IN THE SUPREME COURT OF THE UNITED STATES

AUSTIN MYERS, Petitioner,

vs.

STATE OF OHIO, Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

PETITIONER'S APPENDIX
TO HIS PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: NO EXECUTION DATE SET)

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APPENDIX CONTENTS

The Supreme Court of Ohio

State of Ohio

v.

Austin Gregory Myers

Case No. 2021-0390

ENTRY

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

(Warren County Court of Appeals; No. CA2019-07-074)

Maureen O'Connor
Chief Justice

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	CASE NO. CA2019-07-074
Appellee,	:	JUDGMENT ENTRY
	:	
- vs -	:	
AUSTIN GREGORY MYERS,	:	
Appellant.	:	

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed as to the second, third, and fifth assignments of error, and this cause is remanded for the trial court to permit discovery, conduct an evidentiary hearing, and rule on Grounds 21, 44, and 45 of appellant's postconviction relief petition according to law and consistent with the Opinion filed the same date as this Judgment Entry. In all other respects, the trial court's judgment is affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 50% to appellant and 50% to appellee.

Robert A. Hendrickson, Presiding Judge

Stephen W. Powell, Judge

Mike Powell, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	CASE NO. CA2019-07-074
Appellee,	:	OPINION
	:	3/8/2021
- vs -	:	
	:	
AUSTIN GREGORY MYERS,	:	
Appellant.	:	

CRIMINAL DEATH APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 14CR29826

David P. Fornshell, Warren County Prosecutor, Kirsten A. Brandt, 520 Justice Drive, Lebanon, Ohio 45036, for appellee

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M. POWELL, J.

{¶ 1} Appellant, Austin Gregory Myers, appeals a decision of the Warren County Court of Common Pleas denying his motion for leave to conduct discovery and petition for postconviction relief.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On January 27, 2014, Myers and codefendant, Timothy Mosley, began to plot burglarizing the home of a known drug dealer or the home of Justin Back, Myers' childhood friend. Mark Cates, Back's stepfather, purportedly had a safe containing a firearm and money. Ultimately, Myers and Mosley chose to burglarize the Cates' home. The two men drove to the Cates' home. Upon knocking, they were surprised when Back answered the door. The two men briefly visited with Back and then left. Upon leaving the Cates' home, Myers suggested they return to the home, kill Back, and steal the contents of the safe. Myers and Mosley began to plan Back's murder.

{¶ 3} They initially planned to kill Back by injecting him with cold medicine. In furtherance of their plan, they attempted to purchase cold medicine and a bottle of poisonous "bug wash"; however, Myers' credit card was declined. Later that day, Myers and Mosley returned to the Cates' home and watched a movie with Back. When Cates came home from work, he joined them in watching the movie for a short time until he and Back had to leave for an appointment with a Navy recruiter. Myers and Mosley then left the house.

{¶ 4} Myers and Mosley continued to discuss how to murder Back and burglarize the Cates' home. As they discussed their plans, Mosley wrote down their ideas in a small notebook. The two men hatched a scheme to strangle Back with a wire, take the safe, and make it look as though Back had stolen the safe and run away from home. The two men further planned to dump Back's body in a remote wooded area. Myers and Mosley purchased galvanized steel cable and two metal rope cleats to fashion a garrote. The garrote was put together by their friend Logan Zennie.

{¶ 5} The next morning, January 28, 2014, Myers and Mosley bought ammonia, septic-tank cleaner, and rubber gloves. They believed the septic enzymes would help to

decompose the body in cold weather. Around 1:00 p.m., the two men went to the Cates' home. Mosley was carrying the garrote as well as a five- or six-inch pocketknife. The plan was for Myers to distract Back while Mosley came up behind him. Myers would hold Back down while Mosley would choke him to death with the garrote. After the two men arrived at the Cates' home, Back offered them a drink which Myers accepted. As Back was reaching into the refrigerator, Mosley came up behind him and tried to pull the garrote around his throat. However, the garrote only looped around Back's chin. Mosley panicked and as Myers restrained Back, Mosley repeatedly stabbed him with his knife. As Back begged for his life, Myers simply told him it would be over soon.

{¶ 6} After the murder, Myers and Mosley wrapped Back's body in a blanket, cleaned up the crime scene, and found the safe. Myers also found a handgun belonging to Cates, which he loaded. The two men shoved Back's body into the trunk of Mosley's car and left the house with the safe and various other stolen items. They stopped at Mosley's home where they cleaned up and changed clothes. They eventually dumped Back's body behind a log in a field in Preble County. Myers poured ammonia and septic enzymes onto Back's body. Myers then shot the body twice with the stolen handgun before it jammed. Myers and Mosley were later apprehended; Back's body was discovered on January 29, 2014. An autopsy determined that Back had died of multiple stab wounds. At the time of the murder, Myers and Mosley were both 19 years old.

{¶ 7} Myers was indicted in February 2014 on one count of aggravated murder with prior calculation and design and one count of aggravated murder in violation of R.C. 2903.01(B). Both counts were accompanied by three death-penalty specifications. Myers was further indicted for aggravated robbery, aggravated burglary, grand theft of a firearm, and abuse of a corpse, all with an accompanying firearm specification, and kidnapping, tampering with evidence, and safecracking. Mosley was indicted on similar charges.

However, a week before Myers' jury trial, Mosley reached a plea agreement in which he agreed to testify against Myers. Mosley pled guilty to all charges in exchange for the dismissal of the death-penalty specifications; he was sentenced to life in prison without the possibility of parole.

{¶ 8} The guilt phase of Myers' jury trial commenced on September 22, 2014. On October 2, 2014, the jury found Myers guilty on all counts and specifications. The two aggravated-murder counts were merged for purposes of sentencing; the state elected to proceed on the prior-calculation-and-design aggravated murder count with the aggravated-robbery specification.

{¶ 9} The penalty phase of the jury trial was held on October 6, 2014. Myers presented the testimony of his parents and a sibling and made an unsworn statement by way of mitigation. Myers had no prior criminal history or delinquency adjudications. The jury recommended a death sentence. On October 16, 2014, the trial court sentenced Myers to death and imposed prison sentences on the noncapital counts. Myers' conviction and death sentence were subsequently upheld by the Ohio Supreme Court. *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903.

{¶ 10} On November 10, 2016, while his appeal was pending before the supreme court, Myers filed a petition for postconviction relief ("PCR petition"), raising 60 grounds for relief. The PCR petition challenged the constitutionality of the death penalty and the Ohio statutes governing its imposition, argued that Myers was denied the effective assistance of counsel during both the guilt and penalty phases of the trial, and alleged violation of Myers' due process rights. On November 18, 2016, Myers moved for leave to conduct discovery in support of his PCR petition. In 2017, the state filed an answer to the PCR petition, then moved for summary judgment. In January 2018, the trial court issued a scheduling order which provided that Myers could file a supplemental motion for discovery by March 1, 2018,

and that the state's summary judgment motion would be held in abeyance pending resolution of Myers' discovery motion.

{¶ 11} On March 1, 2018, Myers filed a supplemental motion for discovery, arguing he was entitled to conduct discovery in support of his PCR petition pursuant to newly-amended R.C. 2953.21, which became effective on April 6, 2017. The amended statute makes substantial changes regarding PCR petitions in death-penalty cases, and in particular, allows capital petitioners to obtain discovery in aid of their PCR petition if good cause is shown. *State v. Ketterer*, 12th Dist. Butler No. CA2016-08-166, 2017-Ohio-4117, ¶ 46.

{¶ 12} On July 3, 2018, the trial court denied Myers' discovery motions. The trial court found that amended R.C. 2953.21 was not applicable in the case at bar because the statute did not explicitly state it was retroactive. Alternatively, the trial court found that even if the statutory amendment was applied retroactively, Myers was not entitled to discovery as he had not demonstrated "good cause."

{¶ 13} On November 26, 2018, Myers filed a memorandum opposing the state's motion for summary judgment; the memorandum included 12 additional documents consisting of affidavits, transcripts, and documentary evidence. Myers' memorandum and supplemental appendix triggered additional pleadings from the parties. Ultimately, the trial court never ruled upon the state's summary judgment motion. Instead, on June 27, 2019, the trial court denied Myers' PCR petition without a hearing. The trial court found that Myers' claims were either barred by res judicata or failed to set forth sufficient operative facts to establish substantive grounds for relief, and therefore, "no evidentiary hearing [was] required."

{¶ 14} Myers now appeals the trial court's denial of his PCR petition and discovery motions, raising 11 assignments of error.

II. ANALYSIS

A. Standards of Review for Postconviction Relief Petitions

{¶ 15} A postconviction proceeding is a collateral civil attack on a criminal judgment, not an appeal of a criminal conviction. *State v. Dillingham*, 12th Dist. Butler Nos. CA2012-02-037 and CA2012-02-042, 2012-Ohio-5841, ¶ 8. To prevail on a PCR petition, the petitioner must establish a violation of his constitutional rights that renders the judgment of conviction void or voidable. R.C. 2953.21. A PCR petition does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing. *State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 16. A trial court properly denies a PCR petition without an evidentiary hearing if the supporting affidavits, the documentary evidence, the files, and the records of the case do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief. *State v. Blankenburg*, 12th Dist. Butler No. CA2012-04-088, 2012-Ohio-6175, ¶ 9; R.C. 2953.21.

{¶ 16} "It is well established that a trial court may dismiss a postconviction relief petition on the basis of the doctrine of res judicata." *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 30. Under res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment. *State v. Wagers*, 12th Dist. Preble No. CA2011-08-007, 2012-Ohio-2258, ¶ 10, citing *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus.

{¶ 17} The presentation of competent, relevant, and material evidence outside the record may defeat the application of res judicata. *State v. Lawson*, 103 Ohio App.3d 307,

315 (12th Dist.1995). The evidence submitted with the petition cannot be merely cumulative of or alternative to evidence presented at trial. *State v. Jackson*, 8th Dist. Cuyahoga No. 104132, 2017-Ohio-2651, ¶ 16. To overcome the res judicata bar, evidence outside the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record. *State v. Piesciuk*, 12th Dist. Butler No. CA2013-01-011, 2013-Ohio-3879, ¶ 18. If evidence outside the record is "'marginally significant and does not advance the petitioner's claim beyond a mere hypothesis and a desire for further discovery,' *res judicata* still applies to the claim." *State v. Cowans*, 12th Dist. Clermont No. CA98-10-090, 1999 Ohio App. LEXIS 4157, *8-9 (Sept. 7, 1999).

{¶ 18} "In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard." *State v. Snead*, 12th Dist. Clermont No. CA2014-01-014, 2014-Ohio-2895, ¶ 16. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063, 2013-Ohio-2394, ¶ 34; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130. The trial court does not abuse its discretion in dismissing a PCR petition without an evidentiary hearing if (1) the petitioner fails to set forth sufficient operative facts to establish substantive grounds for relief, or (2) the operation of res judicata prohibits the claims made in the petition. *State v. Maxwell*, 8th Dist. Cuyahoga No. 107758, 2020-Ohio-3027, ¶ 25.

{¶ 19} With these principles and standards in mind, we now address Myers' assignments of error together and out of order where appropriate.

B. Summary Dismissal of Myers' PCR Petition

{¶ 20} Assignment of Error No. 1:

{¶ 21} THE TRIAL COURT DENIED MYERS' RIGHTS TO DUE PROCESS, ACCESS TO THE OHIO COURTS, AND AN ADEQUATE CORRECTIVE PROCESS, AND

VIOLATED R.C. § 2953.21, WHEN IT TREATED THE STATE'S POST-ANSWER "MOTION FOR SUMMARY JUDGMENT" AS A MOTION SEEKING SUMMARILY DISMISSAL (sic) UNDER R.C. § 2953.21(C) [NOW (D)], AND FAILED TO APPLY THE REQUISITE SUMMARY JUDGMENT STANDARDS IN SUMMARILY DISMISSING EVERY CLAIM SET FORTH IN MYERS' PCR PETITION.

{¶ 22} This assignment of error challenges the trial court's failure to rule upon the state's summary judgment motion and the court's election instead to grant a summary dismissal of Myers' PCR petition. Specifically, Myers argues that the trial court erred in granting a summary dismissal of his PCR petition where there was a pending, fully briefed motion for summary judgment. Myers asserts that because the state filed an answer to the PCR petition and a motion for summary judgment and failed to move for dismissal of the petition under R.C. 2953.21(D), the trial court was required to apply the standard set forth in R.C. 2953.21(E) and was precluded from summarily dismissing the PCR petition under R.C. 2953.21(D).[1]

{¶ 23} R.C. 2953.21 provides three methods for adjudicating a PCR petition: (1) "summary dismissal" under R.C. 2953.21(D) and *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, paragraph two of the syllabus; (2) "summary judgment" under R.C. 2953.21(E); and (3) an "evidentiary hearing" under R.C. 2953.21(F). *State v. Blankenburg*, 12th Dist. Butler No. CA2013-11-197, 2014-Ohio-4621, ¶ 23.

{¶ 24} Under R.C. 2953.21(E), either party may move for summary judgment on the issues raised. In ruling on a summary judgment motion in proceedings involving a PCR petition, the trial court must use the same standards set forth in Civ.R. 56(C), i.e., a party is

1. As stated earlier, R.C. 2953.21 was amended, effective April 6, 2017, and some of its provisions were renumbered. As pertinent here, former R.C. 2953.21(C), (D), and (E) were renumbered 2953.21(D), (E), and (F). We note that for purposes of this assignment of error, the language of the applicable renumbered statutory provisions is identical to the language of their pre-amendment counterparts. We therefore elect to apply the current version of R.C. 2953.21.

entitled to summary judgment only if there is no genuine issue of material fact and reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *State v. Francis*, 12th Dist. Butler No. CA2013-05-078, 2014-Ohio-443, ¶ 11. Summary judgment in postconviction proceedings is appropriate only if the right to summary judgment appears on the face of the record. R.C. 2953.21(E); *Id.*

{¶ 25} Under R.C. 2953.21(D), "a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun*, 86 Ohio St.3d 279 at paragraph two of the syllabus; *Francis* at ¶ 12.

