mr. Bays' IQ is in the borderline intellectual functioning range, see, *e.g.,* Tr. Vol. 3 at 381; App. Vol. 18 at 151, as noted above, he stated on the Pre-Interview Form that he is able to read and write and that he has a tenth grade education. Additionally, Mr. Bays did not appear to be under the influence of any substances, did not exhibit any signs of being impaired, and was articulate. Assuming *arguendo* that Det. Savage misrepresented to Mr. Bays the evidence that the police had against him, that fact is relevant only for purposes of evaluating the totality of the circumstances and does not in and of itself make Mr. Bays' confession involuntary.

This Court concludes that the totality of the circumstances establishes that Mr Bays November 19, 1993, confession was voluntary.

In Subclaim C of his Fifth Ground for Relief, Mr. Bays argues that the trial court denied his right to due process when it refused to reopen the suppression hearing. The Ohio Supreme Court rejected this claim on direct appeal as follows:

> Motion for New Suppression Hearing
>
> Bays also argues under his second proposition that the trial court denied him due process by denying his request for a *second* suppression hearing at which he could present evidence of his mental deficits.
>
> Eighteen months after the trial court denied the motion to suppress, and less than a week before the scheduled trial date, the defense filed a renewed motion to suppress the confession. The motion requested

> a new hearing at which defense experts could testify on Bays's cocaine dependency, intellectual capacity, possible brain damage, and the effect of these things on the voluntariness of his confession. The defense also filed a motion for continuance grounded in the need to reopen the suppression hearing. (The defense had already requested and received two continuances.) On November 29, the court denied a continuance and a new hearing.
>
> We do not find that the trial court abused its discretion in denying Bays a second chance to litigate the voluntariness of his confession. We therefore overrule Bays's second proposition of law.

Bays, 87 Ohio St.3d at 23-24.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill*, 470 U .S. 532, 542 (1985), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself. *United States v. Raddatz,* 447 U.S. 667, 679 (1980). A court's authority to consider anew a suppression motion previously denied is within its sound judicial discretion. See *Raddatz*, 447 U.S. at 678 n. 6, citing, *Gouled v. United States*, 255 U.S. 298, 312 (1921), abrogated on other grounds, *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Rouse v. United States*, 123 U.S.App.D.C. 348, 359 F.2d 1014 (1966).

The trial court held the hearing on Mr. Bay's motion to suppress on February 24, 1994, and on May 23, 1994, the court issued its decision denying Mr. Bays' motion. Tr. Vol. 1 at 2; App. Vol. 1 at 126-28. Some eighteen months later, on November 28, 1995, Mr. Bays moved the court to reopen the supression hearing for the purpose of introducing "new evidence" about his dependence on alcohol, marijuana, and crack cocaine and its effect on his ability to make a knowing,

voluntary, and intelligent waiver of his rights during his confession. App. Vol. 4 at 162-64. The court denied Mr. Bays' motion on November 29, 1995. Tr. Vol. 1, Transcript of Nov. 29, 1995, hearing.

As noted above, at the February 24, 1994, hearing, the evidence established that Mr. Bays has a tenth grade education, is able to read and write, verbally waived his *Miranda* rights, and signed a waiver form on November 16, 1993, and again on November 19, 1993.

At the time of the supression hearing, the trial court was aware of the fact that Mr. Bays was involved in drug use. Specifically, Det. Savage testified at the hearing that on November 16, 1993, Mr. Bays was at the police station for awhile after the interview because "[h]e spoke to another detective from the task force about working for them because he said he knew a good amount of people selling drugs." Tr. Vol. 1 at 7. However, the undisputed evidence established that at the time Dets. Savage and Donahue interrogated Mr. Bays and Mr. Bays confessed to killing Mr. Weaver, Mr. Bays did not appear to be under the influence of any drug or other substance, was articulate, and did not exhibit any impairment. Moreover, at the hearing on his motion to suppress, Mr. Bays had to opportunity to cross-examine both Det. Savage and Det. Donahue at length. *Id.* at 15-37; 38; 47-53

Contrary to Mr. Bays' argument in his Traverse that the Ohio Supreme Court unreasonably determined the facts in light of the evidence presented, (Doc. 108), this Court concludes that on February 24, 1994, Mr. Bays received a full and fair hearing on his motion to suppress. Accordingly, the trial court did not violate Mr. Bays' due process rights when it declined to reopen the suppression hearing.

The Ohio Supreme Court's finding that the trial court did not err by failing to

suppress Mr. Bays' confession or by declining to reopen the suppression hearing is not contrary to nor an unreasonable application of, clearly established federal law. Therefore, Mr. Bays' Fifth Ground for Relief should be overruled.

Ground Six

Mr. Bays argues in his Sixth Ground for Relief that the trial court erred when it accepted his waiver of his right to a jury trial. Mr. Bays' position is that he did not waive his right knowingly, intelligently, and voluntarily. Mr. Bays raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> Bays signed a written jury waiver pursuant to R.C. 2945.05. After his counsel submitted the waiver to the trial court, the trial judge had the following exchange with Bays:
>
> "JUDGE GRIGSBY: Now, Mr. Bays, I want to explain to you, you have a right to a Jury Trial of 12 people. That is your Constitutional right. If you sign this waiver of Jury Trial and begin the trial, there is no changing. You understand after a trial is begun, then you cannot go back and ask for a Jury?
>
> "THE DEFENDANT: Yes.
>
> "JUDGE GRIGSBY: Do you understand that?
>
> "THE DEFENDANT: Yes.
>
> "JUDGE GRIGSBY: Now, I want to ask you, you are not under any drugs or alcohol or anything like that this morning, are you?
>
> "THE DEFENDANT: No.
>
> "JUDGE GRIGSBY: This waiver must be made knowingly, and by that, I mean, you understand what you are doing. You are giving up your right to a Jury, and in a case like this, a Jury's verdict must be

unanimous. In other words, if you convince, or your Counsel convinces one Juror not to convict you, there will at least be a mistrial and retrial.

"Do you understand you are giving up that right of the Jury?

"THE DEFENDANT: Yes, I understand that.

"JUDGE GRIGSBY: And is there any-well, just tell me why you want to give up the Jury.

"THE DEFENDANT: My Counsel feels it's best.

"JUDGE GRIGSBY: Now, are you doing this voluntarily, of your own free will?

"THE DEFENDANT: I don't know which way I want to go really. With the Jury, I don't figure it was a fair pick.

"JUDGE GRIGSBY: Well, regardless of whether you waive a Jury, whether it's this panel or another panel, are you giving up that right to a Jury Trial by your own volition?

"THE DEFENDANT: Yes.

"JUDGE GRIGSBY: Then the rule says you must sign that in open Court. I'm going to give you an unsigned copy and I want you to read it. If you have any questions, now is the time to ask them."

Bays then signed another waiver, and the judge accepted it.

In his first proposition of law, Bays contends that his waiver of trial by jury was not voluntary, knowing, and intelligent, and was therefore invalid.

A jury waiver must be voluntary, knowing, and intelligent. *State v. Ruppert* (1978), 54 Ohio St.2d 263, 271, 8 O.O.3d 232. 236, 375 N.E.2d 1250, 1255. Waiver may not be presumed from a silent record; however, if the record shows a jury waiver, the verdict will not be set aside except on a plain showing that the waiver was not freely and intelligently made. *Adams v. United States ex rel McCann* (1942) 317 U.S. 269, 281, 63 S.Ct. 236, 242-43, 87 L.Ed. 268, 275-76. Moreover, a written waiver is presumptively voluntary, knowing, and intelligent. *United States v. Sammons* (C.A.6, 1990), 918 F.2d

592, 597 cf. *United States v. Martin* (C.A. 6 1983), 704 F.2d 267, 274, fn.8.

Voluntariness

Arguing that his waiver was not voluntary, Bays points out that he told the trial judge he was waiving because "[m]y counsel feels it's best," and that he did not "know which way [he] want[ed] to go." However, that Bays cited counsel's advice as a reason for waiving a jury does not suggest involuntariness. If anything, having the advice of counsel would enhance the voluntariness of his decision.

Bays cites his own statement that he did not really know what he wanted as casting doubt on the voluntariness of his decision. Nevertheless, when asked if he was giving up his right to trial by jury "by your own volition," Bays said, "Yes." Bays asks us to discount this answer because, with an IQ of seventy-four, he could not be expected to know what "volition" meant. We are not persuaded. In context the word "volition" was comprehensible, coming (as it did) immediately after the preceding question: "Now, are you doing this voluntarily, of your own free will?"

Bays has not shown that his jury waiver was not voluntary.

Knowingness and Intelligence

Bays contends that his waiver was not knowing and intelligent, in that he did not understand the nature of the jury trial right and consequences of waiving it. During the colloquy, he stated: "With the Jury, I don't figure it was a fair pick." Bays argues that he was waiving a jury that he believed would be unfair, and thus did not understand that he was actually waiving the right to trial by a *fair* jury.

A waiver is the intentional relinquishment of a known right or privilege. *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466. Hence, a defendant must have some knowledge of the nature of the jury trial right to make a valid waiver. *Martin, supra,* 704 F.2d at 273.

However, a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it. *Id*. For instance, the United States Court of Appeals for the Sixth Circuit has said: "A defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is

composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and * * * a judge alone will decide guilt or innocence should he waive his jury trial right." *Id.*, 704 F.2d at 273. Indeed, that may be more than the Constitution requires to render a waiver knowing and intelligent. See *United States v. Sammons, supra*, 918 F.2d at 597. At any rate, a defendant need not be specifically told that he has a right to an *impartial* jury before his jury waiver can be deemed knowing and intelligent.