{¶ 26} We find that the trial court did not err in granting a summary dismissal of Myers' PCR petition under R.C. 2953.21(D) notwithstanding the state's motion for summary judgment and its failure to move for dismissal of the PCR petition under R.C. 2953.21(D). We have held that R.C. 2953.21(D) "explicitly requires the trial court to look beyond the petition and examine the record in order to determine whether there are substantive grounds for relief. The trial court must independently review the record and address the substance of a petitioner's claims regardless of whether the state responds to his petition for postconviction relief." *State v. Wallen*, 12th Dist. Clermont No. CA97-02-017, 1997 Ohio App. LEXIS 3647, *4 (Aug. 11, 1997). *See also State v. Hartman*, 2d Dist. Montgomery No. 27162, 2017-Ohio-7933 (a trial court has an independent duty to analyze a PCR petition under R.C. 2953.21[D]); *State v. McCabe*, 4th Dist. Washington No. 97CA32, 1998 Ohio App. LEXIS 4487 (Sept. 14, 1998) (it is well settled that, regardless of whether or not the state responds to a petition for postconviction relief, R.C. 2953.21[D] requires the trial court

to sua sponte analyze the petition). Thus, the trial court was required to independently determine whether there were substantive grounds for relief and the pendency of the state's motion for summary judgment did not preclude the trial court from summarily dismissing the PCR petition under R.C. 2953.21(D). *See State v. McKelton*, 12th Dist. Butler No. CA2015-02-028, 2015-Ohio-4228; *State v. Noling*, 11th Dist. Portage No. 98-P-0049, 2003-Ohio-5008.

{¶ 27} In his reply brief Myers argues for the first time that the trial court's summary dismissal of the PCR petition without prior notice to the parties violated the notice requirement of procedural due process. However, it is well established that an appellant may not raise new issues or assignments of error in a reply brief. *State v. Renfro*, 12th Dist. Butler No. CA2011-07-142, 2012-Ohio-2848, ¶ 28, citing App.R. 16; *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041. A reply brief simply provides the appellant with an opportunity to respond to the arguments raised in the appellee's brief. *State v. Quaterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 18. Myers' argument is not appropriately before the court and will not be considered. Furthermore, as the discussion above makes clear, parties in postconviction proceedings are on notice of a trial court's sua sponte authority to grant a summary dismissal of a PCR petition. R.C. 2953.21; *Hartman*, 2017-Ohio-7933; *McKelton*, 2015-Ohio-4228; *McCabe*, 1998 Ohio App. LEXIS 4487.

{¶ 28} Myers' first assignment of error is overruled.

C. Discovery Motions

{¶ 29} Assignment of Error No. 2:

{¶ 30} THE TRIAL COURT DENIED MYERS' RIGHTS TO DUE PROCESS, ACCESS TO THE OHIO COURTS, AND AN ADEQUATE CORRECTIVE PROCESS, AND VIOLATED R.C. § 2953.21(A)(1) AND ITS DISCOVERY AMENDMENTS, WHEN THE COURT HELD THAT THE DISCOVERY AMENDMENTS WERE NON-RETROACTIVE

AND THUS INAPPLICABLE TO MYERS' CASE, AND THEN ENFORCED AN UNREASONABLE AND IMPROPERLY-RESTRICTIVE DEFINITION OF "GOOD CAUSE" TO DENY DISCOVERY TO MYERS ON EVERY ONE OF HIS CLAIMS.

{¶ 31} Assignment of Error No. 3:

{¶ 32} EVEN UNDER THE PRIOR VERSION OF THE PCR STATUTE, THE TRIAL COURT ERRED WHEN IT DENIED MYERS' PCR PETITION WITHOUT AFFORDING HIM ANY OPPORTUNITY TO CONDUCT DISCOVERY.

{¶ 33} These assignments of error challenge the trial court's denial of Myers' discovery motions. As stated above, the trial court found that amended R.C. 2953.21 was not applicable in the case at bar because the statute did not explicitly state it was retroactive. Alternatively, the trial court found that even if the statutory amendment was applied retroactively, Myers was not entitled to discovery as he had not demonstrated "good cause." The statute was amended after Myers filed his PCR petition and first motion for discovery but before he filed his supplemental motion for discovery.

{¶ 34} Before R.C. 2953.21 was amended on April 6, 2017, it was well established that the statutory scheme governing postconviction relief did not entitle a petitioner to conduct discovery. *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159, 1999-Ohio-314; *Ketterer*, 2017-Ohio-4117 at ¶ 45. Nevertheless, discovery could be proper where a petitioner set forth operative facts outside the record that revealed a constitutional error in his or her case. *Id.* The granting or overruling of discovery motions rested within the sound discretion of the trial court. *State v. Lawson*, 12th Dist. Clermont No. CA2011-07-056, 2012-Ohio-548, ¶ 17.

{¶ 35} Amended R.C. 2953.21 makes substantial changes regarding PCR petitions in death-penalty cases, and in particular, allows capital petitioners to obtain discovery in aid of their PCR petition if good cause is shown. Specifically, R.C. 2953.21(A)(1)(d) now

provides that

> At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1)(d), (A)(1)(e), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:
>
> (i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.
>
> (ii) For any witness with respect to whom division (A)(1) (d)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

{¶ 36} We first address whether the trial court erred in finding that amended R.C. 2953.21 does not apply to the case at bar because it is not retroactive. This is a strict legal issue which we review de novo. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 8; *State v. Gloff*, 12th Dist. Clermont No. CA2019-06-047, 2020-Ohio-3143, ¶ 17.

{¶ 37} It is well settled that a statute is presumed to apply prospectively unless

expressly declared to be retroactive. R.C. 1.48. Additionally, Section 28, Article II of the Ohio Constitution, prohibits the General Assembly from passing retroactive laws. Applying these two provisions, the Supreme Court of Ohio has established a two-part test to determine whether a statute may be applied retroactively. *Consilio*.

{¶ 38} Under this test, a reviewing court must first determine as a threshold matter whether the statute is expressly made retroactive. *Consilio*, 2007-Ohio-4163 at ¶ 10. "The General Assembly's failure to clearly enunciate retroactivity ends the analysis and the relevant statute may be applied only prospectively." *Id.* If, however, the General Assembly expressly indicated its intention that the statute apply retroactively, the reviewing court must then move to the second step of the analysis and "determine whether the statute is remedial, in which case retroactive application is permitted, or substantive, in which case retroactive application is forbidden." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 27.

{¶ 39} As the trial court properly found, R.C. 2953.21(A)(1)(d) as amended does not explicitly state it is to be applied retroactively. "A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred." *Consilio* at ¶ 15. "If the retroactivity of a statute is not expressly stated in plain terms, the presumption in favor of prospective application controls. Moreover, the General Assembly is presumed to know that it must include expressly retroactive language to create that effect, and it has done so in the past." *Id.* Because amended R.C. 2953.21(A)(1)(d) does not expressly mention retroactivity, we find that the statute applies prospectively and we need not determine whether the statute is remedial or substantive under the second prong of the test.

{¶ 40} We further find that by its plain terms the statute applies prospectively to pending PCR petitions in that it allows capital petitioners to obtain discovery, for good cause

shown, "at any time in conjunction with the filing of a [PCR petition], *or with the litigation of a petition so filed*[.]" (Emphasis added.) In the case at bar, amended R.C. 2953.21(A)(1)(d) was not yet in effect when Myers filed his PCR petition. However, the PCR petition was still being litigated on April 6, 2017, when the amended statute became effective. Amended R.C. 2953.21(A)(1)(d), therefore, applies to Myers' PCR petition. *See Gloff*, 2020-Ohio-3143.

{¶ 41} The statute requires that the petitioner demonstrate "good cause" as a prerequisite for a trial court to allow discovery. As stated above, the trial court alternatively found that Myers failed to show "good cause."

{¶ 42} "Good cause" is not defined by the statute. Consequently, the trial court adopted the definition applied in federal habeas corpus proceedings, to wit, good cause exists "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is * * * entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-909, 117 S.Ct. 1793 (1997). "Conversely, where a petitioner would not be entitled to relief on a particular claim, regardless of what facts he developed, he cannot show good cause for discovery on that claim." *Murphy v. Bradshaw*, S.D.Ohio No. C-1-03-053, 2003 U.S. Dist. LEXIS 15978, *2 (Sept. 13, 2003).

{¶ 43} Before determining whether a petitioner is entitled to discovery under "good cause," the court must first identify the essential elements of the claim on which discovery is sought. *Bracy* at 904. The burden of demonstrating the materiality of the information requested is on the moving party. *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir.2001). Discovery may be allowed where the petitioner's claims are "neither patently frivolous nor palpably incredible" and where "the discovery he requests is specific, *limited*, and reasonably calculated to lead to evidence in support of his claim[.]" *Hill v. Mitchell*, S.D.Ohio

No. 1:98-cv-452, 2007 U.S. Dist. LEXIS 71975, *31-32 (Sept. 27, 2007). A petitioner is not entitled to go on a fishing expedition based on conclusory allegations. *Id.* at *5; *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir.2004). "Even in a death penalty case, 'bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or to require an evidentiary hearing.'" *Stanford* at 460. Rather, the petitioner must set forth specific allegations of fact. *Williams* at 974.

{¶ 44} Myers argues that the trial court erred in denying his motions for discovery because he demonstrated "good cause" or, alternatively, set forth operative facts outside the record that revealed constitutional errors. Myers further argues that the trial court misapplied the *Bracy* good cause standard by essentially requiring him to prove his claims as a prerequisite to discovery.

{¶ 45} Myers' discovery motions were broad overall, seeking a wide range of information, records, and depositions of individuals, some of whom were identified only by category. The trial court broke down Myers' discovery requests into nine general categories of inquiry: (1) records in the custody of the Warren County Children's Services, the Warren County Department of Job and Family Services, and the Warren County Juvenile Court regarding Myers' family, (2) Myers' records from the Warren County Jail, (3) grand jury proceedings, (4) Mosley's institutional records, (5) records of the prosecutor's office and several law enforcement agencies relating to their investigation of Back's death and the arrest of Myers and Mosley, (6) depositions of law enforcement officers, (7) depositions of the jurors, (8) depositions of the attorneys on the prosecution team, and (9) depositions of the defense team.

{¶ 46} Myers' first motion for discovery did not identify how his discovery requests related to his postconviction claims. By contrast, the supplemental motion for discovery argued that Myers was entitled to conduct discovery on (1) his claims of ineffective

assistance of counsel during the guilt phase of the trial, (2) his claims of ineffective assistance of counsel during the penalty phase of the trial, and (3) his claims challenging the constitutionality and propriety of the death sentence for an offender who was still a teenager at the time of the offense. In his brief, Myers argues the trial court erred in denying his motions for discovery on the foregoing claims. We will address the trial court's denial of Myers' discovery motions concerning his claims of ineffective assistance of counsel during the penalty phase of the trial in conjunction with Myers' fifth assignment of error.

{¶ 47} Myers first argues that the trial court erred in denying his motions for discovery regarding his claims challenging the constitutionality and propriety of the death sentence for a 19-year-old offender at the time of the offense. In support of these constitutional challenges, Myers sought discovery of (1) the Warren County's training and instructional materials for judges, prosecutors, and sheriff deputies concerning behavioral characteristics and brain development of juveniles, adolescents, and late-adolescents (18-21 years old) offenders, and (2) Warren County's data concerning the prosecution of such juvenile, adolescent, and late-adolescent offenders for the previous seven years.

{¶ 48} We find that Myers' requested discovery falls more into the category of a fishing expedition. Furthermore, as we discuss in the fourth assignment of error, Myers' claims are barred by res judicata and fail to set forth sufficient operative facts to establish substantive grounds for relief, given the election of the United States Supreme Court and Ohio Supreme Court not to extend the ban on the death penalty to individuals who are over the age of 18 at the time of the crime. "[W]here a petitioner would not be entitled to relief on a particular claim, regardless of what facts he developed, he cannot show good cause for discovery on that claim." *Murphy*, 2003 U.S. Dist. LEXIS 15978 at *2. The trial court, therefore, did not err in denying Myers' motions for discovery regarding his claims challenging the constitutionality and propriety of the death sentence for a 19-year-old

offender at the time of the offense.

{¶ 49} Myers next argues that the trial court erred in denying his motions for discovery concerning his claims of ineffective assistance of counsel during the guilt phase of the trial. Counsel's alleged ineffective assistance included the failure to (1) pursue a youth-based defense theory, (2) hire a fact investigator, (3) fully cross-examine Mosley, (4) cross-examine a sergeant and a detective regarding their failure to follow police procedure manuals, (5) present the testimony of a crime scene expert, (6) present the testimony of a police procedure expert to challenge *Miranda* issues, (7) present the testimony of an expert to evaluate Myers' understanding of his *Miranda* rights, (8) achieve a change of venue, and (9) challenge the chain of custody of Mosley's notebook. As we discuss in the sixth assignment of error, Myers' claims regarding the testimony of a police procedure expert to challenge *Miranda* issues, change of venue, and the chain of custody of Mosley's notebook are barred by res judicata as they could have been raised on direct appeal to the Ohio Supreme Court. As we further discuss in the sixth assignment of error, Myers' other claims fail to set forth sufficient operative facts to establish substantive grounds for relief. *Murphy* at *2. The trial court, therefore, did not err in denying Myers' motions for discovery concerning his claims of ineffective assistance of counsel during the guilt phase of the trial.

{¶ 50} To that extent, Myers' second and third assignments of error are overruled.

D. Constitutional Challenges

{¶ 51} Assignment of Error No. 4:

{¶ 52} THE TRIAL COURT ERRED, AND DENIED MYERS DUE PROCESS AND AN ADEQUATE CORRECTIVE PROCESS, WHEN IT FOUND PROCEDURALLY BARRED MYERS' CLAIMS CHALLENGING THE CONSTITUTIONALITY, PROPRIETY, AND/OR PROPORTIONALITY OF A DEATH SENTENCE FOR AN OFFENDER, LIKE MYERS, WHO WAS STILL A TEENAGER AT THE TIME OF HIS OFFENSE (GROUNDS

5, 8, 9, 46, 47, 48), AND IN SUMMARILY DISMISSING SUCH CLAIMS UNDER R.C. 2953.21(C) WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING AND IN FAILING TO GRANT RELIEF.

{¶ 53} Myers argues that the trial court erred in summarily dismissing Grounds 5, 8, 9, 46, 47, and 48 of his PCR petition, all of which challenged the constitutionality, propriety, and/or proportionality of a death sentence for an offender, like Myers, who was a teenager at the time of the offense. In this assignment of error, Myers details the scientific research on adolescent brain development, references various cases acknowledging that young adults under the age of 21 share many of the characteristics of late-age adolescents, and argues that the imposition of a death sentence upon a teenage offender, such as him, is an unconstitutionally cruel and unusual punishment. Myers asserts that a cut-off of age 18 for imposing a death penalty is arbitrary. Myers further asserts his death sentence is unconstitutionally disproportionate to the life sentence Mosley received.

{¶ 54} Ground 5 argues that R.C. 2929.04(A)(7), Ohio's felony-murder statute, is unconstitutional because it fails to adequately account for youth in violation of the Eighth Amendment. Ground 8 argues that the death sentence was disproportionate compared to Mosley and others convicted of similar crimes in violation of Myers' Eighth Amendment rights. Ground 9 argues that Myers' death sentence was void because the trial court failed to consider the R.C. 2929.11 purposes of felony sentencing when determining the appropriateness of the death sentence on the capital specifications. Ground 46 argues that Myers' Eighth Amendment rights were violated because the trial court failed to accord his youth the mitigating value it deserved. Ground 47 argues that the death penalty was a disproportionate punishment for Myers given his youth and other individual characteristics. Ground 48 argues that the death penalty is per se unconstitutional for a youthful offender convicted of committing a crime prior to turning 21 years old.

{¶ 55} The trial court dismissed Grounds 8 and 9, finding that both arguments were raised in Myers' direct appeal to the Ohio Supreme Court, were addressed by the supreme court, and were therefore barred by res judicata. The trial court further dismissed Grounds 5 and 46 through 48 as follows:

> The Ohio Supreme Court has already addressed whether the sentence of death for Myers based on his age is a violation of the Eighth Amendment and found that it is not a violation of his constitutional rights. Therefore, this argument is barred by res judicata.
>
> Further, the Supreme Court of the United States has addressed the age of youthful offenders in a number of contexts and has not chosen to extend the ban on the death penalty to individuals who are over the age of eighteen at the time of the crime. [Myers] has submitted evidence related to the development in brain science, however, the Ohio Supreme Court and the United States Supreme Court have considered these new developments and similar arguments to the ones set forth by [Myers]. The United States Supreme Court acknowledged that individuals over eighteen may still exhibit signs of a juvenile but also found that since eighteen is the line society draws for many purposes between childhood and adulthood, that was the age that the line for death penalty ought to rest. *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 1197-98 (2005).

{¶ 56} We find that the trial court properly dismissed Grounds 5, 8, 9, and 46 through 48. On direct appeal to the supreme court, Myers argued that the death sentence violated the Eighth Amendment proscription of cruel and unusual punishment, given recent decisions of the United States Supreme Court and a growing body of new developments in brain science indicating that age 18 is not the proper cut-off point for the death penalty. Myers further argued that his death sentence was comparatively disproportionate to the life sentence Mosley received and that he should not have been sentenced to death because he was a 19-year-old immature adolescent with mental and youth-related behavioral issues when he committed his crimes. The supreme court addressed and rejected these claims. *Myers*, 2018-Ohio-1903 at ¶ 173-176. They are therefore barred by res judicata.

{¶ 57} Myers' other claims were properly dismissed by the trial court as failing to set forth sufficient operative facts to establish substantive grounds for relief, given the election of the United States Supreme Court and Ohio Supreme Court not to extend the ban on the death penalty to individuals who are over the age of 18 at the time of the crime. Myers notes that while his direct appeal made a brief reference to the newer brain science, it did not make the constitutional claim for a *Roper*-extension that his PRC petition makes. *See Myers* at ¶ 176 ("Although Myers argues that new developments in brain science indicate that age 18 is not the 'proper cut off point for the death penalty,' he does not propose that the categorical exclusion for those under age 18 be extended to 19-year-olds"). However, such constitutional argument was recently addressed and rejected by the Ohio Supreme Court in *State v. Graham*, Slip Opinion No. 2020-Ohio-6700.

{¶ 58} Graham, who turned 19 years old the month before he committed his crimes and who was sentenced to death, argued that imposing a death sentence on a capital defendant who was under the age of 21 at the time of the crime violated the Eighth Amendment. Extrapolating from the United States Supreme Court's *Roper* decision, Graham argued that it was possible the Supreme Court could extend *Roper* to find that a defendant who turned 19 the month before committing the offense is constitutionally barred from receiving a death sentence. The Ohio Supreme Court squarely rejected the argument: "[B]ecause the United States Supreme Court has drawn the line at 18 for Eighth Amendment purposes, state courts are not free to invoke the Eighth Amendment as authority for drawing it at a higher age. * * * *Roper* is controlling, and we must follow it." *Graham* at ¶ 182, citing *In re Phillips*, 6th Cir. No. 17-3729, 2017 U.S. App. LEXIS 17766 (July 20, 2017) (no authority exists at the present time to support the argument that a defendant who was 19 years old at the time of the offense is ineligible to receive a death sentence).

{¶ 59} Myers' fourth assignment of error is overruled.

{¶ 60} Assignment of Error No. 9:

{¶ 61} THE TRIAL COURT ERRED, AND DENIED MYERS DUE PROCESS AND AN ADEQUATE CORRECTIVE PROCESS, WHEN IT FOUND PROCEDURALLY BARRED MYERS' CLAIMS CHALLENGING IN MULTIPLE RESPECTS THE CONSTITUTIONALITY OF OHIO'S DEATH PENALTY STATUTE AND SYSTEMS (GROUNDS 2-4, 7, 57), AND IN SUMMARILY DISMISSING SUCH CLAIMS UNDER R.C. 2953.21(C) WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING AND IN FAILING TO GRANT RELIEF.

{¶ 62} Myers argues the trial court erred in summarily dismissing Grounds 2, 3, 4, 7, and 57 of his PCR petition, all of which challenged the constitutionality of Ohio's death-penalty scheme and the statutes governing it. Specifically, Myers argues that Ohio's death-penalty scheme (1) is per se unconstitutional due to several fundamental constitutional defects, (2) is unconstitutional because it allows racial disparities in capital indictment practices and the actual infliction of the death penalty, (3) is incompatible with modern standards of decency, and (4) violates the Sixth Amendment right to a jury trial under *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616 (2016). Myers further argues that R.C. 2929.04(A)(7), Ohio's felony-murder statute, is unconstitutional as a capital specification because it allows for invidious racial discrimination in its application and fails to provide adequate safeguards to ensure only the most culpable offenders are sentenced to death.

{¶ 63} Myers' claims are barred by res judicata as they were either raised or could have been raised in his direct appeal to the Ohio Supreme Court. *Myers*, 2018-Ohio-1903 at ¶ 201-202. This includes his Sixth Amendment argument under *Hurst* as his merit brief was filed in the supreme court four months after *Hurst* was decided. Myers acknowledges that the supreme court "has thus far been unwilling to conclude that Ohio's death penalty

statute is unconstitutional under the U.S. and/or Ohio constitutions in the respect alleged * * * in these Grounds." *See, e.g., Myers*; *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462; *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942. In December 2020, the supreme court once again held that Ohio's death-penalty scheme was not unconstitutional under *Hurst*. *Graham*, 2020-Ohio-6700 at ¶ 185-186.

{¶ 64} Myers' ninth assignment of error is overruled.

{¶ 65} Assignment of Error No. 11:

{¶ 66} THE TRIAL COURT ABUSED ITS DISCRETION, AND COMMITTED AN ERROR OF LAW, WHEN IT DENIED MYERS RELIEF ON HIS FIRST GROUND FOR RELIEF, BECAUSE OHIO'S POSTCONVICTION PROCEDURES FAIL TO PROVIDE DEATH-SENTENCED PETITIONERS WITH AN ADEQUATE CORRECTIVE PROCESS AND THEY VIOLATE THE FEDERAL AND STATE CONSTITUTIONS.

{¶ 67} Myers argues that Ohio's statutory scheme for postconviction relief is unconstitutional because it does not provide an adequate corrective process due to its "rigid" reliance on principles of res judicata and a petitioner's inability to conduct discovery until convincing a trial court that a hearing is warranted. This court has already determined that "the statutory procedure for postconviction relief constitutes an adequate corrective process." *State v. Lindsey*, 12th Dist. Brown No. CA2002-02-002, 2003-Ohio-811, ¶ 13; *State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554, ¶ 43. Other Ohio appellate courts have likewise rejected the claim that Ohio's postconviction relief statute does not afford an adequate corrective process. *See, e.g. State v. Conway*, 10th Dist. Franklin No. 17AP-504, 2019-Ohio-2260. Furthermore, the propriety of resolving a postconviction petitioner's arguments on the basis of res judicata is well settled. *E.g., Szefcyk*, 77 Ohio St.3d 93. We see no reason to deviate from our prior precedent. *Lawson*.

{¶ 68} Myers' eleventh assignment of error is overruled.

E. Merits of Myers' Grounds for Relief

1. Prosecutorial Misconduct

{¶ 69} Assignment of Error No. 7:

{¶ 70} THE TRIAL COURT ERRED, AND DENIED MYERS DUE PROCESS AND AN ADEQUATE CORRECTIVE PROCESS, WHEN IT SUMMARILY DISMISSED, UNDER R.C. 2953.21(C) AND RULE 12, MYERS' CLAIMS OF PROSECUTORIAL MISCONDUCT (GROUNDS 50, 58), WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING AND IN FAILING TO GRANT RELIEF.

{¶ 71} Myers argues the trial court erred in summarily denying Grounds 50 and 58 of his PCR petition which allege prosecutorial misconduct.

{¶ 72} For a conviction to be reversed on the basis of prosecutorial misconduct, a defendant must prove the prosecutor's comments were improper and that they prejudicially affected the defendant's substantial rights. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 62; *McKelton*, 2015-Ohio-4228 at ¶ 13. However, "[t]he focus of an inquiry into allegations of prosecutorial misconduct is upon the fairness of the trial, not upon culpability of the prosecutor." *State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 56. Therefore, "[p]rosecutorial misconduct is not grounds for error unless the defendant has been denied a fair trial." *State v. Olvera-Guillen*, 12th Dist. Butler No. CA2007-05-118, 2008-Ohio-5416, ¶ 27, citing *State v. Maurer*, 15 Ohio St.3d 239 (1984).

{¶ 73} We first address Myers' averment that "the late and questionable disclosure of Mosley's notebook may very well have been the result of prosecutorial misconduct."

{¶ 74} R.C. 2953.21(A)(4) requires a petitioner to "state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner." Except as provided in R.C. 2953.23, inapplicable here, "any ground for relief that is not so stated in the petition is waived." R.C. 2953.21(A)(4); *State v. Lawrence*, 12th Dist. Butler

Nos. CA2017-06-078 and CA2019-03-048, 2020-Ohio-855, ¶ 17. Myers did not raise this claim of prosecutorial misconduct in his PCR petition and has therefore forfeited it. *State v. Zeune*, 10th Dist. Franklin No. 13AP-147, 2013-Ohio-4156, ¶ 30; *State v. Barb*, 8th Dist. Cuyahoga No. 94054, 2010-Ohio-5239, ¶ 25; *State v. McKee*, 9th Dist. Lorain No. 96CA006599, 1997 Ohio App. LEXIS 4433, *9 (Oct. 1, 1997) (failure to raise issue in PCR petition results in a waiver of the right to assert the issue on appeal).

{¶ 75} Ground 50 alleges that Myers' due process rights were violated when privileged attorney-client discussions were potentially broadcast throughout the courthouse and into the prosecutor's office via the trial court's audio/video recording system. In his brief, Myers asserts the fact that conversations from the defense table could be broadcast in such a manner should cause "great concern about whether any privileged conversations were 'overheard,' whether any were recorded, whether someone took notes of what they heard, [and] whether such information was utilized by the State in any fashion[.]"

{¶ 76} Myers does not identify the resulting prejudice. The trial court sua sponte addressed the issue at a pretrial hearing in August 2014, subsequently conducted an evaluation of its audio/video recording system to make sure that conversations taking place at the defense table could not be heard by others, and provided a copy of that evaluation to counsel. In dismissing Ground 50, the trial court found "NO evidence that any conversation of counsel was ever overheard," noted its investigation into the issue, and "determined that the mute button was sufficient to prevent anyone from overhearing any conversation between counsel and the petitioner." Furthermore, this issue could have been raised on direct appeal to the Ohio Supreme Court and is therefore barred by res judicata. The trial court did not err in dismissing Ground 50.

{¶ 77} Ground 58 alleges that the elected prosecutor engaged in misconduct by extensively posting about the case on his county prosecutor Facebook and Twitter accounts

during and after the trial and via statements he made in an interview during a 2016 BBC documentary. Ground 58 further alleges that Myers was prejudiced by the prosecutor's misconduct. The trial court dismissed the ground, finding that Myers "failed to establish sufficient operative facts to establish substantive grounds for relief." In his brief, Myers asserts that the prosecutor's social media postings and interview "tainted" his right to a fair trial.

{¶ 78} We find that the trial court did not err in dismissing Ground 58. The prosecutor's post-trial social media posts, post-trial media statements, and statements in the 2016 BBC documentary are irrelevant and could not and did not deprive Myers of a fair trial. Regarding the prosecutor's social media postings and statements that occurred before and during trial, Myers does not articulate how any specific post or media statement prejudiced his right to a fair trial. A review of the posts and statements shows that they were restricted to providing the public with information about the criminal proceedings against Myers and communicated the results of various stages of the criminal proceedings against Myers either directly or by sharing links to news headlines. Following the guilty verdict, the prosecutor simply recognized Back's family and the efforts of the investigators and his office.