Similarly, Bays also contends that his waiver was not knowing and intelligent because the trial court did not explain that a single juror can block a death recommendation, see *State v. Springer* (1992), 63 Ohio St.2d 167, 586 N.E.2d 96, and that a death sentence recommended by a jury could not be reimposed if reversed on appeal (as was then the case; see *State v. Penix* [1988], 32 Ohio St.3d 369, 513 N.E.2d 744, and R.C. 2929.06[B]). Again, however, these are not aspects of the jury trial right that a defendant must know about before he can knowingly and intelligently waive a jury trial. *Martin, supra*. The trial court is not required to inform the defendant of all the possible implications of waiver. See *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus.

Bays further contends that his waiver was not knowing because the trial judge misinformed him as to the burden of persuasion in a jury trial. In explaining to Bays that "a Jury's verdict must be unanimous," the judge stated: "In other words, if you convince, or your Counsel convinces one Juror not to convict you, there would at least be a mistrial and a retrial."

According to Bays, the trial judge's words implied that, if Bays asked for a jury trial, he would have to persuade the jurors of his innocence. Thus, he contends that the trial court affirmatively misinformed him about the nature of the jury trial right, a circumstance that generally invalidates a jury waiver. See *State v. Ruppert, supra*; *State v. Haight* (1994), 98 Ohio App.3d 639, 649 N.E.2d 294.

However, the topic the judge was talking about here was the unanimity required for a jury verdict, not the allocation of the burden of proof. One could draw an incorrect inference about the burden of proof by minutely parsing the trial judge's words, but we find it hard to believe that a defendant would draw any inference at all about the burden of proof from hearing these particular words spoken, in a context where the burden of proof was not the subject under

> discussion. Thus, we do not find that the trial court affirmatively misinformed Bays about the nature of the jury trial right.
>
> It does not plainly appear from the record that Bays's jury waiver was anything less than voluntary, knowing, and intelligent. Consequently, his first proposition of law fails.

Bays, 87 Ohio St.3d at 18-21.

Trial by jury is fundamental to American criminal jurisprudence. See *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968). The purpose of the jury trial is to prevent governmental oppression and arbitrary law enforcement. *Id.* at 155. The jury trial gives the defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Apprendi v. New Jersey,* 530 U.S. 466, 548 (2000), *citing, Duncan,* 391 U.S. at 156. Trial by jury may be waived only where the defendant's waiver is voluntary, knowing, and intelligent. See *Patton v. United States,* 281 U.S. 276 (1930), abrogated on other grounds, *Williams v. Florida,* 399 U.S. 78 (1970).

A jury trial may be waived upon the express and intelligent consent of the defendant. *Sowell v. Bradshaw*, 372 F.3d 821, 831 (6th Cir. 2004), citing *Patton,* 281 U.S. at 312-13. The waiver of this important right is effective only where it is not a product of duress or coercion. *United States v. Martin,* 704 F.2d 267, 273 (6th Cir. 1983)(citations omitted). Although the courts will not presume a waiver from a silent record, the burden of demonstrating that a waiver was not valid lies with the defendant who made the waiver. *Id.*, *citing Adams v. United States ex rel. McCann,* 317 U.S. 269, 281 (1942). A colloquy regarding the waiver is not constitutionally required. *Sowell,* 372 F.3d at 832, citing *United States v. Martin*, 704 F.2d 267 (6th Cir. 1983). Similarly, a written waiver is not constitutionally required. *Fitzgerald v. Withrow,* 292 F.3d 500, 504 (6th Cir. 2002)(citation omitted). However, a written waiver is presumptively voluntary, intelligent, and knowing. *State*

v. Fitzpatrick, 102 Ohio St. 3d 321, 326 (2004), citing *United States v. Sammons,* 918 F.2d 592, 597 (6th Cir. 1990).

Under Ohio law, the waiver must be in writing and made in open court; there must be some evidence in the record that the defendant while in the courtroom acknowledged the jury waiver to the trial court. *State v. Lomax,* 114 Ohio St. 3d 350 (2007)(interpreting Ohio Revised Code § 2945.04). In the absence of a valid waiver, a three-judge panel lacks jurisdiction to try a capital case. *State v. Pless,* 74 Ohio St. 3d 333, 339 (1996).

This Court's review of the record in this case reveals that the Ohio Supreme Court accurately described the facts surrounding Mr. Bays' jury trial waiver.

First, Mr. Bays signed a jury trial waiver. In fact, the record indicates that Mr. Bays signed two waivers, one prior to the commencement of open court proceedings and the second in open court after engaging in a dialogue with the court. Tr. Vol. 2 at 4-5; App. Vol. 4 at 208.

The trial court explained to Mr. Bays that he had a constitutional right to a jury trial and Mr. Bays verbalized his understanding of that right. Tr. Vol. 2 at 5. In addition, Mr. Bays denied that he was under the influence of any drugs or alcohol, verbalized his understanding of the requirement that a jury's verdict must be unanimous, acknowledged that he had discussed the waiver with counsel, and acknowledged that he was giving up his jury trial right voluntarily. *Id.* at 5-6.

Mr. Bays argues that the trial court erred when it accepted his waiver because he had expressed some uncertainty about waiving a jury trial. After it explained his jury trial right to Mr. Bays, the court asked Mr. Bays why he was giving up his right to a jury and Mr. Bays essentially responded that he was following the advice of his counsel. *Id.* at 6. The court then asked Mr. Bays

if he was waiving his right "voluntarily, of your own free will?" and although Mr. Bays initially responded that he didn't "know which way I want to go really", he subsequently told the court that he was voluntarily waiving a jury trial. *Id.*

Mr. Bays also argues that his waiver was not valid because the court's use of the word "volition" was confusing. While it is true that the trial court did ask Mr. Bays if is was "giving up that right to a Jury Trial by your own volition?", *Id.*, the court asked that question only after it had asked Mr. Bays if he understood his right to a jury trial, if he understood that he was giving up that right, and whether he was doing so voluntarily. When reviewed in the entire context of its dialogue with Mr. Bays, the court's use of the word "volition" was understandable and not a cause of confusion.

Mr. Bays argues that his waiver was invalid because the trial court misled him as to the burden of proof in a criminal trial. Mr. Bays points to the following language the court used:

> This waiver must be made knowingly, and by that, I mean, you understand what you are doing. You are giving up your right to a Jury, and in a case like this, a Jury's verdict must be unanimous. In other words, if you convince, or your Counsel convinces one Juror not to convict you, there would at least be a mistrial and a retrial.
>
> Do you understand you are giving up that right of the Jury?

Id. Mr. Bays claims that the court misstated the burden of proof implying that he had to convince the jurors that he was innocent rather than the state having to prove that he was guilty beyond a reasonable doubt. In the context of its dialogue with Mr. Bays, the court was explaining to him the unanimity requirement—that is, in order to return a verdict, all of the jurors had to agree with the verdict and if only one juror did not agree, the jury could not return a verdict and the court would declare a mistrial. Contrary to Mr. Bays' argument, the court was not discussing with him the

burden of proof in a criminal trial.

Mr. Bays also argues that his waiver was invalid because the trial court failed to inform him that he had a right to a fair jury, that a single juror could prevent a recommendation for death, and that a sentence of death that is reversed on appeal could not be reinstated. First, as noted above, a colloquy regarding the waiver is not constitutionally required. Second, Mr. Bays has not cited, nor has this Court found, any federal law, let alone any that is firmly established by Supreme Court precedent, that stands for the proposition that a trial court is required to inform a defendant of all possible implications of a jury trial waiver.

Mr. Bays argues further that the trial court knew that his jury waiver was not valid and that the court's knowledge is reflected by the fact that it hurried to swear in the first witness so that the trial would officially begin and he could not change his mind about his waiver. That assertion is simply not supported by the record. First, as noted, Mr. Bays signed two waivers, the first prior prior to the commencement of open court proceedings and the second in open court after engaging in a dialogue with the court. Second, Mr. Bays advised the trial court that he had consulted with counsel about the jury waiver. Third, the court engaged in a dialogue with Mr. Bays during which the court explained to him his right to a jury trial and inquired as to his understanding of that right as well as the voluntariness of his waiver. Finally, Mr. Bays signed the waiver in open court at 10:50 a.m. and court recessed for forty minutes, until 11:30 a.m., at which time the court swore-in the first witness. Tr. Vol. 2 at 7-8. Those factors do not support Mr. Bays' claim that the court hurried to begin the trial so that he could not withdraw his jury waiver.

A review of the transcript reveals that after Mr. Bays signed the jury waiver in open court, the prosecutor requested that the court not discharge the jury panel until the trial began "in

case there is a difficulty" and that once the trial began, "the Jury could be brought in and they could be told that their being here was not in vain." *Id.* at 7. The court responded:

> What I was going to suggest, when the other Judge – the other Judges get here, we take the Bench, we waive – reserve your opening statement until this afternoon. You, too, can reserve your opening statement until this afternoon. They can swear and put on a witness, if they ask no more than their name and where they live and so forth. The trial will have begun, so there will be no backing out of your waiver of the Jury.
>
> Okay. So we shall recess until the panel can meet.

Id.

First, it is clear from the context of the court's comments that the purpose of waiving the opening statements and swearing in a witness was so that the trial would begin and the court could then release the jury. Its purpose was not to prevent Mr. Bays from changing his mind about waiving his jury trial right. More importantly, however, the court made it clear that once the trial started, Mr. Bays would not be able to withdraw his jury waiver. Nevertheless, in spite of the court's advising Mr. Bays about the implication of starting the trial as well as the forty-minute recess, Mr. Bays made no attempt to withdraw his waiver nor did he object to the trial commencing at the end of that recess.

Finally, Mr. Bays argues in his Traverse, (Doc. 108), that the decisions of the Ohio courts which rejected his jury waiver claim were objectively unreasonable and therefore *Cullen, supra,* does not bar this Court from considering the testimony taken during the evidentiary hearing before this Court. However, based on the colloquy which the trial court held with Mr. Bays as well as the fact that Mr. Bays signed a waiver of his jury trial right (twice) with the advice of counsel, this Court concludes that the Ohio court's findings as to Mr. Bays' jury waiver are not objectively unreasonable.

The Ohio Supreme Court's finding that Mr. Bays' waiver of his jury trial was knowing, intelligent, and voluntary is not contrary to nor an unreasonable application of, clearly established federal law. Therefore, Mr. Bays' Sixth Ground for Relief should be rejected.

Ground Seven

Mr. Bays essentially argues in support of his Seventh Ground for Relief that the trial court should have suppressed his November 19, 1993, confession and that without his confession and the evidence discovered as a result of his confession, there was insufficient evidence to convict him of aggravated murder. Mr. Bays raised this claim on direct appeal and the Ohio Supreme Court rejected it stating:

> In his ninth proposition, Bays contends that, if we find his confession inadmissible, we must find that the *remaining* evidence is legally insufficient to sustain his conviction. Because we have found the confession admissible, this proposition of law is overruled as moot.

Bays, 87 Ohio St.3d at 24.

Mootness is "the doctrine of standing set in a time frame." *Diaz v. Kinkela*, 253 F.3d 241, 243 (6th Cir. 2001), quoting *Arizonians for Official English v. Arizona,* 520 U.S. 43, 68 n. 22 (1997). Therefore, for a case to continue through the judicial system, it must continually possess what was required for the case to begin — a justiciable case or controversy. See *Kinkela*, *supra*, citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

"Moot questions require no answer." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), quoting *Missouri, Kansas & Texas R. Co. v. Ferris*, 179 U.S. 602, 606 (1900). Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract

propositions. *Rice, supra,* citing *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893).

Mr. Bays' Seventh Ground for Relief relies entirely on the premise that the trial court should have suppressed his November 19, 1993, confession. However, this Court determined in its analysis of Mr. Bays' Fifth Ground for Relief that the trial court did not err by failing to suppress his confession. Therefore, because the trial court properly admitted Mr. Bays' confession, his argument that in the absence of his confession there was insufficient evidence to sustain his conviction of aggravated murder is moot. In other words, the question of whether, in the absence of his confession, there was sufficient evidence to convict Mr. Bays of aggravated murder is a question that does not require an answer. Therefore, the Ohio Supreme Court properly determined that Mr. Bays' claim that, if his confession was inadmissible, the remaining evidence is legally insufficient to sustain his conviction, was moot.

The Ohio Supreme Court's decision is not contrary to nor an unreasonable application of, clearly established federal law and Mr. Bays' Seventh Ground for Relief should be overruled.

Ground Eight

In his Eighth Ground for Relief, Mr. Bays argues that the trial court violated his Sixth Amendment right to a fair trial when it denied his motion to disclose the identity of the police informant. Mr. Bays raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

In his sixth proposition of law, Bays contends that the trial court should have ordered the state to disclose the identity of the informant who told Savage where Bays had discarded the shirt, glove, and wallet.

At the suppression hearing Savage testified that, on November 19, "I received a phone call * * * from an anonymous caller who had described the homicide to me. They [*sic*] described how Mr. Weaver was killed, what instruments were used to murder him, who had done the killing, where evidence was from the scene that had been removed and where the clothing that Mr. Bays had worn were [*sic*] placed.."

Bays filed a motion for disclosure of the caller's identity, based on *Roviaro v. United States* (1975), 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639. (Although the call to Savage was anonymous, Bays asserted that a deputy sheriff knew how to contact the caller.) The trial court denied disclosure.

Bays contends that the trial court should have ordered disclosure, or at least held an *in camera* review to determine whether the informant had information helpful to Bays's defense.

The state has a privilege to withhold from disclosure the identities of those who give information to the police about crimes. *State v. Beck* (1963), 175 Ohio St.73, 76-77, 23 O.O.2d 377, 379, 191 N.E.2d 825, 828, reversed on other grounds (1964), 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed2d 142. However, the privilege must give way where disclosure of the informant's identity would be helpful to the accused in making a defense to a criminal charge. *Id.* at paragraph two of the syllabus; see, also, *Roviaro,* 353 U.S. at 60-61, 77 S.Ct. at 628*,* 1 L.Ed.2d at 645.

In general, courts have compelled disclosure in cases involving "an informer who helped to set up the commission of the crime and who was present at its occurrence" whenever the informer's testimony may be helpful to the defense *Id.* at 61, 77 S.Ct. at 628, 1 L.Ed.2d at 645-646. For instance, *Roviaro* itself involved a controlled drug transaction between the defendant and the informant. See, also, *State v. Butler* (1984), 9 Ohio St.3d 156, 9 OBR 445, 459 N.E.2d 536; *State v. Williams* (1903), 4 Ohio St.3d 74, 4 OBR 196, 446 N.E.2d 779; *State v. Phillips* (1971), 27 Ohio St.2d 294, 56 O.O.2d 174, 272 N.E.2d 347.

In contrast, "where the informant merely provided information concerning the offense," the courts "have quite consistently held that disclosure is not required." 3 LaFave & Israel, Criminal Procedure (1984) 19, Section 23.3. Cf. *Beck,* 175 Ohio St. at 77, 23 O.O.2d at 379, 191 N.E.2d at 828 (distinguishing *Roviaro*) with *Phillips,* 27 Ohio St.2d at 299-300, 56 O.O.2d at 177, 272 N.E.2d at 350-351(distinguishing *Beck*).

Bays suggests that this case falls within the former category rather than the latter. His argument is that the informant must have been either a witness, the perpetrator, or an accomplice because he gave such detailed information; moreover, the informant must have been "more than just an observer" because he knew exactly what items Bays had thrown down the sewer, even though Bays did this at night.

We are not persuaded by this speculation. The facts Bays cites are entirely consistent with the inference that the informant learned about the crime from the killer. See *State v. Williams* (1995), 73 Ohio St.3d 153, 172, 652 N.E.2d 721, 736-737. In fact, that is the likelier scenario: Bays's statements to Detective Savage and to Larry Adkins mention no accomplice. So far as the record shows, Bays and Weaver appear to have been alone in the house.

Bays has not shown that the informant did anything more than provide information concerning the offense. Hence, the trial court did not abuse its discretion by denying disclosure.

Alternatively, Bays argues that the trial court should have conducted an *in camera* review to determine whether the informant's identity would have been helpful. See *United States v. Sharp* (C.A. 6, 1985), 778 F.2d 1182, 1187. FN2. We disagree. "An in camera hearing is necessary only when 'the defendant makes an initial showing that the confidential informant may have evidence that would be relevant to the defendant's innocence.' " *State v. Allen* (1990), 27 Wash. App. 41, 48, 615 P.2d 526, 531, quoting *State v. Potter* (1980), 25 Wash.App. 624, 628, 611 P.2d 1282, 1284. Bays made no such showing here.

> FN2 At a November 29, 1995 hearing, one of the trial judges said that he would speak *in camera* with the deputy who allegedly knew the informant's identity, but there is no record of any such *in camera* interview.

Bays's sixth proposition is overruled.

Bays, 87 Ohio St.3d at 24-26.

In *Roviaro v. United States*, 353 U.S. 53 (1957), the Court held, after discussing the history of the confidential informer privilege, that “[w]here the disclosure of an informer's identity ... is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” *Id.* at 60. A court faced with the issue must “balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense.” *Id.* at 62.

In *McCray v. Illinois*, 386 U.S. 300, 311 (1967), the Court observed:

> What *Roviaro* thus makes clear is that this court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake.

Although there is no fixed rule about disclosure of an informant’s identity, as *Roviaro* makes clear, there may be some instances where the Constitution requires disclosure. For example, disclosure has generally been required when “the informer was an active ‘participant in the events underlying the defendant’s potential criminal liability’”. *United States v. Sharp*, 778 F.2d 1182, 1186 n.2 (6th Cir. 1985). Mr. Bays couches his “informant disclosure” claim in terms of his Sixth Amendment right to confront witnesses against him.

The Sixth Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]” U.S. Const. amend. VI. Here, the Confrontation Clause is not implicated because the informant did not testify at trial. By its terms the Confrontation Clause applies only to the witnesses, and “a defendant has

no right to confront an informant who provides no evidence at trial." *United States v. Francesco*, 725 F.2d 817, 822 (1st Cir.1984); accord *Cooper v. California*, 386 U.S. 58, 62 n. 2, (1967) ("Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront the witnesses against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit."); *United States v. Porter*, 764 F.2d 1, 9 (1st Cir.1985); *United States v. Morgan*, 757 F.2d 1074, 1076 (10th Cir.1985); *McAllister v. Brown*, 555 F.2d 1277, 1278 (5th Cir.1977) (per curiam).

It is true that the introduction of testimonial hearsay by a witness not testifying at trial may amount to a denial of the right to confront the witnesses against a defendant. *See Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). However, petitioner has identified no hearsay statements made by the confidential informant that were introduced at trial. The mere fact that Det. Savage received a telephone call from an anonymous caller who described how Mr. Bays killed Mr. Weaver and what Mr. Bays had done with certain items did not place before the three-judge panel "testimony" by the informant in Mr. Bays' case within the meaning of the Sixth Amendment. Because the informant did not testify at Mr. Bays' trial, and because none of the informant's out-of-court statements were admitted at trial, (see Tr. Vol. 3 at 239-327), the informant was not a "witness against him" under the Sixth Amendment, and Mr. Bays was not denied his Confrontation Clause rights by the trial court's failure to order disclosure of the confidential informant.