{¶ 79} Furthermore, the trial court repeatedly admonished the jurors not to view or listen to any news reports in any form. We presume the jury followed the trial court's admonitions unless it is demonstrated otherwise. *State v. Miller*, 12th Dist. Preble No. CA2019-11-010, 2021-Ohio-162, ¶ 50. Myers has not introduced any evidence to the contrary. Prejudice to a defendant will not be presumed in the absence of proof of jury exposure to possibly prejudicial news reports, or in this case, the prosecutor's social media posts. *See State v. Wright*, 3d Dist. Crawford No. 3-92-24, 1994 Ohio App. LEXIS 6090 (Dec. 30, 1994).

{¶ 80} Finally, this issue could have been raised by Myers in his direct appeal to the Ohio Supreme Court. We note that Myers actually did allege claims of prosecutorial misconduct as part of his direct appeal under his tenth proposition of law. Res judicata applies to any issue that could have been raised on direct appeal, including a claim alleging prosecutorial misconduct. *McKelton*, 2015-Ohio-4228 at ¶ 23, citing *State v. Zych*, 12th Dist. Clermont No. CA97-02-012, 1997 Ohio App. LEXIS 4731 (Oct. 27, 1997). Myers fails to identify any reason why this claim of prosecutorial misconduct could not have been raised on direct appeal. Myers does not assert he learned about the prosecutor's social media posts after filing his direct appeal. Nor does he allege the posts were not known or available at the time of trial or his direct appeal. *Dillingham*, 2012-Ohio-5841 at ¶ 10.

{¶ 81} Myers' seventh assignment of error is overruled.

2. Trial Court Rulings

{¶ 82} Assignment of Error No. 8:

{¶ 83} THE TRIAL COURT ERRED, AND DENIED MYERS DUE PROCESS AND AN ADEQUATE CORRECTIVE PROCESS, WHEN IT SUMMARILY DISMISSED, UNDER R.C. 2953.21(C) AND RULE 12, MYERS' CLAIMS OF TRIAL COURT ERRORS IN MULTIPLE RESPECTS (GROUNDS 51-56, 59), WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING AND IN FAILING TO GRANT RELIEF.

{¶ 84} Myers argues the trial court erred in summarily dismissing Grounds 51 through 56 and 59 of his PCR petition, all of which challenged several trial court's rulings.

{¶ 85} Ground 51 challenges the trial court's failure to grant a continuance of the trial date to allow defense counsel to obtain a mitigation specialist. This issue involves lead defense counsel's request to have his wife appointed as a mitigation specialist, which was initially denied by the trial court. After he was unable to find another mitigation specialist, lead counsel moved the trial court to reconsider its previous ruling. *Alternatively*, counsel

moved the court for a continuance of the trial date. The trial court reconsidered its previous denial, appointed lead counsel's wife as the mitigation specialist, and denied the alternative request for continuance. The trial court did not err in dismissing Ground 51.

{¶ 86} Ground 52 challenges the trial court's failure to grant a continuance of the trial date to allow defense counsel to investigate Mosley's notebook after it was disclosed to the defense the day before trial was to commence. Ground 53 challenges the trial court's admission of the notebook into evidence and its failure to instruct the jury on the break in the chain of custody. The notebook was discovered in Mosley's home eight months after the original search warrant was executed. On direct appeal, the Ohio Supreme Court addressed the state's delayed disclosure of the notebook, the trial court's denial of defense counsel's motion for a continuance, and the admissibility of the notebook into evidence. *Myers*, 2018-Ohio-1903 at ¶ 86-93, 112-120. In his direct appeal, defense counsel did not challenge the trial court's failure to instruct the jury on chain of custody. Because the issues above could have been or were raised on direct appeal to the supreme court, they are barred by res judicata. The trial court did not err in dismissing Grounds 52 and 53.

{¶ 87} Grounds 54 and 55 challenge the trial court's denial of Myers' motion to suppress his "involuntary" statements to Detective Michael Wyatt where he "did not understand his *Miranda* rights and never signed a *Miranda* waiver." In support of these grounds, Myers submitted the reports of Gary Rini, a crime scene/police procedure expert, and Dr. Drew Barzman, a psychiatrist. Upon reviewing Myers' videotaped police interrogations, Rini concluded that Myers "was clearly confused and befuddled during his questioning" and was "therefore apparently unable to appreciate the gravity of his situation, nor was he aware of the constitutional rights afforded to him." Upon reviewing Myers' police interrogations, administering the Miranda Rights Comprehension Instruments test ("MCRI"), and reviewing comprehensive historical information regarding Myers, Dr. Barzman opined

that "due to his young age of 19, probable, but at that time untreated, Bipolar Disorder, and lack of experience with interrogations and the adult criminal justice system in general," Myers "was unable to adequately apply his *Miranda* rights at the time of the interrogations."

{¶ 88} On direct appeal, the supreme court overruled Myers' proposition of law relating to the trial court's denial of his motion to suppress and the claims that he never validly waived his right to remain silent, that he was denied his constitutional right to counsel, and that his statements were involuntary. *Myers*, 2018-Ohio-1903 at ¶ 61-82. In his brief, Myers asserts that the expert reports of Rini and Dr. Barzman "were necessary to substantiate the claim" his statements were not voluntarily made and were obtained in violation of *Miranda*. With the exception of the MCRI test, the same facts and historical information reviewed by Rini and Dr. Barzman were known and available to Myers at the time of his direct appeal to the supreme court. Myers, therefore, could have appealed his statements to police on the basis of his demeanor during questioning, his age, his "probable, but at that time untreated, Bipolar Disorder, and his lack of experience with interrogations and the adult criminal justice system in general," but did not. "A report not found in the record does not automatically equate to a valid issue for post-conviction review purposes where, as here, the issue could have been raised on direct appeal." *State v. Drummond*, 7th Dist. Mahoning No. 05 MA 197, 2006-Ohio-7078, ¶ 43. The trial court did not err in dismissing Grounds 54 and 55.

{¶ 89} Ground 56 challenges the trial court's denial of Myers' motion for change of venue based on the "overwhelming" pretrial media publicity regarding the case. Although Myers moved the trial court for a change of venue, he did not challenge the trial court's denial of his motion in his direct appeal to the Ohio Supreme Court. It is therefore barred by res judicata. *See McKelton*, 2015-Ohio-4228. The trial court did not err in dismissing Ground 56.

{¶ 90} Ground 59 challenges the trial court's failure to instruct the jury that Mosley's plea deal to a life sentence without parole was a mitigating factor. The record shows that the trial court did instruct the jury that, in addition to the specific statutory mitigation factors, it could consider any additional factors that were not specifically mentioned in favor of a sentence other than death. Defense counsel was allowed to and did argue Mosley's plea deal as a mitigating factor. Furthermore, this claim could have been raised on direct appeal to the supreme court and is therefore barred by res judicata. *See State v. Jennings*, 10th Dist. Franklin No. 17AP-248, 2018-Ohio-3871; *State v. Southers*, 12th Dist. Butler No. CA88-03-027, 1988 Ohio App. LEXIS 2720 (June 30, 1988). The trial court did not err in dismissing Ground 59.

{¶ 91} Myers' eighth assignment of error is overruled.

3. Ineffective Assistance of Counsel during the Guilt Phase

{¶ 92} Assignment of Error No. 6:

{¶ 93} THE TRIAL COURT ERRED, AND DENIED MYERS DUE PROCESS AND AN ADEQUATE CORRECTIVE PROCESS, WHEN IT SUMMARILY DISMISSED, UNDER R.C. 2953.21(C) AND RULE 12, MYERS' CLAIMS THAT HIS TRIAL COUNSEL RENDERED CONSTITUTIONALLY DEFICIENT PERFORMANCE IN THE TRIAL PHASE OF HIS CAPITAL TRIAL (GROUNDS 6, 10-18), WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING, AND IN FAILING TO GRANT RELIEF ON THESE MERITORIOUS IAC CLAIMS.

{¶ 94} Myers argues the trial court erred in summarily dismissing Grounds 6 and 10 through 17 of his PCR petition, all of which allege numerous instances of ineffective assistance of counsel during the guilt phase of the trial.

{¶ 95} In order to establish a claim of ineffective assistance of counsel, it must be shown that an attorney's performance was deficient and that the deficient performance

prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). In postconviction proceedings, a petitioner bears the initial burden of submitting evidentiary materials containing sufficient operative facts to demonstrate the lack of competent counsel and also that the defense was prejudiced by counsel's ineffectiveness. *State v. Jackson*, 64 Ohio St.2d 107, 111 (1980). Pursuant to the res judicata doctrine, a PCR petition may be dismissed where a petitioner, represented by new counsel on direct appeal, could have raised the ineffective assistance of trial counsel claim on direct appeal without resort to evidence outside the record. *State v. Lentz*, 70 Ohio St.3d 527 (1994), syllabus; *State v. Loza*, 12th Dist. Butler No. CA96-10-214, 1997 Ohio App. LEXIS 4574, *9-10 (Oct. 13, 1997). Additionally, mere presentation of evidence outside the record does not transform a claim into one addressable in postconviction. *Drummond*, 2006-Ohio-7078 at ¶ 17. The evidence must show that the petitioner could not have appealed his claim based upon the information in the original record. *Id.*

{¶ 96} Ground 6 alleges that counsel was ineffective because he failed to present a youth-based defense theory during the guilt phase of the trial in anticipation of the penalty phase. Myers asserts that his "youth, its specific effects on him, and its manifestation in the conduct alleged by the State at trial should have all formed a central, consistent theme presented during both phases of the trial." Counsel's defense theory during the guilt phase was that Mosley committed the murder, Myers was simply present during the crime, and Mosley subsequently turned on Myers by entering into a plea deal and testifying against him. This was consistent with the penalty phase during which defense counsel argued Myers' sentence should not be more severe than Mosley's sentence.

{¶ 97} The decision regarding which defense theory to pursue at trial is a matter of trial strategy, and trial strategy decisions are not the basis of a finding of ineffective assistance of counsel. *State v. Murphy*, 91 Ohio St.3d 516, 524, 2001-Ohio-112; *State v.*

Kinsworthy, 12th Dist. Warren No. CA2013-06-053, 2014-Ohio-1584, ¶ 43. Moreover, as the trial court noted when it dismissed Ground 6, the fact that another defense attorney may have or would have employed a different approach does not mean the alternative strategy fell below an objective standard of reasonableness. *State v. Casey*, 12th Dist. Butler No. CA2017-08-013, 2018-Ohio-2084, ¶ 34. "[T]here is a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* Defense counsel's guilt-phase strategy will not be second-guessed even though appellate counsel now argue that they would have defended differently. *State v. Mason*, 82 Ohio St.3d 144, 169, 1998-Ohio-370. The trial court did not err in dismissing Ground 6.

{¶ 98} Ground 10 alleges that counsel was ineffective because he failed to hire a fact investigator even though the trial court had approved funds for an investigator. Lead defense counsel's affidavit submitted in support of the PCR petition indicates that counsel "ultimately did not retain" an investigator because the case was not a "who done it." Ground 11 alleges that counsel was ineffective because he failed to fully cross-examine Mosley. Myers asserts that an investigator would have discovered, inter alia, that Mosley was suffering from rage and depression in the days leading to Back's murder, suffered from severe drug addiction and had violent tendencies, and was not in the habit of taking notes in a notebook. The investigation would have further discovered that Mosley's cellphone records belied his trial testimony. Myers claims that this information could have been used to properly cross-examine Mosley and impeach his credibility.

{¶ 99} "The *Strickland* holding and the American Bar Association's Guidelines only require trial counsel to perform a reasonable investigation, not to hire an investigator." *State v. Hairston*, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 36. "Further, '[a]n attorney's decision not to hire an investigator does not equate to a failure to investigate and

result in ineffective assistance of counsel.'" *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 247, quoting *Hairston* at ¶ 36. Defense counsel's failure to hire a fact investigator does not mean counsel did not investigate Mosley's background. The affidavits, reports, and records submitted by Myers in support of Ground 10 do not show a failure to investigate.

{¶ 100} Furthermore, as the Ohio Supreme Court specifically noted on direct appeal, defense counsel did cross-examine Mosley "vigorously and at length." *Myers*, 2018-Ohio-1903 at ¶ 186. Defense counsel's cross-examination of Mosley shows that counsel was very familiar with Mosley's statements to police and demonstrated his investigation and familiarity with personal facts about Mosley, including Mosley's substance abuse issues and the fact he engaged in illegal activity. Defense counsel's cross-examination elicited testimony that later allowed counsel to argue that Mosley was the principal offender, that he had a financial motive to commit the crimes, that he had a motive to keep his testimony consistent with his statements to Detective Wyatt because of his plea agreement, and that he lied to the police about Zennie to protect Zennie over Myers. Defense counsel's cross-examination of Mosley refutes any suggestion counsel did not investigate Mosley's background.

{¶ 101} Whether defense counsel discovered all of the information Myers identifies as topics of cross-examination is unknown. However, counsel's strategy was to cast Mosley as the leader who planned the crimes and executed them with little help from Myers and who was now turning on Myers to save himself. Some of the information that Myers suggests should have been a topic during Mosley's cross-examination is the same type of information which would have undermined Myers' mitigation strategy that Mosley bore primary responsibility for Back's murder. In this sense, portraying Mosley as suffering from depression and cocaine withdrawal at the time of the crime would have run counter to

defense counsel's strategy that Mosley was fully responsible for Back's murder. In addition, in light of the overwhelming evidence of Myers' guilt and the fact that Mosley's testimony regarding his and Myers' actions on the days leading to and culminating in the murder was corroborated by third-party witnesses, there is no reasonable probability Myers would have been acquitted of the charges. The trial court did not err in dismissing Grounds 10 and 11.

{¶ 102} Ground 12 challenges counsel's failure to cross-examine Sergeant Jeff Garrison of the Clayton Police Department and Detective Wyatt during the hearing on Myers' motion to suppress and at trial regarding their failure to follow their respective police procedure manual in handcuffing Myers when he was only wanted for an interview. Myers asserts that had counsel used the manuals when cross-examining the officers, this would have aided in showing that Myers was "effectively seized" when he was handcuffed and would have tarnished the officers' credibility.