Aside from his Sixth Amendment Confrontation claim, Mr. Bays seems to argue that the identity of the informant was crucial to his defense because he could only have come by the information he gave Det. Savage if he was involved in the crime or if he witnessed the crime. However, mere speculation that a witness may have evidence that is helpful to the defendant's case

does not warrant disclosure under *Roviaro*. *Sharp,* 778 F.2d at 1186 (citation omitted).

The Ohio Supreme Court's finding that Mr. Bays was not entitled to disclosure of the anonymous caller's identity is not contrary to nor an unreasonable application of, clearly established federal law. Therefore, Mr. Bays' Eighth Ground for Relief should be rejected.

Ground Eleven

In his eleventh ground for relief, Mr. Bays argues that the cumulative effect of the constitutional errors he has set forth in this Petition violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *Delaware v. VanArsdall*, 475 U.S. 673, 681 (1986). Indeed, there can be no such thing as an error-free, perfect trial. *United States v. Hastings,* 461 U.S. 499, 508-09 (1983).

The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir.2002). "[W]e have held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief." *Moore v. Parker,* 425 F.3d 250, 256 (6th Cir. 2005), *cert. denied. sub nom. Moore v. Simpson,* 549 U.S. 1027 (2006), citing *Scott v. Elo,* 302 F.3d 598, 607 (6th Cir. 2002), *cert. denied,* 537 U.S. 1192 (2003) and *Lorraine, supra.*

First, there were no errors of a constitutional magnitude which can be accumulated. for purposes of this Ground. Moreover, Mr. Bays' "cumulative error" is not cognizable in federal habeas. Therefore, his Eleventh Ground for Relief should be rejected.

Conclusion

Mr. Bays' Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, (Doc. 16), should be denied. It is therefore respectfully recommended that judgment be entered in favor of the Respondent and against the Petitioner dismissing the Petition with prejudice.

February 18, 2012.

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

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), ©), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

J:\Death Penalty\Bays\Bays Merits R&R.wpd

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by State v. Sanders, Ohio App. 10 Dist., July 22, 2010

87 Ohio St.3d 15
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
BAYS, Appellant.

No. 98–520.
|
Submitted May 18, 1999.
|
Decided Oct. 13, 1999.

Synopsis

Defendant was convicted in the Court of Common Pleas, Greene County, of aggravated murder with a death specification, and sentenced to death. Defendant appealed, and the Court of Appeals affirmed. Defendant appealed, and the Supreme Court, Alice Robie Resnick, J., held that: (1) defendant's waiver of right to jury trial was knowing, intelligent, and voluntary; (2) defendant's confession was voluntarily obtained; (3) trial court acted within its discretion by refusing to compel disclosure of identity of police informant; (4) claim that probate judge could not serve on three-judge panel which presided over trial was waived; (5) defendant did not receive ineffective assistance of trial or appellate counsel; (6) sentencing errors by trial court and Court of Appeals could be cured during Supreme Court's independent review; and (7) death sentence was appropriate and proportionate.

Affirmed.

****1131 *15** On November 15, 1993, appellant, Richard Bays, robbed and murdered Charles Weaver. Bays was convicted of aggravated murder with a death specification and sentenced to death.

Seventy-six-year-old Charles Weaver lived in Xenia with his wife Rose. On November 15, 1993, Weaver's daughter, Betty Reed, went to her parents' house to see if they needed anything. Betty Reed and Rose Weaver decided to do some shopping and left the house together sometime between noon and 12:30 p.m. Between 1:30 ****1132** and 2:30 that afternoon, Iris Simms (who lived near the Weavers' house) saw a slim man in his late twenties, with shoulder-length brown hair, walk onto Weaver's porch and approach the door. [1]

Howard Hargrave, an acquaintance of Richard Bays, was standing around with two other people on Xenia's Main Street that afternoon when Bays approached him, out of breath, and asked whether Hargrave "knew anyone that had any drugs." According to Hargrave, Bays appeared "nervous" and "kept looking around." Hargrave noticed a red stain on Bays's T-shirt that looked like blood.

Betty Reed drove her mother home at about 5:30 p.m., accompanied by her son Michael. Dusk had fallen, and Betty noticed that no lights were on in the house, not even "a flicker of a television set." This was unusual enough that she and her son decided to escort Mrs. Weaver inside.

Michael Reed went in first. Turning on a light, he saw his grandfather's wheelchair standing empty. He then entered the kitchen. There he found Mr. Weaver lying on the floor. Michael told his mother to call 911.

Paramedics arrived in response to the 911 call, found Mr. Weaver dead, and summoned Xenia police officers to the scene. Officers found a shattered plastic tape recorder and a large, square-shaped battery charger with blood on it. The bedroom was in extreme disarray—a "total shambles," Betty Reed later testified— with drawers pulled out and their contents dumped on the floor. The bedroom had not been in that condition when Betty Reed and Mrs. Weaver left the house that afternoon.

Weaver's body was taken to the Montgomery County Coroner's Office. The ensuing autopsy showed that Weaver had suffered two stab wounds to the chest and three incised wounds on the neck. He also had several contusions, abrasions, and lacerations on top of his head, consistent with blows from a square, blunt object. The deputy coroner conducting the autopsy concluded that Weaver died of "a stab wound to the chest and blunt impact injuries to the head."

On November 16, the day after the murder, Xenia police detective Daniel Savage decided to interview Richard Bays.

At first, Bays told Savage that he had not been at Weaver's house on the day of the murder. However, Savage told Bays that someone had seen him there and that "if his [Bays's]

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

prints matched the ones on Mr. Weaver's front door, then I [Savage] would be asking him to explain it." Bays then admitted that he had been at Weaver's house around 2:00 p.m. on November 15. He said he had coffee with Weaver, chatted, and left by 2:15.

However, an inconsistency in Bays's statement aroused Savage's curiosity. Bays told Savage that Weaver had been sitting in his wheelchair during Bays's visit and had not taken out his wallet. Yet Bays had also said that Weaver had the wallet in his back pocket during the visit. If Weaver was sitting in the wheelchair, Savage wondered, how could Bays have known that the wallet was in Weaver's back pocket?

On November 19, an informant told Savage that Weaver's killer had dropped the wallet, along with some clothing he had worn during the crime, into a storm sewer near Bays's house. Based on this information, Savage and Detective Daniel Donahue interviewed Bays again on November 19. During this interview, Bays confessed to killing Weaver.

Bays told the detectives that he went to Weaver's house after smoking some crack. He asked Weaver to lend him $30, but Weaver said he had no money. So Bays picked up the battery charger and hit ****1133** Weaver on the head with it twice. When the battery charger's handle broke off, Bays started to run away, but then Weaver shouted that he was going to call the police. Bays then picked up a portable tape recorder and went back to hit Weaver on the head with it. The blow shattered the recorder, so Bays dropped it and attacked Weaver with a sharp kitchen knife. Bays admitted that he cut Weaver's throat and thought that he stabbed him in the chest.

Weaver fell out of his wheelchair, and Bays took the wallet from Weaver's back pocket. Weaver's wallet contained $25 cash and $9 worth of food stamps. Bays ***17** then went into the bedroom and dumped out the contents of the drawers. Then he fled. He subsequently bought crack with Weaver's $25.

Bays told the detectives that he threw Weaver's wallet down the storm sewer at the northwest corner of Second and Monroe Streets, along with the T-shirt and glove he had worn during the murder. At the end of Bays's statement, Savage placed him under arrest.

When detectives searched the storm sewer at Second and Monroe, they found the T-shirt, glove, and wallet, just as Bays had said. Betty Reed, who had given that wallet to her father, identified it in court.

While held in the county jail, Bays discussed his crime with another inmate, Larry Adkins. Adkins testified that Bays had told him that he "hit [Weaver] with a battery charger" and when Weaver fell from his chair, Bays "took his wallet and * * * stabbed him in the chest. Then he was almost on his way out and he turned around and cut [Weaver's] throat * * * to make sure he wasn't alive."

The Greene County Grand Jury indicted Bays on one count of aggravated murder under former R.C. 2903.01(A) and one under former R.C. 2903.01(B). Each count carried a felony-murder death specification under R.C. 2929.04(A)(7). The indictment also charged aggravated robbery.

Bays waived a jury and was tried to a three-judge panel. On Bays's motion, with the state's acquiescence, the trial court dismissed the count charging aggravated murder under R.C. 2903.01(A). At trial, Bays offered no evidence in the guilt phase. The panel found Bays guilty of aggravated murder, R.C. 2903.01(B), and aggravated robbery. After a penalty hearing, the panel sentenced Bays to death. Bays appealed this judgment to the court of appeals, which affirmed the convictions and sentence.

The cause is now before us upon an appeal as of right.

Attorneys and Law Firms

David H. Bodiker, Ohio Public Defender, Stephen A. Ferrell and Angie Greene, Assistant State Public Defenders, for appellant.

Opinion

ALICE ROBIE RESNICK, J.

ALICE ROBIE RESNICK, J. Appellant raises fifteen propositions of law. For the reasons stated below, we find them without merit and therefore overrule all fifteen. We have also independently weighed the single aggravating circumstance against the mitigating factors and considered whether the sentence of death is disproportionate to sentences imposed in similar cases, as R.C. 2929.05(A) requires us to do. As a result of our review, we affirm Bays's convictions and sentence of death.