{¶ 103} The record shows that it was Clayton police officers who handcuffed Myers and placed him in the back seat of a Clayton police cruiser after he was located at Mosley's home. At the time, Myers was a suspect who was detained at the request of the Warren County Sheriff's Office. The Clayton Police Department manual allows one to be restrained when the officer can articulate a need to handcuff for safety reasons. The sergeant's testimony at the suppression hearing indicates that Myers was handcuffed for safety reasons and to prevent him from running. Detective Wyatt's testimony reveals that the detective did not direct that Myers be handcuffed, and that in fact, he directed that the handcuffs be removed after he discovered that Myers was handcuffed.

{¶ 104} Furthermore, as the trial court found, the extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 146. Even assuming, arguendo, that defense counsel was deficient in failing

to use the manuals when he cross-examined the officers, Myers fails to establish that, but for counsel's error, a reasonable probability exists that the result of the suppression hearing and his trial would have been different. The trial court did not err in dismissing Ground 12.

{¶ 105} Ground 13 alleges that counsel was ineffective because he failed to present a crime scene expert testimony to question the veracity of Mosley's notebook and rebut such evidence. The notebook was discovered in Mosley's home eight months after the original search warrant was executed in January 2014. In support of Ground 13, Myers submitted Rini's report. The report indicates that photographs taken during the January 2014 search of Mosley's home do not show the notebook at all, nor was the notebook mentioned in any investigative report generated as a result of the January 2014 search of Mosley's home. Rini's report states that the "discovery" of the notebook "eight months later, during a warrantless search in a location previously photographed during the January [2014] search, draws into question the legitimacy of the 'find' by investigating officers." Thus, "[i]t is not unwarranted for one to conclude the possibility that the [notebook] was not, in fact present during the original crime scene search, and may have been placed at the scene sometime after the search was completed."

{¶ 106} "As an initial matter, the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 66. Further, even if the wisdom of such an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 49 (1980). Defense counsel cross-examined Mosley upon all issues identified in Rini's report and revisited those issues in closing argument. Detective Wyatt testified the notebook was found where Mosley said it would be. The trial court did not err in dismissing Ground 13.

{¶ 107} Ground 14 alleges that counsel was ineffective because he failed to present

a police procedure expert such as Rini to challenge *Miranda* issues. Myers asserts that Rini could have testified, based on his review of Myers' police interrogations, that Myers was "clearly confused" during questioning, that Detective Wyatt did not adequately explain the *Miranda* warnings to Myers, and that the detective provided Myers with inaccurate information concerning how he could obtain an attorney. Ground 15 alleges that counsel was ineffective because he failed to present an expert to evaluate Myers' understanding of his *Miranda* rights. In support of this ground, Myers submitted the report of Dr. Barzman. Upon reviewing Myers' police interrogations, administering the MCRI test, and reviewing comprehensive historical information regarding Myers, Dr. Barzman opined that "due to his young age of 19, probable, but at that time untreated, Bipolar Disorder, and lack of experience with interrogations and the adult criminal justice system in general," Myers "was unable to adequately apply his *Miranda* rights at the time of the interrogations."

{¶ 108} During the suppression hearing defense counsel's cross-examination of Detective Wyatt addressed the issues raised in Rini's report, and the videotapes of Myers' interrogations were played and admitted into evidence. The videotapes were likewise played to the jury and admitted into evidence at Myers' trial. The trial court denied Myer's motion to suppress, finding that Myers validly waived his *Miranda* rights. The trial court further found that, based on the totality of the evidence, Myers understood the nature of his *Miranda* rights and the consequences in declining to exercise them. In his direct appeal to the Ohio Supreme Court, Myers challenged the validity of his *Miranda* waiver and argued that counsel was ineffective during the guilt phase of his trial. Myers' alleged confusion during police questioning, Detective Wyatt's explanation to Myers of the *Miranda* warnings and the information he provided Myers concerning how to retain an attorney, and counsel's alleged ineffectiveness in failing to present expert testimony to challenge *Miranda* issues were cognizable and could have been raised on direct appeal based solely on the original

record. Rini's report does not constitute evidence outside the record as Myers asserts. Myers' argument is therefore barred by res judicata. *See State v. Dempsey*, 8th Dist. Cuyahoga No. 76386, 2000 Ohio App. LEXIS 2628 (June 15, 2000); *State v. Holloway*, 1st Dist. Hamilton No. C-900805, 1992 Ohio App. LEXIS 283 (Jan. 29, 1992). The trial court did not err in dismissing Ground 14.

{¶ 109} The trial court dismissed Ground 15, finding that "even if the defense had requested an expert to evaluate Myers['] understanding of his *Miranda* rights, based on the evidence presented at the motion to suppress hearing it is unlikely that the Court would have granted that request since the Court denied the motion to suppress." The trial court further found that "[t]he failure to request a * * * police procedures expert or another expert to challenge *Miranda* issues was not such an error as to deny [Myers'] constitutional rights. [Myers] was not entitled to any such expert[.]" Thus, the trial court found that even considering Dr. Barzman's report, Myers failed to set forth sufficient operative facts establishing a substantive ground for relief.

{¶ 110} The MRCI administered by Dr. Barzman in October 2016 is the updated version of the Thomas Grisso's Instruments for Assessing Understanding & Appreciation of Miranda Rights, commonly referred to as the Grisso test. The test specifically assesses a person's capacity to understand and appreciate *Miranda* rights at the time of the evaluation. *Garner v. Mitchell*, 557 F.3d 257, 266 (6th Cir.2009). The test consists of four subtests, called "instruments": Comprehension of *Miranda* Rights (CMR), Comprehension of *Miranda* Rights – Recognition (CMR-R), Function of Rights in Interrogation (FRI), and Comprehension of *Miranda* Vocabulary (CMV). *Id.*; *State v. Higgins*, 7th Dist. Jefferson No. 12 JE 11, 2013-Ohio-2555, ¶ 43.

{¶ 111} Myers' scores were within the range for 19-year-old individuals with a verbal IQ of 101 to 110 in the first three instruments; his score of 29 out of 32 in the fourth

instrument (CMV) was good in comparison to 19-year-old individuals with a verbal IQ of 101 to 110. As stated above, the Grisso test purports to assess one's capacity to understand the *Miranda* warnings only at the time of the evaluation, not at the time the warnings were given. *Garner* at 270. The test does not purport to measure the validity of the waiver of *Miranda* rights or legal competence to waive *Miranda* rights. *Id.* at 269. In his report Dr. Barzman admitted the limited usefulness of Myers' scores "since his interrogations were almost 3 years ago[.]" Nonetheless, Dr. Barzman opined that "[b]ased on his responses to the [test], it is evident that Austin currently understands the words of the *Miranda* Rights but he had problems with applying his rights. Although [he] appeared to have average to above average intelligence, he did not have the 'street smarts' three years ago to actually apply his *Miranda* Rights under intense stress."

{¶ 112} Myers' scores indicate he did understand his *Miranda* rights. Myers was interviewed five times by Detective Wyatt. *Miranda* warnings were not required during the first interview as Myers was not in custody. Detective Wyatt administered *Miranda* warnings to Myers on three separate times; each time Myers stated he understood them. Myers invoked his right to counsel in the second interview and the detective ended the interview. Myers sought to re-initiate questioning during a third interview but was rebuffed because he had invoked his right to counsel. Myers subsequently re-initiated questioning during a fourth interview, was administered the *Miranda* warnings again, and provided a statement. Detective Wyatt administered the *Miranda* warnings for a third time before the fifth interview. Myers indicated he understood them and answered the detective's questions. On direct appeal, the Ohio Supreme Court found that Myers understood his *Miranda* rights, which was further demonstrated by his invocation of his right to counsel. *Myers*, 2018-Ohio-1903 at ¶ 69-71. The trial court did not err in dismissing Ground 15.

{¶ 113} Ground 16 alleges that counsel was ineffective because he failed to support

the motion for a change of venue with news articles evidencing the extraordinary amount of pretrial publicity, failed to renew the motion after voir dire, and ultimately failed to achieve a change of venue. The trial court dismissed Ground 16, finding that the motion for change of venue was initially denied subject to reconsideration if a jury could not be empaneled in accordance with *State v. Lundgren*, 73 Ohio St.3d 474, 1995-Ohio-227. The motion was subsequently denied after the trial court was able to successfully seat a jury in accordance with *Lundgren*. Juror questionnaires submitted in support of Ground 16 indicate that six of the 12 jurors had seen or heard pretrial news coverage of the case. All jurors indicated that they could and would decide the case based solely on the evidence presented at trial. Furthermore, although Myers alleged claims of ineffective assistance of counsel during the guilt phase as part of his direct appeal to the Ohio Supreme Court, he did not challenge defense counsel's failure to achieve a change of venue. It is therefore barred by res judicata. *See Piesciuk*, 2013-Ohio-3879. The trial court did not err in dismissing Ground 16.

{¶ 114} Ground 17 alleges that counsel was ineffective because he failed to challenge the chain of custody of Mosley's notebook either through cross-examination of the state's witnesses or by expert testimony. As stated above, the notebook was discovered in Mosley's home eight months after the original search warrant was executed. Counsel vigorously cross-examined Mosley about the notebook and objected to its admission. On direct appeal to the supreme court, Myers challenged the admission of the notebook into evidence and alleged ineffective assistance of counsel during the guilt phase of the trial. The issue regarding the chain of custody of Mosley's notebook was cognizable and could have been raised on direct appeal to the supreme court and is therefore barred by res judicata. *See State v. Dickason*, 5th Dist. Stark Case No. 1996CA00423, 1997 Ohio App. LEXIS 3241 (July 7, 1997). The trial court did not err in dismissing Ground 17.

{¶ 115} Myers' sixth assignment of error is overruled.

4. Ineffective Assistance of Counsel during the Penalty Phase

{¶ 116} Assignment of Error No. 5:

{¶ 117} THE TRIAL COURT ERRED, AND DENIED MYERS DUE PROCESS AND AN ADEQUATE CORRECTIVE PROCESS, WHEN IT SUMMARILY DISMISSED, UNDER R.C. 2953.21(C) AND RULE 12, MYERS' CLAIMS THAT HIS TRIAL COUNSEL RENDERED CONSTITUTIONALLY DEFICIENT PERFORMANCE IN THE SENTENCING PHASE OF HIS CAPITAL TRIAL (GROUNDS 19-45, 49), WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING, AND IN FAILING TO GRANT RELIEF ON THESE MERITORIOUS IAC CLAIMS.

{¶ 118} Myers argues that the trial court erred in summarily dismissing Grounds 19 through 45, all of which allege several instances of ineffective assistance of counsel during the penalty phase of the trial. Specifically, Myers argues that counsel was ineffective during the penalty phase of the trial because he failed to (1) conduct a competent mitigation investigation and consult with and hire a competent mitigation specialist in a timely fashion, (2) present the testimony of expert witnesses regarding Myers' youth and psychological history, (3) present expert testimony regarding the science on adolescent brain development, and (4) present the testimony of numerous witnesses who would have testified about Myers' background, family history, mental health, education, and relationships with others. Myers argues that defense counsel's primary mitigation strategy was that Myers should not receive a punishment harsher than the life sentence without parole imposed on Mosley. Myers avers that had defense counsel's focus been broader and include the testimony of experts and other witnesses, he would not have been sentenced to death.

{¶ 119} The trial court dismissed the grounds for relief, finding that (1) the failure to

call witnesses is trial strategy that does not raise to a constitutional violation, (2) a PCR petition is not a vehicle to substitute another trial strategy for one that failed, (3) defense counsel did argue Myers' youth in mitigation and the trial court instructed the jury that youth was a mitigating factor, and (4) defense counsel's failure to present the testimony of an expert in adolescent brain development, and his decision to consult with but not call a psychology expert to the stand and instead rely on arguing that Myers' sentence should not be harsher than that of Mosley was trial strategy.

{¶ 120} Myers' foregoing claims of ineffective assistance of counsel during the penalty phase of the trial were also the basis for his motions for discovery and why he argues the trial court erred in denying his motions for discovery under his second and third assignments of error. As pertinent here, the trial court denied the discovery motions as follows:

> This is not a case where the defense did not seek the assistance of an investigator, mitigation expert and mental health expert. Clearly, a decision by trial counsel not to even have these valuable tools available to him while defending a capital murder case can never be a tactical, strategic decision. However, the decision of whether or not to use these tools or how to use them, as a matter of strategy or in the context of marshalling resources, is the cornerstone in building a proper legal defense.
>
> Petitioner has made allegations that his attorneys and mitigation specialist were ineffective and did not properly investigate and prepare a defense. In support of this claim, he has provided affidavits and documentary evidence concerning their performance. However, petitioner has made no specific representation about what he expects to learn in a deposition of [lead defense counsel, co-counsel and/or the mitigation specialist]. Both [lead counsel and the mitigation specialist] provided affidavits explaining what they knew, what they did, and why they did it. The fact that an attorney may look back in a deposition or otherwise, with 20/20 hindsight, and question or revisit his trial strategy **after** the jury has rendered its verdict provides no real insight to the Court. Further, the fact that [lead counsel] may have limited his mitigation strategy to what he believed to be the strongest and most compelling arguments does not support conducting discovery on this issue. * * *

> In short, the petitioner has not established good cause to conduct discovery with respect to the defense team, including the attorneys.

{¶ 121} During the penalty phase of the trial, defense counsel presented the testimony of Myers' father, mother, and younger brother Bryce. All three testified about Myers' family history and background, including the breakup of the family and the parents' divorce following the mother's affair with a coworker and resultant pregnancy. They further testified about Myers' close bond with his siblings and how he was a very good mediator and mentor for his stepsiblings. Myers' mother testified that as a child, Myers tested gifted in several areas, was a talented piano player, and had designed a business card for himself in sixth grade. However, she started seeing changes in Myers when he was 14 years old. After she discovered Myers had been cutting himself and shooting his legs with a pellet gun, he was hospitalized for five days at Kettering Hospital Youth Services. Myers' mother testified that Myers was initially diagnosed with bipolar disorder and upon discharge, was prescribed medications and weekly therapy with a psychologist. However, Myers discontinued both when he began living with his father later that year. Defense counsel introduced photographs of Myers and his family, the business card he had designed for himself, his letters to his family during his incarceration, the records of his hospitalization at Kettering Hospital, and his gifted test results when he was in fifth grade. The Kettering Hospital records show that Myers was hospitalized as a result of taking 20 Benadryl tablets and that he was initially diagnosed with "depressive disorder not otherwise specified versus bipolar disorder most recent depressed; substance induced mood disorder; over-the-counter drug abuse." Myers was ultimately diagnosed with "depressive disorder, not otherwise specified. Rule out bipolar disorder."