***18** I

Jury Waiver

Bays signed a written jury waiver pursuant to R.C. 2945.05. After his counsel submitted the waiver to the trial court, the trial judge had the following exchange with Bays:

"JUDGE GRIGSBY: Now, Mr. Bays, I want to explain to you, you have a right to a Jury Trial of 12 people. That is your Constitutional right. If you sign this waiver of Jury Trial and begin the trial, there is no changing. You understand after a ****1134** trial is begun, then you cannot go back and ask for a Jury?

"THE DEFENDANT: Yes.

"JUDGE GRIGSBY: Do you understand that?

"THE DEFENDANT: Yes.

"JUDGE GRIGSBY: Now, I want to ask you, you are not under any drugs or alcohol or anything like that this morning, are you?

"THE DEFENDANT: No.

"JUDGE GRIGSBY: This waiver must be made knowingly, and by that, I mean, you understand what you are doing. You are giving up your right to a Jury, and in a case like this, a Jury's verdict must be unanimous. In other words, if you convince, or your Counsel convinces one Juror not to convict you, there will at least be a mistrial and retrial.

"Do you understand you are giving up that right of the Jury?

"THE DEFENDANT: Yes, I understand that.

"JUDGE GRIGSBY: And is there any—well, just tell me why you want to give up the Jury.

"THE DEFENDANT: My Counsel feels it's best.

"JUDGE GRIGSBY: Now, are you doing this voluntarily, of your own free will?

"THE DEFENDANT: I don't know which way I want to go really. With the Jury, I don't figure it was a fair pick.

"JUDGE GRIGSBY: Well, regardless of whether you waive a Jury, whether it's this panel or another panel, are you giving up that right to a Jury Trial by your own volition?

"THE DEFENDANT: Yes.

"JUDGE GRIGSBY: Then the rule says you must sign that in open Court. I'm going to give you an unsigned copy and I want you to read it. If you have any questions, now is the time to ask them."

***19** Bays then signed another waiver, and the judge accepted it.

In his first proposition of law, Bays contends that his waiver of trial by jury was not voluntary, knowing, and intelligent, and was therefore invalid.

A jury waiver must be voluntary, knowing, and intelligent. *State v. Ruppert* (1978), 54 Ohio St.2d 263, 271, 8 O.O.3d 232, 236, 375 N.E.2d 1250, 1255. Waiver may not be presumed from a silent record; however, if the record shows a jury waiver, the verdict will not be set aside except on a plain showing that the waiver was not freely and intelligently made. *Adams v. United States ex rel. McCann* (1942), 317 U.S. 269, 281, 63 S.Ct. 236, 242–243, 87 L.Ed. 268, 275–276. Moreover, a written waiver is presumptively voluntary, knowing, and intelligent. *United States v. Sammons* (C.A.6, 1990), 918 F.2d 592, 597; cf. *United States v. Martin* (C.A.6, 1983), 704 F.2d 267, 274, fn. 8.

Voluntariness

Arguing that his waiver was not voluntary, Bays points out that he told the trial judge he was waiving because "[m]y counsel feels it's best," and that he did not "know which way [he] want[ed] to go." However, that Bays cited counsel's advice as a reason for waiving a jury does not suggest involuntariness. If anything, having the advice of counsel would enhance the voluntariness of his decision.

Bays cites his own statement that he did not really know what he wanted as casting doubt on the voluntariness of his decision. Nevertheless, when asked if he was giving up his right to trial by jury "by your own volition," Bays said, "Yes." Bays asks us to discount this answer because, with an IQ of seventy-four, he could not be expected to know

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

what "volition" meant. We are not persuaded. In context the word "volition" was comprehensible, coming (as it did) immediately after the preceding question: "Now, are you doing this voluntarily, of your own free will?"

****1135** Bays has not shown that his jury waiver was not voluntary.

Knowingness and Intelligence

Bays contends that his waiver was not knowing and intelligent, in that he did not understand the nature of the jury trial right and consequences of waiving it. During the colloquy, he stated: "With the Jury, I don't figure it was a fair pick." Bays argues that he was waiving a jury that he believed would be unfair, and thus did not understand that he was actually waiving the right to trial by a *fair* jury.

A waiver is the intentional relinquishment of a known right or privilege. ***20** *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466. Hence, a defendant must have some knowledge of the nature of the jury trial right to make a valid waiver. *Martin, supra,* 704 F.2d at 273.

However, a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it. *Id*. For instance, the United States Court of Appeals for the Sixth Circuit has said: "A defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and * * * a judge alone will decide guilt or innocence should he waive his jury trial right." *Id.,* 704 F.2d at 273. Indeed, that may be more than the Constitution requires to render a waiver knowing and intelligent. See *United States v. Sammons, supra,* 918 F.2d at 597. At any rate, a defendant need not be specifically told that he has a right to an *impartial* jury before his jury waiver can be deemed knowing and intelligent.

Similarly, Bays also contends that his waiver was not knowing and intelligent because the trial court did not explain that a single juror can block a death recommendation, see *State v. Springer* (1992), 63 Ohio St.3d 167, 586 N.E.2d 96, and that a death sentence recommended by a jury could not be reimposed if reversed on appeal (as was then the case; see *State v. Penix* [1988], 32 Ohio St.3d 369, 513 N.E.2d 744, and R.C. 2929.06[B]). Again, however, these are not aspects of the jury trial right that a defendant must know about before he can knowingly and intelligently waive a jury trial. *Martin, supra*. The trial court is not required to inform the defendant of all the possible implications of waiver. See *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus.

Bays further contends that his waiver was not knowing because the trial judge misinformed him as to the burden of persuasion in a jury trial. In explaining to Bays that "a Jury's verdict must be unanimous," the judge stated: "In other words, if you convince, or your Counsel convinces one Juror not to convict you, there would at least be a mistrial and a retrial."

According to Bays, the trial judge's words implied that, if Bays asked for a jury trial, he would have to persuade the jurors of his innocence. Thus, he contends that the trial court affirmatively misinformed him about the nature of the jury trial right, a circumstance that generally invalidates a jury waiver. See *State v. Ruppert, supra*; *State v. Haight* (1994), 98 Ohio App.3d 639, 649 N.E.2d 294.

However, the topic the judge was talking about here was the unanimity required for a jury verdict, not the allocation of the burden of proof. One could draw an incorrect inference about the burden of proof by minutely parsing the trial judge's words, but we find it hard to believe that a defendant would draw any inference at all about the burden of proof from hearing these particular ***21** words spoken, in a context where the burden of proof was not the subject under discussion. Thus, we do not find that the trial court affirmatively misinformed Bays about the nature of the jury trial right.

****1136** It does not plainly appear from the record that Bays's jury waiver was anything less than voluntary, knowing, and intelligent. Consequently, his first proposition of law fails.

II

Admissibility of Confession

In his second proposition of law, Bays asserts that the trial court should have suppressed his November 19 confession to Detective Savage as involuntary. He contends that his will was overborne and the confession extracted by deceit, intimidation, and implied promises of leniency.

Findings of Fact

In ruling on the motion, the trial court made detailed findings of fact, in accordance with Crim.R. 12(E). Since the record supports those findings, they bind us. See, *e.g.*, *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972, 981. Hence, we set them forth here, along with the supporting testimony.

The trial court found that, on November 19, 1993, Savage received an anonymous call. The caller knew details of the murder that had not been released to the press, and he implicated Bays in the crime. "The police returned to Mr. Bays's home [the trial court found] and he again voluntarily accompanied the police to the police station. At the station Detective Donahue read Mr. Bays his rights and he again initialed the Pre–Interview form [acknowledging that he understood his rights]."

The trial court found that Bays signed the form at 7:08 p.m. and gave the detectives a taped statement at 7:20 p.m. During the intervening twelve minutes, the detectives told Bays that they knew he committed the murder. Detective Savage stated that "withholding the truth could only hurt [Bays] and not benefit him." Then the detectives told Bays how the murder happened. Bays admitted that the detectives' scenario was correct, then went over the details with them and reenacted the murder on videotape.

The trial court further found that, during the interrogation, Savage "stated the different penalties for different crimes including the death sentence." At the hearing, Savage testified that he told Bays, "[I]t looked like a death penalty case." Savage then recited to Bays the possible penalties for aggravated murder, murder, manslaughter, and involuntary manslaughter.

***22** The trial court found that Savage had "raised the volume of his voice," but "[t]here was no evidence of screaming or of threats being made." Donahue testified that Savage raised his voice "a couple of times where Mr. Savage would say something to him and [Bays] would deny it, and he would say Ricky, we know better than that, you know, the lab has the results * * * or something like that."

Savage testified that he "may have" struck the table with his hand, but he couldn't recall. He also testified that he told Bays that "his hair was at the scene in Mr. Weaver's hand [and] that somebody had seen him up on the porch that day and confirmed that he was there." These statements exaggerated the strength of the evidence against Bays, since the witness did not identify Bays on the porch and the hairs were never conclusively matched to Bays.

The trial court found that "Mr. Bays is 28 years old, he has a tenth grade education and has demonstrated that he can read and write. Mr. Bays has prior criminal experience * * * ."

The trial court concluded that Detective Savage's statements regarding the different penalties for different levels of homicide did not constitute a promise of leniency, nor did his statement that withholding the truth could only hurt Bays and not benefit him. Accordingly, the court found Bays's confession voluntary and overruled his motion to suppress it.

Analysis

"In deciding whether a defendant's confession is involuntarily induced, ****1137** the court should consider the totality of the circumstances * * *." *State v. Edwards* (1976), 49 Ohio St.2d 31, 3 O.O.3d 18, 358 N.E.2d 1051, paragraph two of the syllabus, judgment vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155. Circumstances to be considered include "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement."