{¶ 122} Myers made an unsworn statement, telling the jury that he was sorry "this

happened" and wished he "could go back in time and stop this before it even happened," and that the death penalty would not hurt him and would only cause more pain and suffering to innocent people such as his parents and siblings. Myers asked the jury to spare his life and give him a chance to become a better person.

{¶ 123} In closing argument, defense counsel stressed Myers' good qualities and the positive influence he could have in his siblings' lives, acknowledged there had been "bumps in the road," such as issues with Myers' family, "his mental health a little bit," and his cutting and shooting himself with the pellet gun, and asked the jury to consider Myers' age, the love of his family, and the Kettering Hospital records. Overall, defense counsel focused on Mosley's plea agreement and resulting life sentence, telling the jury that it was the most important mitigating factor in the case and that Myers should not be punished more than Mosley who was the one who actually killed Back.

{¶ 124} Grounds 22 through 43 allege that counsel was ineffective because he failed to present or "fully" present the testimony of numerous witnesses who would have testified about Myers' background, family history, mental health, education, and relationships with others. In support of this claim, Myers attached 22 affidavits from relatives, friends, acquaintances, and former educators to his PCR petition. Of those witnesses, only three testified at the penalty phase, to wit, Myers' parents and his brother Bryce.

{¶ 125} It is well established that a "defense decision to call or not call a mitigation witness is a matter of trial strategy. * * * Debatable trial tactics generally do not constitute ineffective assistance of counsel." *Graham*, 2020-Ohio-6700 at ¶ 139. The Ohio Supreme Court has further stated that trial counsel is not ineffective for failing to call all available family members. *State v. McGuire*, 80 Ohio St.3d 390, 399, 1997-Ohio-335. Furthermore, "[a]dditional mitigating evidence that is 'merely cumulative' of that already presented does not undermine the results of sentencing." *State v. Herring*, 142 Ohio St.3d 165, 2014-Ohio-

5228, ¶ 117. Instead, "the new evidence * * * must differ in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing." *Id.*

{¶ 126} Upon reviewing the witnesses' affidavits, we find that the trial court did not err in dismissing Grounds 22 through 43. Although the 19 individuals who did not testify may have provided a more disinterested account of Myers' family, their testimony to a large extent was cumulative to and did not differ in substantial way from the testimony of Myers' parents and his brother Bryce. *See State v. Twyford*, 7th Dist. Jefferson No. 98-JE-56, 2001 Ohio App. LEXIS 1443 (Mar. 19, 2001). Likewise, the affidavits of Myers' parents and brother did not differ in substantial way from their testimony at the penalty phase.

{¶ 127} Grounds 19 and 20 allege that counsel was ineffective because he failed to consult with and hire a competent mitigation specialist in a timely fashion.

{¶ 128} In March 2014, lead defense counsel moved to employ his wife, a licensed attorney with experience defending capital cases, as the mitigation specialist. The trial court balked at the request due to the family relationship and denied the motion. Lead counsel did not seek assistance from another mitigation specialist until he contacted the Ohio Public Defender's Office in May 2014. However, the public defender's office did not have the resources to provide a mitigation specialist. Unable to find another mitigation specialist, lead counsel moved the trial court to reconsider its previous denial. The trial court held a hearing on the motion for reconsideration on June 4, 2014. Thereafter, the trial court appointed lead counsel's wife as the mitigation specialist. The trial court's decision noted that counsel's wife had "already undertaken some mitigation work in the case, including meeting with the family of the Defendant[.]"

{¶ 129} The jury found Myers guilty on all counts and specifications on October 2, 2014. The penalty phase was held on October 6, 2014. In support of his PCR petition, Myers attached the affidavits of lead counsel and the mitigation specialist. Both affidavits

state that during the three-day weekend between the jury verdict and the penalty phase, lead counsel and the mitigation specialist met with and interviewed Myers' mother and two of his siblings at the mother's home. That same weekend, they also met with and interviewed Myers' father and stepmother at their home. The affidavits of Myers' parents and stepmother corroborated that the interviews took place that weekend. Myers' stepmother stated the interview was short. Myers' mother stated that her interview lasted about one hour and one half and that she gave photographs to the mitigation specialist at another time and "spent another hour to an hour and a half with her."

{¶ 130} The Ohio Supreme Court has held that capital defendants "[do] not have a constitutional right to a mitigation specialist or a right to an effective one." *Herring*, 2014-Ohio-5228 at ¶ 113, citing *McGuire*, 80 Ohio St.3d at 399 (no requirement for counsel to hire mitigation specialist in capital case); *Drummond*, 2006-Ohio-7078 at ¶ 69 (a mitigation specialist is not a requirement for effective assistance of counsel). The trial court noted that the mitigation specialist "was a trained attorney who has handled a number of capital cases and therefore has the ability to determine what evidence is effective in the [penalty] phase." The trial court did not err in dismissing Grounds 19 and 20.

{¶ 131} Grounds 21, 44, and 45 generally challenge counsel's failure to conduct a comprehensive investigation into Myers' background and counsel's failure to present effective mitigation evidence during the penalty phase of the trial. Specifically, Grounds 21, 44, and 45 allege that counsel was ineffective because he failed to present the expert testimony of clinical forensic psychologist Dr. Bobbie Hopes, failed to consult with and present an expert in adolescent brain development, and failed to effectively present youth as a mitigation factor.

{¶ 132} In support of his PCR petition, Myers submitted affidavits and reports from several experts related to adolescent brain development and expressing opinions based

upon their evaluation of Myers and his mental health and social records. The evidence submitted by Myers generally reflects that individuals of his age are prone to risk taking, peer influence, and impulsivity more akin to adolescents than adults. Myers argues that this evidence established substantive grounds for relief and he is therefore entitled to discovery and an evidentiary hearing on his PCR petition. The state argues that the evidence was not presented as a matter of trial strategy because it was in conflict with defense counsel's mitigation strategy to emphasize Myers' good qualities and was cumulative to evidence presented at the penalty phase.

{¶ 133} In his direct appeal to the Ohio Supreme Court, Myers argued ineffective assistance of counsel in the penalty phase for failure to present any expert testimony. Specifically, Myers asserted that defense counsel "should have adduced expert testimony to explain the meaning of his self-harming behavior in his early teens and how brain development affects the decision-making of young people." *Myers*, 2018-Ohio-1903 at ¶ 198. The supreme court rejected Myers' claim on the ground that "nothing in the record shows what such expert would have said in the penalty phase[.] Thus, Myers has not demonstrated prejudice from missing such testimony." *Id.* The supreme court further found, "At trial, the defense requested and received funds to hire a consulting psychologist. The psychologist the defense chose was appointed, but the record does not show what she told Myers's counsel regarding her conclusions. Hence, there is nothing to show deficient performance by counsel." *Id.* at ¶ 199.

{¶ 134} In a capital case, "[d]efense counsel has a duty to investigate the circumstances of his client's case and explore all matters relevant to the merits of the case and the penalty, including the defendant's background, education, employment record, mental and emotional stability, and family relationships." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 219. Defense counsel has a duty to make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary. *State v. Johnson*, 24 Ohio St.3d 87, 89 (1986). Counsel's "investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527 (2003), citing American Bar Association, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Section 11.4.1(C), 93 (1989). Given the severity of the potential sentence and the reality that the life of a capital defendant is at stake, it is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to the client's case. *Johnson* at 90. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.] However, a failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted." *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir.1994). "An attorney's failure to reasonably investigate the defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel." *Pickens* at ¶ 219.

{¶ 135} Myers was examined by Dr. Barzman for purposes of the PCR petition and his report is attached to the petition. Myers was also examined by Dr. Daniel Davis, a forensic psychologist, and his report is attached to the PCR petition. In his report, Dr. Barzman opined that Myers' mental health history, which included significant depressive and manic symptoms, was consistent with bipolar disorder which is associated with increased impulsivity and a focus on immediate gratification.

{¶ 136} In his report, Dr. Davis stated that the symptoms Myers experienced in high school were associated with bipolar disorder and that he was not fully neurologically

developed at the time of his crimes and sentencing. Dr. Davis further stated that the trial court and jury were deprived of pertinent psychological information specific to Myers and general psychological research specific to youthful and capital offenders, evidence that would have been extremely helpful to understand Myers' actions and demeanor. In particular, Dr. Davis noted that while Myers' youth was clearly evident at trial, the crimes took place when Myers was still developing neurologically and psychologically, however "there was no specific testimony as to the considerable scientific literature concerning neurological development in late adolescents and young adults." Dr. Davis also noted Myers' apparent lack of remorse for his crimes at sentencing but stated that scientific literature shows that an apparent lack of remorse is not indicative of anything atypical in adolescent males and is typically mistaken as one of the "signs of the development of a psychopathic personality when they are, in fact, transient features of adolescent development." Dr. Davis' report continued,

> Further, abused and neglected children, such as Austin demonstrate a limited range of emotions as a way to cope with very stressful home environments. These research findings apply specifically to Austin. He was raised in a highly neglectful environment. He was at the time of his sentence still in the commonly accepted development stage of late adolescence. Neither the trial court nor jury had this critically important research presented to them[.]

{¶ 137} In support of his PCR petition, Myers also submitted the affidavits of his lead defense counsel and Dr. Hopes. Lead counsel's affidavit details what he did and did not do. As pertinent here, lead counsel stated he believed "that everyone close to the process thought that [Myers] would receive a life sentence regardless of the trial phase result, based upon Mosley's plea deal having been the principal offender in the aggravated murder of Justin Back." Counsel's affidavit further stated,

> I did not consider requesting funding for, or hiring, a youth/adolescent expert to help explain issues, including

youth/adolescent brain development, to the jury.

> Even though we did retain a psychologist, Dr. Bobbie Hopes, for mitigation, Dr. Hopes told me that she would not be able to provide anything for the jury except for a timeline of Austin's life, something which Dr. Hopes believed Austin's mother could provide and that it would be better if it came from her. Given her statements to me, I was concerned that if Dr Hopes presented this information to the jury, it would just be seen as "psychobabble."
>
> When Austin's mother * * * did not effectively provide such a timeline as I had anticipated and that [the mitigation specialist] and I had worked with her on, I did not think to then call Dr. Bobbie Hopes to the stand to testify.

{¶ 138} Lead counsel's averments were contradicted by Dr. Hopes' affidavit. Dr. Hopes evaluated Myers three times in August 2014, for a total of six hours, for purposes of death penalty mitigation. Dr. Hopes averred that she provided lead counsel with a report in which she expressed the opinion that Myers' age, his history of childhood physical abuse, including his history of being diagnosed and treated for depression, and his history of self-mutilation were mitigation factors. Following Myers' conviction for aggravated murder, lead counsel called Dr. Hopes and told her he did not intend to use her as a mitigation expert. Dr. Hopes suggested that Myers' age and relevant research on adolescent brain development were strong mitigation factors but was told by lead counsel that information about youth had come out during jury selection. Dr. Hopes averred that she was willing and prepared to testify about age and adolescent brain development research. Dr. Hopes further averred that she never advised lead counsel that she could only present a timeline of Myers' life and that she never discussed a timeline with counsel.

{¶ 139} As stated above, "[i]n a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *Jackson*, 64

Ohio St.2d 107 at syllabus. In order to secure an evidentiary hearing on a PCR petition asserting ineffective assistance of counsel, a petitioner need not prove counsel rendered ineffective assistance. Rather, the PCR petition only needs to set forth sufficient operative facts to establish substantive grounds for relief.

{¶ 140} Upon reviewing the reports of Drs. Barzman and Davis and the affidavits of Dr. Hopes and lead defense counsel, we find that Myers has provided evidentiary documents setting forth sufficient operative facts to warrant an evidentiary hearing on his PCR petition regarding his claim that counsel was ineffective for failing to present expert testimony at the penalty phase of the trial.

{¶ 141} Defense counsel has the affirmative duty to investigate mitigating evidence. *State v. Herring*, 7th Dist. Mahoning No. 08-MA-213, 2011-Ohio-662, ¶ 55. Defense counsel "can make the decision to forego the presentation of evidence, but only after a full investigation." *Id.* It is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to their client's case. *Johnson*, 24 Ohio St.3d at 89.

{¶ 142} Lead counsel's averment that he did not consider requesting funding for, or hiring, a youth/adolescent expert to explain issues regarding adolescent brain development to the jury fails to indicate counsel's motivation and instead suggests that counsel's failure to present such expert testimony was not the product of an informed, tactical decision. That is, counsel's averment shows he did not engage into a reasoned and careful consideration of such expert testimony before ultimately rejecting it. The same can be said about counsel's failure to have Dr. Hopes testify as an expert witness at the penalty phase. While counsel averred in his affidavit that Dr. Hopes did not testify because she could only provide a timeline of Myers' life, this averment was explicitly contradicted by Dr. Hopes' affidavit. There is little evidence documenting the extent of defense counsel's reasoning for his

investigation and decision making regarding expert testimony mitigation evidence.

{¶ 143} The state argues that mitigation evidence regarding Myers' dysfunctional family, self-mutilation, and mental health issues such as childhood depression and bipolar disorder, was presented through the testimony of his mother at the penalty phase, and thus, much of the psychological testimony that Drs. Hopes, Barzman, and Davis could have presented would have been cumulative. However, Myers' mother's testimony was much more limited on the issue. Myers' mother testified that the deterioration of her marriage did not seem to affect Myers, that she had not noticed Myers' self-mutilation, and that she believed Kettering Hospital initially diagnosed Myers with bipolar disorder. There was no testimony regarding Myers' childhood depression. Furthermore, Myers' mother is not qualified to provide the expert testimony necessary to contextualize the factors above.