Several circumstances militate strongly in favor of finding the confession voluntary. Bays went to the station voluntarily. He was interrogated for only twelve minutes before confessing. He was in his late twenties and had been arrested before. There was no evidence of physical abuse or deprivation. Savage did raise his voice when he thought Bays was lying and may have hit the table as well, but there was no evidence of any direct threats. Bays heard his *Miranda* rights, acknowledged that he understood them, and signed a waiver, the validity of which is not challenged here. Savage testified that Bays was calm and did not seem nervous.

Savage did mislead Bays as to the strength of the evidence against him. See *Frazier v. Cupp* (1969), 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684; *State v.* ***23** *Wiles* (1991), 59 Ohio St.3d 71, 81, 571 N.E.2d 97, 112. However, "[a] defendant's will is not overborne simply because he is led to

believe that the government's knowledge of his guilt is greater than it actually is." *Ledbetter v. Edwards* (C.A.6, 1994), 35 F.3d 1062, 1070.

Bays also points to his low IQ and childhood head injuries. Although this was not raised in the suppression hearing (see discussion below), the penalty-phase record shows that Bays's IQ was seventy-four, placing him in the least intelligent five percent of the population. On the other hand, Bays had a tenth grade education, and the record indicates that he "did well in school" until he began engaging in substance abuse. There was no evidence that he was under the influence of any substances during the interrogation.

We think that the factors pointing to voluntariness far outweigh those negating voluntariness. We therefore conclude that, under the totality of the circumstances, Bays's statement was voluntary.

However, Bays also contends that, whatever the totality-of-the-circumstances analysis may show, his confession was involuntary because (as the trial court found) Savage informed him of the penalties for various degrees of homicide. According to Bays, these statements rendered his confession inadmissible, because they amounted to an implied promise of leniency.

We cannot agree. A promise of leniency, while relevant to the totality-of-the-circumstances analysis, does not require that the confession be automatically suppressed. *Edwards,* 49 Ohio St.2d at 40–41, 3 O.O.3d at 23–24, 358 N.E.2d at 1058–1059.

Moreover, Savage's recitation did not constitute a promise of leniency. All Savage did was to state the penalties for the various levels of homicide. An interrogator may inform the suspect of the penalties for the offense of which he is suspected. *State v. Arrington* (1984), 14 Ohio App.3d 111, 115, 14 OBR 125, 130, 470 N.E.2d 211, 216, citing *United States v. Ballard* (C.A.5, 1978), 586 F.2d 1060, 1063, and *United States v. Vera* (C.A.11, 1983), 701 F.2d 1349, 1364. We therefore reject Bays's contention that Savage, by informing him of the possible penalties he faced, rendered Bays's otherwise voluntary confession inadmissible.

Motion for New Suppression Hearing

Bays also argues under his second proposition that the trial court denied him due process by denying his request for a *second* suppression hearing at which he could present evidence of his mental deficits.

****1138** Eighteen months after the trial court denied the motion to suppress, and less than a week before the scheduled trial date, the defense filed a renewed motion to suppress the confession. The motion requested a new hearing at which defense experts could testify on Bays's cocaine dependency, intellectual capacity, possible ***24** brain damage, and the effect of these things on the voluntariness of his confession. The defense also filed a motion for continuance grounded in the need to reopen the suppression hearing. (The defense had already requested and received two continuances.) On November 29, the court denied a continuance and a new hearing.

We do not find that the trial court abused its discretion in denying Bays a second chance to litigate the voluntariness of his confession. We therefore overrule Bays's second proposition of law.

III

Evidentiary Sufficiency

In his ninth proposition, Bays contends that, if we find his confession inadmissible, we must find that the *remaining* evidence is legally insufficient to sustain his conviction. Because we have found the confession admissible, this proposition of law is overruled as moot.

IV

Disclosure of Informant

In his sixth proposition of law, Bays contends that the trial court should have ordered the state to disclose the identity of the informant who told Savage where Bays had discarded the shirt, glove, and wallet.

At the suppression hearing Savage testified that, on November 19, "I received a phone call * * * from an anonymous caller who had described the homicide to me. They [*sic*] described how Mr. Weaver was killed, what

instruments were used to murder him, who had done the killing, where evidence was from the scene that had been removed and where the clothing that Mr. Bays had worn were [*sic*] placed."

Bays filed a motion for disclosure of the caller's identity, based on *Roviaro v. United States* (1957), 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639. (Although the call to Savage was anonymous, Bays asserted that a deputy sheriff knew how to contact the caller.) The trial court denied disclosure.

Bays contends that the trial court should have ordered disclosure, or at least held an *in camera* review to determine whether the informant had information helpful to Bays's defense.

The state has a privilege to withhold from disclosure the identities of those who give information to the police about crimes. *State v. Beck* (1963), 175 Ohio St. 73, 76–77, 23 O.O.2d 377, 379, 191 N.E.2d 825, 828, reversed on other grounds (1964), 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142. However, the privilege must give way ***25** where disclosure of the informant's identity would be helpful to the accused in making a defense to a criminal charge. *Id*. at paragraph two of the syllabus; see, also, *Roviaro,* 353 U.S. at 60–61, 77 S.Ct. at 628, 1 L.Ed.2d at 645.

In general, courts have compelled disclosure in cases involving "an informer who helped to set up the commission of the crime and who was present at its occurrence" whenever the informer's testimony may be helpful to the defense. *Id.* at 61, 77 S.Ct. at 628, 1 L.Ed.2d at 645–646. For instance, *Roviaro* itself involved a controlled drug transaction between the defendant and the informant. See, also, *State v. Butler* (1984), 9 Ohio St.3d 156, 9 OBR 445, 459 N.E.2d 536; *State v. Williams* (1983), 4 Ohio St.3d 74, 4 OBR 196, 446 N.E.2d 779; *State v. Phillips* (1971), 27 Ohio St.2d 294, 56 O.O.2d 174, 272 N.E.2d 347.

In contrast, "where the informant merely provided information concerning the offense," the courts "have quite consistently held that disclosure is not required." ****1139** 3 LaFave & Israel, Criminal Procedure (1984) 19, Section 23.3. Cf. *Beck,* 175 Ohio St. at 77, 23 O.O.2d at 379, 191 N.E.2d at 828 (distinguishing *Roviaro*) with *Phillips,* 27 Ohio St.2d at 299–300, 56 O.O.2d at 177, 272 N.E.2d at 350–351 (distinguishing *Beck*).

Bays suggests that this case falls within the former category rather than the latter. His argument is that the informant must have been either a witness, the perpetrator, or an accomplice because he gave such detailed information; moreover, the informant must have been "more than just an observer" because he knew exactly what items Bays had thrown down the sewer, even though Bays did this at night.

We are not persuaded by this speculation. The facts Bays cites are entirely consistent with the inference that the informant learned about the crime from the killer. See *State v. Williams* (1995), 73 Ohio St.3d 153, 172, 652 N.E.2d 721, 736–737. In fact, that is the likelier scenario: Bays's statements to Detective Savage and to Larry Adkins mention no accomplice. So far as the record shows, Bays and Weaver appear to have been alone in the house.

Bays has not shown that the informant did anything more than provide information concerning the offense. Hence, the trial court did not abuse its discretion by denying disclosure.

Alternatively, Bays argues that the trial court should have conducted an *in camera* review to determine whether the informant's identity would have been helpful. See *United States v. Sharp* (C.A.6, 1985), 778 F.2d 1182, 1187.[2] We disagree. "An in camera hearing is necessary only when 'the defendant makes ***26** an initial showing that the confidential informant may have evidence that would be relevant to the defendant's innocence.' " *State v. Allen* (1980), 27 Wash.App. 41, 48, 615 P.2d 526, 531, quoting *State v. Potter* (1980), 25 Wash.App. 624, 628, 611 P.2d 1282, 1284. Bays made no such showing here.

Bays's sixth proposition is overruled.

V

Assignment of Probate Judge

This case was tried to a panel of three judges designated by the presiding judge of the Greene County Common Pleas Court. That panel included Robert Hagler, a judge of that court's probate division, assigned pursuant to former C.P.Sup.R. 2, which was in effect at the time of the trial.[3] In his seventh proposition of law, Bays contends that, pursuant to R.C. 2945.06 and 2931.01(B),[4] a probate judge may not serve on a three-judge panel in a capital case.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Bays did not object at trial to Judge Hagler's assignment. Hence, this issue is waived. Judge Hagler's assignment did not rise to the level of plain error, notwithstanding R.C. 2931.01(B), because, as Bays concedes, we rejected an argument similar to his in *State v. Cotton* (1978), 56 Ohio St.2d 8, 10 O.O.3d 4, 381 N.E.2d 190, paragraph four of the syllabus.

****1140** Bays's seventh proposition of law is overruled.

VI

Other–Acts Evidence

In his eighth proposition, Bays contends that state's witness Larry Adkins testified about irrelevant, inflammatory other acts by Bays, violating Evid.R. 404(B). Adkins testified that, when Bays told him about the murder, Bays said, "[I]f anybody is going to tell on me, I'm going to mess around and catch another murder case." Adkins also testified that Bays "was coming up with some ideas of framing a colored man." While Bays entered an objection to a latter portion of Adkins's testimony, he made no specific objection to the foregoing testimony. ***27** Thus, he waived this claim. Moreover, the law presumes that in a bench trial the court considers only relevant, material, and competent evidence. *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759. Bays's eighth proposition is therefore overruled.