{¶ 144} The state next argues that presenting this expert testimony at the penalty phase would have been inconsistent with defense counsel's mitigation theory emphasizing Myers' good qualities and the positive influence he could have in his siblings' lives. Thus, the state asserts, defense counsel's decision not to present such testimony was trial strategy which should not be second-guessed.

{¶ 145} However, lead counsel's affidavit does not advance this as the reason he did not present Dr. Hopes' expert testimony at the penalty phase. Lead counsel avers only that he did not call Dr. Hopes as a witness because she could only provide a timeline of Myers' life, an averment explicitly contradicted by Dr. Hopes' affidavit. Whether it was defense counsel's mitigation strategy to emphasize Myers' qualities, which counsel's affidavit does not suggest, it is not apparent why such strategy excludes a parallel strategy to contextualize Myers' youth in light of the science on adolescent brain development. As her affidavit clearly indicates, Dr. Hopes was prepared and available to testify about these issues and advised lead counsel on the eve of the penalty phase that Myers' age and

relevant research on adolescent brain development were strong mitigation factors. And while a decision by defense counsel to present only positive mitigation can be a sound trial strategy, counsel's decision to pursue a positive-mitigation theory can properly be made only after counsel has conducted a full mitigation investigation. *Herring*, 2014-Ohio-5228 at ¶ 90.

{¶ 146} The state further asserts that defense counsel did argue that Myers was only 19 years old at the time of the crimes. Counsel did briefly ask the jury to take Myers' age into consideration as a mitigation factor. However, counsel never developed the significance of Myer's youth as a mitigating factor.

{¶ 147} In light of the foregoing, we find that the trial court erred in summarily dismissing Grounds 21, 44, and 45 of the PCR petition without an evidentiary hearing. The trial court further erred in finding that Myers did not establish good cause to conduct discovery regarding his claim counsel was ineffective at the penalty phase in failing to present expert testimony on adolescent brain development in conjunction with Myers' age and mental health issues. Myers' claims are "neither patently frivolous nor palpably incredible" and "the discovery he requests" in the form of depositions of the defense team is "limited and reasonably calculated to lead to evidence in support of his claim[.]" *Hill*, 2007 U.S. Dist. LEXIS 71975 at *31-32; *Johnson v. Bobby*, S.D.Ohio No. 2:08-cv-55, 2010 U.S. Dist. LEXIS 103351 (Sept. 30, 2010); *Stallings v. Bradshaw*, N.D.Ohio No. 5:05CV0722, 2006 U.S. Dist. LEXIS 97540 (Feb. 28, 2006).

{¶ 148} We therefore remand this case for the trial court to conduct an evidentiary hearing on Grounds 21, 44, and 45 of the PCR petition which allege ineffective assistance of counsel at the penalty phase for failing to present expert testimony on adolescent brain development in conjunction with Myers' age and mental health issues. The advantages that an evidentiary hearing on a PCR petition based on ineffective assistance of counsel

can provide a trial judge are well established:

> The trial judge can delve into the motivation or reasoning of trial counsel through trial counsel's testimony. The court can hear the testimony of witnesses that were never called to testify at the original trial, and can determine the worth of their testimony as well as the witnesses' credibility. The trial judge can ask what the counsel knew, when he knew it, and whether a mistake was not strategic, but was instead careless. As here, in a postconviction hearing, a judge can hear testimony about what evidence was made available to trial counsel and when it was made available. A trial court in a postconviction proceeding thus plays a unique role in the consideration of ineffective assistance of counsel claims. It is the only court that actually hears testimony on that issue.

State v. Gondor, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 54.

{¶ 149} Myers' fifth assignment of error is sustained. To the extent noted above, Myers' second and third assignments of error are sustained in part.

5. Cumulative Errors

{¶ 150} Assignment of Error No. 10:

{¶ 151} THE TRIAL COURT ERRED, AND DENIED MYERS DUE PROCESS AND AN ADEQUATE CORRECTIVE PROCESS, WHEN IT SUMMARILY DISMISSED, UNDER R.C. 2953.21(C), MYERS' CLAIM OF CUMULATIVE ERROR (GROUND 60), WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING AND IN FAILING TO GRANT RELIEF.

{¶ 152} Myers argues the trial court erred in dismissing Ground 60 which alleges cumulative errors. We include under this assignment of error Myers' claims that the trial court erred in dismissing Grounds 18 and 49, which allege cumulative effect of the denial of effective assistance of counsel during the guilt and penalty phases of the trial (as initially argued in the fifth and sixth assignments of error). Under the doctrine of cumulative errors, a judgment may be reversed if the cumulative effect of errors deprives a defendant of a fair trial even though each of the instances of trial-court error does not individually constitute

cause for reversal. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 140. Given our resolution of Myers' second, third, and fifth assignments of error, this assignment of error is moot. *See State v. Stein*, 3d Dist. Logan No. 8-17-39, 2018-Ohio-2621, citing App.R. 12(A)(1)(c).

III. CONCLUSION

{¶ 153} In light of our resolution of Myers' second, third, and fifth assignments of error, the trial court's judgments denying Myers' motions for discovery and his PCR petition regarding his claim of ineffective assistance of counsel for failing to present expert testimony at the penalty phase of the trial are reversed and the matter is remanded for further proceedings consistent with this opinion. Specifically, on remand, the trial court shall permit discovery, conduct an evidentiary hearing, and rule on Grounds 21, 44, and 45 of the PCR petition.

{¶ 154} Judgment affirmed in part, reversed in part, and remanded.

HENDRICKSON, P.J., and S. POWELL, J., concur.

Myers v. Ohio

Supreme Court of the United States

January 7, 2019, Decided

No. 18-6532.

Reporter
2019 U.S. LEXIS 352 *; 139 S. Ct. 822; 202 L. Ed. 2d 599; 87 U.S.L.W. 3260; 2019 WL 113347

Austin Myers, Petitioner v. Ohio.

Prior History: State v. Myers, 2018-Ohio-1903, 2018 Ohio LEXIS 1280, 114 N.E.3d 1138 (Ohio, May 17, 2018)

Judges: [*1] Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

Petition for writ of certiorari to the Supreme Court of Ohio denied.

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Appendix C

Appx-0056

THE STATE OF OHIO, APPELLEE, *v.* MYERS, APPELLANT.

[Cite as *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903.]

Criminal Law—Aggravated murder—Convictions and death penalty affirmed.

(No. 2014-1862—Submitted December 5, 2017—Decided May 17, 2018.)

APPEAL from the Court of Common Pleas of Warren County, No. 14CR29826.

DEWINE, J.

{¶ 1} This is a direct appeal in a capital case. Austin Myers was convicted of aggravated murder with a death specification for killing his childhood friend Justin Back. We affirm his convictions and the imposition of the death penalty.

I. BACKGROUND

A. Planning and Preparation

{¶ 2} The case was tried to a jury. Much of the account of what happened came from Myers's friend and codefendant Timothy Mosley. According to Mosley, he and Myers began to concoct their scheme on January 27, 2014. That morning, Myers, who had just slept through the start of a new job, woke up Mosley and asked him whether he "wanted to make some money." When Mosley said he did, Myers suggested that they rob either a drug dealer he knew or "Justin Back's step dad, Mark [Cates]." Myers had once lived near Back's family. He and Back had attended seventh and eighth grades together and briefly had been friends until Back's mother told him he could no longer be around Myers. Myers had been in Back's home and told Mosley that Cates had a safe containing a gun and money that was "usually cracked open."

{¶ 3} Later that day, with Myers giving directions, Mosley drove them to the Waynesville area. As they approached Waynesville, Mosley realized that Myers had decided to rob Cates rather than the drug dealer.

Appendix D

{¶ 4} The two men arrived at the Cates house around noon. But when they got there, Back was at home, so they decided not to commit the robbery. Instead, they visited with Back for 15 to 20 minutes and then left. After leaving the house, Myers and Mosley went to the Waynesville library to discuss how to "get the money." According to Mosley, it was during this discussion that Myers "came up with the idea of killing Justin Back."

{¶ 5} Their first plan was to give Back a fatal injection. Mosley suggested using cold medicine, so they went to a Waynesville store to buy some. Mosley picked up four boxes of nighttime cold medicine, and Myers added a bottle of poisonous "bug wash." Myers carried these items to the checkout counter but could not complete the purchase because his credit card was declined. Then Myers tried to withdraw money from the store's ATM, but that did not work either.

{¶ 6} Empty-handed, the two left the store, and Myers directed Mosley to a nearby pharmacy, where Myers asked a clerk for syringes. When Myers explained that he wanted the kind with needles, the clerk referred him to the pharmacist. They stood in line briefly at the pharmacy counter but walked out without syringes.

{¶ 7} Myers and Mosley returned to the Cates house later in the day and watched a movie with Back. When Cates came home from work, he joined them in watching the movie for a short time until he and Back had to leave for an appointment with a Navy recruiter. At that point, Mosley and Myers left the house and drove to a McDonald's in Waynesville.

{¶ 8} In the McDonald's parking lot, the pair plotted "what to do * * * to further the plans." As Mosley tells it, he proposed returning immediately to the Cates house and breaking in while Cates and Back were away. But Myers rejected that idea, reasoning that they did not know how long Cates and Back would be gone. Instead, they went to their friend Logan Zennie's house, driving past the Cates house "to scout it out." Later, Myers, Mosley, Zennie, and a fourth man, named Cole, went to Mosley's house.

{¶ 9} At Mosley's house, while Zennie and Cole watched television downstairs, Mosley and Myers went to Mosley's room to "[come] up with another plan on how to get the safe." As they talked, Mosley wrote down their ideas in a small notebook.

{¶ 10} They hatched a scheme to strangle Back with a wire and then take the safe. The idea was to make it look as though Back had stolen the safe and run away from home. They planned to "take whatever [they] thought Justin would take"—specifically his "clothes, money, phone and charger"—and dump his body in a remote wooded area.

{¶ 11} According to Mosley, Myers then suggested that they kill Cates as well. Myers proposed that they "mak[e] it look like [Cates] killed [Back] and * * * ran off." Mosley testified that he opposed this idea because it would involve more work and greater risk.

{¶ 12} Their planning session complete, Mosley and Myers headed to a Lowe's store in Trotwood. Myers bought a three-foot length of galvanized steel cable and two metal rope cleats. Their intent was to fashion a garrote—or "choke wire" as Mosley called it—from these items by securing a cleat to each end of the cable.

{¶ 13} They returned to Mosley's room to put together their garrote, where Zennie walked in on them before they could hide the materials. At trial, Mosley could not recall precisely what they had told Zennie but said that they did not tell him what they planned to do with the garrote. In any event, Zennie put the garrote together for them.

{¶ 14} The next morning, Myers and Mosley bought more supplies. Mosley suggested buying ammonia, because he believed from watching crime shows that "it would destroy any DNA." Myers had the idea of purchasing "septic enzymes." He explained to Mosley that the cold weather would slow the body's decomposition; he thought they could speed up the process by pouring the enzymes

on it. They drove to a store northwest of Dayton, where Myers bought ammonia, septic-tank cleaner, and rubber gloves.

{¶ 15} The pair returned to Waynesville. Myers intended to commit the crime around 1:00 p.m. Needing to burn some time, they browsed an antiques store for a while. At 12:48 p.m., they bought gas for the car. After driving past the Cates house several times, they pulled in the driveway around 1:00 p.m. The plan, according to Mosley, was for Myers to distract Back while Mosley came up behind him. Myers would hold Back down while Mosley choked him to death with the garrote. Mosley stuffed the garrote into one of his pockets. He also was carrying a five- or six-inch pocketknife.

B. The Murder

{¶ 16} Myers knocked on the door. Back answered and let the pair in. The three men talked for a while. At some point, Back asked Myers whether he wanted a drink. Myers said he did, so Back went with him to the kitchen. Mosley "saw the opportunity" and followed them.

{¶ 17} Back opened the refrigerator and bent down to get the drink. As Back was straightening up, Mosley looped the garrote cable over Back's head from behind and crossed his arms to pull it tight. At the same time, Myers grabbed Back to restrain him. Mosley kicked Back's feet from under him, and all three fell to the floor, entangled.

{¶ 18} Mosley, however, had not been able to get the cable around Back's neck; instead, it was looped around his chin. As Back struggled for his life—which took "a good couple of minutes"—he repeatedly asked, "[W]hy[?]," and pleaded with his assailants to stop. Myers tried to "calm him down" by saying something "[along] the lines of 'it's all right, it's almost over.' "

{¶ 19} After Myers told Mosley that Mosley "had missed his throat and that [the wire] was wrapped around his chin," Mosley panicked, pulled out his knife, and stabbed Justin in the back. After that, Myers took hold of the garrote and

managed to get it around Back's neck. Sitting on the kitchen floor with his back to the wall, Myers pulled on the garrote with Back lying in his lap. Mosley then began stabbing Back in the chest. When he was done, there was "blood everywhere."

{¶ 20} After Back died, Mosley and Myers hunted for the safe, which they found in a closet in the master bedroom. But contrary to their expectations, it was locked. (Cates testified that although he had previously left the safe unlocked because he had lost the combination, someone had inadvertently locked it, and he had not opened it for some time.) Myers also found a handgun belonging to Cates, which he loaded.

{¶ 21} The pair returned to the kitchen where they cleaned up the crime scene using ammonia, small rugs from the kitchen floor, and assorted rags and towels. They wrapped Back's body in a blanket and shoved it in the trunk of Mosley's car. Then they ransacked the house, taking the safe as well as some jewelry and credit cards. Myers filled some bags with Back's clothing. They also filled a laundry basket with more clothes and other items, including Back's headphones, glasses, laptop computer, phone charger, and laptop charger. They stuffed the bloody towels, rags, and rugs into a garbage bag. They loaded everything into Mosley's car and left the house by about 2:00 p.m.

{¶ 22} Andrew Raymond, a next-door neighbor of the Cates family, saw Mosley's car in the Cateses' carport early that afternoon. A silver Chevrolet Cavalier, the car had a distinctive appearance, its entire rear window having been replaced by a sheet of plastic held in place with red duct tape. A side window of the car sported a "Tap Out" sticker. Raymond had seen someone coming out of the back door of the Cateses' house. He did not recognize the person but knew it was not Back.