VII

Ineffective Assistance

In his tenth proposition, Bays claims that his trial counsel rendered ineffective assistance. To demonstrate ineffective assistance, Bays must show that, in light of all circumstances, counsel's performance fell below an objective standard of reasonable representation. He must also show prejudice, *i.e.*, a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Strickland v. Washington* (1984), 466 U.S. 668, 687–694, 104 S.Ct. 2052, 2064–2068, 80 L.Ed.2d 674, 693–698; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142–143, 538 N.E.2d 373, 380, and paragraphs two and three of the syllabus.

Bays cites six instances of allegedly ineffective assistance.

(1) When the trial court asked Bays why he wanted to waive the jury, Bays said, "My Counsel feels it's best." On being asked whether he waived jury trial of his own free will, Bays replied, "I don't know which way I want to go really. With the Jury, I don't figure it was a fair pick."

Bays contends that "[i]f counsel had advised Bays to waive his rights because of perceived bias by the jury, counsel had a duty to raise an objection with the court." However, the record does not show whether this was counsel's reason for advising Bays to waive a jury. What the record does show is that counsel *did* "raise an objection with the court"; on December 6, 1995, counsel filed a motion to dismiss the venire, alleging that it was not randomly selected. (Bays waived jury trial later that day, rendering the motion moot.)

Bays notes that the record does not reflect that counsel advised him of the consequences of waiving the jury. However, it is Bays's burden to show that counsel rendered ineffective assistance. *Strickland*; *Bradley, supra*. The fact that counsel did not advise Bays on the record hardly suggests that counsel failed to advise him at all. It is a normal practice for lawyers to advise their clients in private, rather than on the record. Bays has failed to affirmatively show that his lawyer did not advise him.

Bays further contends that his counsel had a duty to ensure that the trial court advised him of the consequences of waiver, inquired more deeply into the voluntariness of his waiver, and used simpler language. However, such a ***28** colloquy is not required for a valid jury waiver. *State v. Jells, supra,* 53 Ohio St.3d at 25–26, 559 N.E.2d at 468.

(2) Bays claims that his counsel should have objected to the presence of a probate judge on the panel, based on R.C. 2931.01. However, *State v. Cotton,* ****1141** *supra,* 56 Ohio St.2d 8, 10 O.O.3d 4, 381 N.E.2d 190, had rejected a similar claim. It follows that counsel had no duty to object to the presence of the probate judge, for "[i]t is not ineffective assistance for a trial lawyer to maneuver within the existing law, declining to present untested or rejected legal theories." *State v. McNeill* (1998), 83 Ohio St.3d 438, 449, 700 N.E.2d 596, 607.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(3) Detective Savage testified that the blood stains found at the crime scene displayed "directional patterns" that showed how many times the victim was struck. Bays argues that trial counsel should have objected to this evidence under Evid.R. 403(A) as inflammatory and cumulative.

Under Evid.R. 403(A), as applied to death penalty cases by *State v. Morales* (1987), 32 Ohio St.3d 252, 257–258, 513 N.E.2d 267, 273–274, the trial court must exclude evidence if its probative value does not outweigh the danger of unfair prejudice. Even in a jury trial, this is a difficult standard to meet, and broad discretion is vested in the trial judge. See *State v. Rahman* (1986), 23 Ohio St.3d 146, 152, 23 OBR 315, 320, 492 N.E.2d 401, 407; *State v. McGuire* (1998), 80 Ohio St.3d 390, 400, 686 N.E.2d 1112, 1121. Thus, counsel could rarely (if ever) be deemed ineffective for failing to object under Evid.R. 403(A). But this was a bench trial, in which the court is presumed to have considered only the relevant, material, and competent evidence. *State v. Post, supra,* 32 Ohio St.3d at 384, 513 N.E.2d at 759. Hence, "[c]ounsel could reasonably assume that the judge[s] would be unaffected by any inflammatory material * * *." *State v. Campbell* (1994), 69 Ohio St.3d 38, 43, 630 N.E.2d 339, 346.

(4) Bays contends that his trial counsel should have asked for the appointment of a defense investigator under R.C. 2929.024. However, the record does not disclose what investigations trial counsel actually performed or failed to perform, or what information an investigator might have turned up that the defense in fact failed to obtain. See *State v. Hutton* (1990), 53 Ohio St.3d 36, 42, 559 N.E.2d 432, 441. Hence, on this record Bays's claim of prejudice from counsel's failure to employ investigative services is speculative.

(5) Bays claims that his counsel should have objected to the *en bloc* admission of all guilt-phase evidence in the penalty phase. See *State v. Getsy* (1998), 84 Ohio St.3d 180, 201, 702 N.E.2d 866, 887. However, Bays fails to point to any specific guilt-phase evidence that should have been excluded from the penalty phase as irrelevant. Thus, he has shown neither attorney error nor prejudice. Moreover, as previously noted, in a bench trial we presume that the court ***29** considered only the relevant, material, and competent evidence. *Post, supra,* 32 Ohio St.3d at 384, 513 N.E.2d at 759.

(6) Bays contends that his counsel "failed * * * to fully present evidence in mitigation that was available to them." First, Bays notes that he did not give an unsworn statement in the penalty phase. However, Bays stated at trial that he did not wish to make an unsworn statement. Nothing in the record shows that Bays's counsel were responsible for this decision. Hence, Bays cannot make the showing *Strickland* requires.

Bays also points out that his wife and father did not directly ask the court to spare his life. But their testimony made it clear that they loved and supported him. Express pleas for mercy would have added little to their testimony. Finally, he contends that his trial counsel did not elicit from Bays's wife and father any personal history that would have illustrated his cognitive difficulties and presented him as a unique human being. But the witnesses did testify about Bays's personal history, and three expert witnesses supplied evidence of his mental and cognitive difficulties and chemical dependence.

****1142** Bays's tenth proposition is found to be without merit and is overruled.

In his twelfth proposition, Bays claims ineffective assistance of appellate counsel in the court of appeals. See, generally, *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821; *State v. Watson* (1991), 61 Ohio St.3d 1, 16, 572 N.E.2d 97, 109. Bays cites five issues that he claims appellate counsel should have raised.

Item 1 on Bays's list of overlooked appellate issues (corresponding to the third proposition of law in Bays's brief to this court) alleges that appellate counsel should have attacked certain errors in the trial court's sentencing opinion. However, in view of our independent reweighing below, there is no prejudice.

Items 2 (reasonable-doubt definition), 3 (vagueness), and 4 (prosecutorial misconduct) correspond to Bays's thirteenth, fourteenth, and eleventh propositions of law, respectively. However, trial counsel failed to raise these alleged errors. Since the issues were waived at trial, appellate counsel could reasonably decide not to pursue them in the court of appeals.

In Item 5, Bays claims that appellate counsel were ineffective because they failed to raise ineffective-assistance claims concerning trial counsel's failure to object to the alleged errors set forth in Items 2, 3, and 4. However, appellate counsel did raise ten other issues attacking trial counsel's performance. There is nothing to suggest that appellate counsel did not simply select what they regarded as issues on which Bays would most likely prevail.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Bays's claims in Items 2 and 3 are inconsistent with existing law. As for Item 4, it was not such a strong issue that a reasonable attorney would necessarily ***30** raise it. Since this was a bench trial, it would have been difficult for appellate counsel to show that trial counsel prejudiced Bays by not objecting to the alleged prosecutorial misconduct. See *Post,* 32 Ohio St.3d at 384, 513 N.E.2d at 759; *Campbell,* 69 Ohio St.3d at 43, 630 N.E.2d at 346.

VIII

Prosecutorial Misconduct

In his eleventh proposition, Bays claims prosecutorial misconduct. However, Bays did not object to the misconduct at trial or raise it in the court of appeals. His claims are therefore waived. See, generally, *State v. Williams* (1977), 51 Ohio St.2d 112, 116–118, 5 O.O.3d 98, 100–101, 364 N.E.2d 1364, 1367–1368, and paragraphs one and two of the syllabus. None of the alleged errors fits the definition of plain error set forth in Crim.R. 52 and elaborated in *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804. Hence, we overrule Bays's eleventh proposition.

IX

Sentencing Opinion

In his third proposition of law, Bays points out errors in the panel's sentencing opinion.

The panel referred to "aggravating circumstances" in the plural, even though there was only one. However, this was a minor mistake. The panel correctly identified the single aggravating circumstance in the opinion. Its incorrect use of the plural is not a basis to conclude that the court was considering nonstatutory aggravating circumstances. *State v. Jells, supra,* 53 Ohio St.3d at 33–34, 559 N.E.2d at 475–476.

The panel committed three other errors, however. First, instead of weighing the mitigating factors collectively against the aggravating circumstance, the panel weighed each proffered factor individually against the aggravating circumstance. Second, the panel concluded that each of the mitigating factors considered "does not outweigh the aggravating circumstances that the defendant has been ****1143** found guilty of committing." This improperly placed the burden on the defendant to prove that mitigation outweighed aggravation, whereas R.C. 2929.03(D)(2) and (D)(3) require the state to prove that the aggravating circumstance outweighs the mitigating factors. Finally, the panel considered the evidence relating to Bays's brain damage and retardation only under R.C. 2929.04(B)(3) (diminished capacity) and not under (B)(7) (catchall).

The errors noted in this proposition can be cured by this court's independent review. See, generally, ***31** *Clemons v. Mississippi* (1990), 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725, 736; *State v. Lott* (1990), 51 Ohio St.3d 160, 170, 555 N.E.2d 293, 304. Thus, Bays's third proposition is overruled.

X

Appellate Opinion

In his fourth proposition of law, Bays contends that the court of appeals erred by relying upon extra-record material in its independent review of the death sentence.

In considering how much weight Bays's crack addiction should be given in mitigation of sentence, the court of appeals quoted at length from Waldorf, Reinarman & Murphy (1991), Cocaine Changes: The Experience of Using and Quitting, a work "based on a two-year study of 267 cocaine users." The authors found that cocaine addiction can influence users to commit crimes in order to obtain the drug, but that users who are already involved in criminal activities are more likely to do so than users who are not. The authors cautiously describe their conclusions as "a hypothesis worthy of further investigation" and warn that "[w]e cannot overgeneralize here because we cannot 'prove' anything with fifty-three subjects."

Nevertheless, based on the hypothesis set forth in Cocaine Changes, the court of appeals found that Bays's addiction was not a significant mitigating factor in this case. Bays contends that the court of appeals could not properly base its conclusions on that hypothesis, since the merits of the hypothesis were not presented at trial.

We agree. Although, as the court of appeals observed, sentencing judges may draw upon their experiences in making factual determinations, see *Barclay v. Florida* (1983), 463

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

U.S. 939, 950, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134, 1144, that is not what happened here. Instead, the court of appeals based its factual conclusions upon what amounted to an expert opinion, which should have been subjected to adversarial testing. [5] See *Gardner v. Florida* (1977), 430 U.S. 349, 360–362, 97 S.Ct. 1197, 1205–1207, 51 L.Ed.2d 393, 403–404.

Now that the error has been called to our attention, we can cure it by not considering the extra-record material in our own independent review of the sentence. See *State v. Clark* (1988), 38 Ohio St.3d 252, 263, 527 N.E.2d 844, 856. Consequently, this proposition is overruled.

***32** XI

Settled Issues

In his thirteenth proposition, Bays challenges the R.C. 2901.05(D) definition of reasonable doubt, which the panel applied in this case. However, Bays failed to raise this issue at trial, waiving it.

We reject Bays's fourteenth proposition on authority of *State v. Gumm* (1995), 73 Ohio St.3d 413, 416–418, 653 N.E.2d 253, 259–260.

Bays's fifteenth proposition attacks the constitutionality of the Ohio death-penalty scheme. His claim that electrocution violates the Eighth Amendment ****1144** lacks merit. *In re Kemmler* (1890), 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519; *In re Sapp* (C.A.6, 1997), 118 F.3d 460, 464 (citing cases). Moreover, a condemned prisoner may elect to be executed by lethal injection, R.C. 2949.22(B)(1); thus, if Bays objects to electrocution as a mode of execution, he need not submit to it. See *Stewart v. LaGrand* (1999), 526 U.S. 115, ––––, 119 S.Ct. 1018, 1020, 143 L.Ed.2d 196, 201 (condemned prisoner who chose lethal gas waived claim that execution by lethal gas violated Eighth Amendment).

Bays's other claims we summarily reject. See *State v. Jenkins* (1984), 15 Ohio St.3d 164, 167–171, 173–174, 15 OBR 311, 314–317, 318–320, 473 N.E.2d 264, 272–274, 277–278; *State v. Buell* (1986), 22 Ohio St.3d 124, 137–138, 22 OBR 203, 214–215, 489 N.E.2d 795, 807–808; *State v. Phillips* (1995), 74 Ohio St.3d 72, 101, 103–104, 656 N.E.2d 643, 669, 671.

XII

Independent Review

In Bays's fifth proposition of law, he contends that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt and that the death sentence is not proportionate to sentences approved in similar cases. We now proceed to determine these issues in our statutorily mandated independent review of Bays's death sentence.

Aggravating Circumstance

The sole aggravating circumstance is that Bays committed the murder while committing aggravated robbery. R.C. 2929.04(A)(7). The evidence is sufficient to prove this circumstance. (See discussion of Bays's ninth proposition of law, above.)

Mitigating Factors

In the penalty phase, Bays presented testimony from his father, his wife, and three expert witnesses.

Dr. Newton Jackson, a forensic psychologist, performed numerous psychological tests on Bays, including the WAIS–R intelligence test, the MMPI–2, and the ***33** Rorschach test. Bays's IQ was seventy-four, placing him in the borderline intellectual range, between normal and retarded. Bays had no major behavioral or personality disorder and did not appear to be psychotic. However, he did suffer from "chronic * * * inadequacy * * * to deal with the complexities of life," symptomatized by depression and anxiety. The SMDT and Bender tests "strongly indicated * * * organic brain dysfunction."

Dr. Kathleen Burch, a clinical psychologist, is an expert in neuropathological assessment. She reviewed Bays's medical records, school records, and the results of Jackson's psychological examination of Bays. She also performed an extensive battery of tests on him. Her results were consistent with a "moderate level of neuropsychological dysfunction."

According to Bays's medical records, his umbilical cord was compressed during birth, resulting in apparent brain

damage. At age six, Bays suffered a head injury and possible concussion. These injuries could have accounted for Bays's intellectual deficits.

However, Dr. Burch testified that Bays did not exhibit the type of deficits that would suggest damage to his frontal lobes, which are responsible for "mature behaviors, the ability to deny gratification of impulses, the ability to plan and organize behavior."

Dr. Harvey Siegal performed a "chemical dependency assessment" on Bays. He concluded that Bays was dependent on marijuana and crack. Siegal related some of Bays's history of substance abuse. Bays was "drinking consistently" from the age of twelve or thirteen and using marijuana daily since his teen years. Bays married at twenty and gave up heavy drinking, but continued to use marijuana. He began using crack around the time of his mother's death in 1992.

****1145** Bays's wife Martha testified that Bays had three children, one aged nine and two aged eight. Mrs. Bays told how, in 1985, she resolved to stop drinking and issued an ultimatum to Bays that he do likewise, or she would leave him. Bays did stop heavy drinking, but continued to use marijuana (and crack, although Mrs. Bays was unaware of it).

Bays's father testified that Bays's birth had involved "complications," that he "had some falls" as a child, and that he had some academic problems. He testified that Bays "was kind of lost" when his mother died.

Bays's wife and father both kept in touch with him with phone calls and visits during his incarceration. Mrs. Bays and her children visited Bays every week. Bays has never assaulted his wife, children or stepchildren, his wife said.

The parties stipulated to Bays's criminal record. In 1982, Bays was adjudged delinquent for burglary. He had eight misdemeanor convictions between 1983 and 1985: four convictions of operating a motor vehicle under the influence of ***34** alcohol, two of disorderly conduct, one of unauthorized use of property, and one of driving under suspension. We find this record entitled to little weight in mitigation under R.C. 2929.04(B)(5).

Bays has no history of violent behavior. Moreover, Dr. Jackson testified that Bays does not exhibit "any characteristics of a psychopath or an individual who is call[o]used towards others, or a person who * * * chronically engages in assaultive or impulsive behavior." We accord this evidence weight as a mitigating factor under R.C. 2929.04(B)(7).

Bays's cocaine addiction is also a (B)(7) mitigating factor. See *State v. Hill* (1995), 73 Ohio St.3d 433, 447, 653 N.E.2d 271, 284. Moreover, Bays said in his confession that he smoked crack before the murder. That is another mitigating factor, but a weak one. See, *e.g., State v. Otte* (1996), 74 Ohio St.3d 555, 568, 660 N.E.2d 711, 723.

Bays's below-average intelligence, caused by brain damage, is also a (B)(7) mitigating factor. See, *e.g., State v. Rojas* (1992), 64 Ohio St.3d 131, 143, 592 N.E.2d 1376, 1387. However, we assign it little weight.

Bays claims the nature and circumstances of the crime were mitigating because the crime was impulsive. That is not entirely true, however. The initial assault may well have been impulsive, but when Weaver threatened to summon the police, Bays turned back and silenced him with five knife wounds.

Bays readily confessed to police on November 19, though only after lying to them on November 16. His cooperation is entitled to some weight. So is his family's love and support.

Despite the presence of some mitigating factors in this case, we find that, beyond a reasonable doubt, the robbery-murder aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

The final step in our analysis is proportionality review. Bays's sentence is proportionate to death sentences affirmed in other robbery-murder cases. See, *e.g., State v. Greer* (1988), 39 Ohio St.3d 236, 530 N.E.2d 382; *State v. Allen* (1995), 73 Ohio St.3d 626, 653 N.E.2d 675; *State v. Hill, supra,* 73 Ohio St.3d 433, 653 N.E.2d 271.

Based upon the foregoing, we find the death sentence in this case to be appropriate and proportionate.

The judgment of the court of appeals, upholding Bays's convictions and death sentence, is affirmed.

Judgment affirmed.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

MOYER, C.J., DOUGLAS, FRANCIS E. SWEENEY, Sr., PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

All Citations

87 Ohio St.3d 15, 716 N.E.2d 1126, 1999 -Ohio- 216

Footnotes

1 Simms did not identify Bays in court; however, her description of the man on the porch is consistent with Bays's appearance.

2 At a November 29, 1995 hearing, one of the trial judges said that he would speak *in camera* with the deputy who allegedly knew the informant's identity, but there is no record of any such *in camera* interview.

3 The rule authorized the presiding judge of a court to "assign judges on a temporary basis from one division of the court to serve another division as the business of the court may require." Former C.P.Sup.R. 2 corresponds to present Sup.R. 3(B)(2).

4 R.C. 2945.06 provides that a defendant who waives jury trial "shall be tried by a court to be composed of three *judges*." (Emphasis added.)
R.C. 2931.01(B) provides:
"As used in Chapters 2931. to 2953. of the Revised Code:
" * * *
"(B) 'Judge' does not include the probate judge."

5 Since the book's conclusions were used as a basis for drawing case-specific factual inferences about the relation between Bays's addiction and his behavior, this case does not involve judicial notice of "legislative facts." See Staff Note to Evid.R. 201(A).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.