{¶ 23} While driving, Mosley developed "paranoia" about being followed, so he took side roads to a remote area, where he parked and checked the outside of the car for blood. Then he and Myers searched for Back's wallet, which they

located in one of the bags. The wallet contained more than $100, which Myers took. The two continued on to Mosley's house.

C. Disposing of the Evidence

{¶ 24} Myers went into Mosley's house and rinsed the blood from his hands and arms. Meanwhile, Mosley unloaded stuff from the car to his bedroom. Together, they dragged the safe up the stairs and then changed their clothes. Mosley proposed dumping the body near West Alexandria, an area he knew well. That was fine with Myers, so they headed that way.

{¶ 25} They decided to hide the body behind a log in a field near "Cry Baby Bridge" near the village of Gratis in Preble County. Mosley drove into the field, stopping about 20 feet from the log. The pair carried the body to the log and laid it on the ground. They found Back's iPod on his body and took it. Myers then poured ammonia and septic enzymes onto the corpse, which was still clothed and partly wrapped in the blanket.

{¶ 26} According to Mosley, Myers "wanted to shoot the body," so Mosley got the stolen gun from the car and handed it to Myers, who fired two shots into Back's body. The gun jammed on the third shot. Myers cleared the jam, ejecting the bullet to the ground, where it was later found by the police.

{¶ 27} After they hid the body, Myers suggested again that they kill Cates to make it look as if he had killed Back and disappeared. Mosley vetoed this idea. Instead, the men drove to a park in Brookville, where Mosley tossed Back's laptop into a dumpster. They then pulled into a nearby tavern parking lot to get rid of the iPod. Myers hid it in the gap between the windshield and the hood of a parked car.

{¶ 28} They bought a crowbar in Englewood and went back to Mosley's house to crack open the safe. Instead of the $20,000 that Myers had promised, the safe contained "[p]aperwork, loose change, bullets, gun accessories, and random items." Myers and Mosley separated out items that they thought they could sell.

Afterward, they burned the papers, several trash bags containing evidence of the crime, and their bloody clothes in a fire pit in the back yard.

{¶ 29} Myers and Mosley put everything from the house and safe that looked valuable (including the gun, headphones, sunglasses, a coin collection, and a necklace) into a bag and took it to Zennie's house. Zennie let them store the bag in his safe in his bedroom. Myers, Mosley, and Zennie next drove to Tipp City, where they threw Cates's safe into a river.

D. The Investigation

{¶ 30} Cates came home from work around 3:30 p.m. that day. He realized that a table had been moved and that some rugs were missing. Later, he and his wife found that Cates's safe and handgun were missing. They called 9-1-1 and tried to contact Back. They discovered his cell phone in the house and also found the shoes that he always wore when he went out.

{¶ 31} During the ensuing investigation, officers obtained a description of the car Raymond had seen in the Cateses' carport and were informed by Cates that Myers had visited the Cates house the day before in the same car. Warren County sheriff's detectives sent out a "be on the lookout" alert for Myers and the car to nearby police departments and county sheriffs. The car was located by the Clayton police, who detained Myers at Mosley's house and notified the Warren County detectives.

{¶ 32} The detectives interviewed Myers at the Clayton police station early the next morning, January 29. He denied knowing anything about Back's disappearance or the burglary at the Cates residence. After the interview, Myers was taken back to Mosley's house, and Mosley was taken to the station for questioning. When the detectives finished talking with Mosley, he was returned to his house, and Zennie was taken to the station. Based on what they learned from Zennie, the detectives had Clayton police officers arrest Mosley and Myers and

return them to the station. The detectives again interviewed Mosley and then Myers. The story of the murder started coming out.

{¶ 33} Myers admitted that he had been present when Mosley stabbed Back. He said that when he had gone to hang out with Back on January 28, he did not know that Mosley was going to kill Back. Nor did he know why Mosley had killed Back. Myers denied shooting Back's body, claiming instead that Mosley had done that.

{¶ 34} When the detectives interviewed Mosley again, he confessed, telling essentially the same story he later told at trial. Following Mosley's confession, the detectives interviewed Myers, who again changed his story. This time, he admitted shooting the body. He also acknowledged buying the materials to make the garrote, which he described as a "self-defense weapon" that was to be used only "to knock [Back] out," not to kill him. He continued to deny that he had restrained Back during the murder.

{¶ 35} That day, Preble County sheriff's deputies found Back's body near Cry Baby Bridge. The body was covered in white powder—later determined to be septic enzymes. A Montgomery County coroner autopsy determined that Back had died of multiple stab wounds.

E. Indictment, Trial, and Sentence

{¶ 36} Myers was indicted on nine counts:

Count 1	aggravated murder with prior calculation and design (R.C. 2903.01(A)) with three death-penalty specifications: kidnapping, aggravated burglary, and aggravated robbery (R.C. 2929.04(A)(7))
Count 2	aggravated murder—felony-murder (R.C. 2903.01(B)) with three death-penalty specifications: kidnapping, aggravated burglary, and aggravated robbery (R.C. 2929.04(A)(7))
Count 3	kidnapping (R.C. 2905.01(A)(2))

Count 4	aggravated robbery (R.C. 2911.01(A)(3)) with a firearm specification
Count 5	aggravated burglary (R.C. 2911.11(A)(1)) with a firearm specification
Count 6	grand theft of a firearm (R.C. 2913.02(A)(1)) with a firearm specification
Count 7	tampering with evidence (R.C. 2921.12(A)(1))
Count 8	safecracking (R.C. 2911.31(A))
Count 9	abuse of a corpse (R.C. 2927.01(B)) with a firearm specification

{¶ 37} The jury found Myers guilty on all counts and specifications. The two aggravated-murder counts were merged for purposes of sentencing, and the state elected to proceed on Count 1—aggravated murder with prior calculation and design—with the aggravated-robbery specification for the penalty phase. The jury recommended a death sentence, and the trial judge sentenced Myers to death. The judge imposed prison sentences on the noncapital counts.

{¶ 38} Myers now appeals to this court, presenting 18 propositions of law. We have examined each of Myers's claims and find that none has merit. Accordingly, we affirm Myers's convictions and sentence of death.

II. SHACKLING ISSUES

{¶ 39} We begin with Myers's ninth proposition of law, in which he contends that the trial court violated his due-process rights and denied him a fair trial by requiring that he wear leg shackles during the trial.

{¶ 40} Before trial, Myers filed a motion to be tried without restraints. The trial court held a hearing on the motion. Major Barry Riley, the jail administrator, testified that the sheriff's office initially classified Myers as a "maximum security" inmate because he was charged with a "brutal, premeditated murder." Myers's security classification was later increased due to "jailhouse infractions," including destroying jail property and fashioning a rope from a cloth. (Myers claimed that he intended to use the rope as a belt, but Riley testified that such a rope could also be

used as a weapon or to tie a door shut.) Based on Myers's classification and the security concerns involved, Riley recommended that Myers be kept in "maximum restraints," including "leg shackles, belly chains and handcuffs." The "least restrictive restraint" that Riley felt he could recommend was leg shackles.

{¶ 41} On cross-examination, Riley conceded that there had not been a specific incident involving Myers in the courtroom or during transport. He also agreed that the shackles would probably make noise when Myers moved his legs.

{¶ 42} After Riley testified, a defense attorney stated that the defense did not "strenuously object" to leg shackles if the shackles could be concealed. The attorney explained that the defense was principally concerned about the use of handcuffs and belly chains.

{¶ 43} After the hearing, the trial court issued an order establishing security protocols. The court found: "Based on the evidence and arguments of counsel, * * * the nature of the proceedings and the specific security risks posed by this Defendant require a heightened level of security." Thus, the court ordered that Myers be transported to and from the courtroom in restraints to be determined by the sheriff's department. But the courtroom was to be cleared of the public before Myers entered, all restraints other than leg restraints were to be removed before the public was readmitted, and the courtroom was to be cleared at the close of the hearings prior to Myers's departure. The court further directed that a "modesty panel" be placed under both counsel tables to "obscure the leg restraints from the view of the jury." Finally, the court found that the protocols established by its order were the "least restrictive means of security and restraint available."

{¶ 44} "No one should be tried while shackled, absent unusual circumstances." *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 82. "The decision to impose such a restraint is left to the sound discretion of the trial court, which is in a position to consider the prisoner's actions both inside and outside the courtroom, as well as his demeanor while court is in session."

(Citation omitted.) *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 79. "The trial court must exercise its own discretion and not leave the issue up to security personnel." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 104. Myers contends that leg shackles were not necessary to protect courtroom security and that the trial court improperly deferred to the sheriff's office in making its decision. But here, the court merely heard the concerns presented by Riley. Notably, the court did not accede to Riley's request to have Myers in handcuffs and belly chains. And the court ordered a modesty panel so that the leg shackles would not be visible. We conclude that there was no abuse of discretion.

{¶ 45} Nor has Myers shown that his due-process rights were violated. Due process "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). "[A] claim based on *Deck* 'rises or falls on the question of whether the [restraining device] was visible to the jury.' " *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 842 (6th Cir.2017), quoting *Earhart v. Konteh*, 589 F.3d 337, 349 (6th Cir.2009). The procedures put in place for Myers to enter and leave the courtroom out of the view of the public, along with the modesty panel ordered by the trial court, shielded the shackles from view. There is nothing in the record to indicate that the jury saw the shackles.

{¶ 46} Indeed, Myers does not claim that his shackles were visible. Rather, he argues that the jury was aware of the shackles because they made noise. Significantly, at no time during the trial did anyone mention noise coming from the shackles. Having raised the subject during the hearing, trial counsel were well aware of the possibility that the shackles might make noise. We would expect, then, that trial counsel would have called any such noise to the court's attention.

On the state of this record, Myers's claim that the jury was aware of the shackles is mere speculation.

{¶ 47} Myers further argues that he was prejudiced because the shackles prevented him from rising when prospective jurors entered the courtroom during voir dire. Before voir dire began, the court ordered that everyone already in the courtroom would remain seated when the prospective jurors were brought in so that Myers's shackles would not be seen. Nonetheless, Myers claims error based upon the following discussion that occurred outside the presence of the venire on the third day of voir dire:

> [Defense counsel]: * * * Sorry, Judge, we're used to standing up when the Court comes in, especially when somebody says all rise. We stand up, they stand up, I know the court has indicated it's not necessary, there's a concern because Mr. Myers is shackled * * *, do you want us to just stay down? Because what I don't want to have happen is we all stand up and he doesn't stand up and then some juror goes he's being disrespectful.
>
> THE COURT: What has been happening, is I've been coming in before the jury has been here and I know that you guys stand up and when we just entered the courtroom before, I mean the jury wasn't here yet. The all rise was not supposed to happen. My plan is to be seated here and have everybody else seated here and when the jury comes in, everybody remains seated. If you stand up when the jury comes in, I will tell you to sit down.
>
> [Defense counsel]: Fair enough, I just wanted some clarification on that Judge, thank you.

(Capitalization sic.)

{¶ 48} From this, Myers asks us to infer that "during the majority of voir dire, every time the [venire] came in and the bailiff said 'All rise,' all the attorneys stood up, but Myers could not due to the shackles." But, actually, the above passage provides no indication that this had happened more than the one time alluded to by the trial court. In any event, Myers claims prejudice, arguing that his failure to stand up for the venire's entrance when the attorneys were doing so made "a bad impression" on the prospective jurors. But nothing in the record suggests that the problem—assuming there was one—recurred after the trial judge clarified that counsel were not to rise for the venire's entrance. During trial, the jurors would have observed that nobody rose when they entered the courtroom, and any impression they may have formed as a result of Myers's failure to do so during voir dire likely had faded. Consequently, we see no likelihood that any error that may have occurred during voir dire affected the verdict or sentence.

{¶ 49} Myers's ninth proposition of law is overruled.

III. SUPPRESSION ISSUES

{¶ 50} In his third proposition of law, Myers contends that the trial court should have suppressed the statements he made to Detectives Michael Wyatt and Paul Barger on January 29. His principal claim is that he was subjected to custodial interrogation without being advised of his *Miranda* rights. *See generally Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He also maintains that he never validly waived his right to remain silent, that he was denied his constitutional right to counsel, and that his statements were involuntary.

A. Lack of *Miranda* Warnings for the First Interview

{¶ 51} After midnight on January 29, Sergeant Jeff Garrison of the Clayton police department and another Clayton police officer went to Mosley's house to locate Myers. Garrison cuffed Myers's hands behind his back, walked him outside, searched him for weapons, and placed him in the back seat of a cruiser. Garrison told Myers that "he was being detained for Warren County."

{¶ 52} Warren County Detective Wyatt arrived at Mosley's house around 2:50 a.m. He opened the cruiser door and found Myers asleep. Wyatt woke Myers, identified himself, explained that the police were looking for Back, and asked Myers whether he was willing to come to the nearby Clayton police station to talk. Myers agreed.

{¶ 53} Myers emphasizes that the Clayton police detained him in handcuffs at Mosley's residence. Indeed, the trial court determined that Myers was in the custody of those officers during that time. But Myers was not interrogated and made no statements during that period. "[I]n conducting the *Miranda* analysis, we focus on the time that the relevant statements were made." *United States v. Swan*, 842 F.3d 28, 31 (1st Cir.2016). Thus, our analysis is not controlled by the fact that Myers was in custody before the first interview. Instead, we turn our attention to whether Myers was in custody during the first interview.

{¶ 54} A Clayton officer drove Myers to the Clayton police station, with Wyatt and Barger following. At the station, Myers was removed from the cruiser. When Wyatt noticed that Myers was handcuffed, he asked the Clayton officer to take off the cuffs, and they were removed before Myers entered the building. Wyatt and Barger took Myers into a conference room, where the three of them sat at a table with Wyatt farthest from the door. Myers sat on Wyatt's right, closer to the door; Barger sat across the table from Myers. The door was initially closed, but at some point during the interview it was opened and was left open for the rest of the interview.

{¶ 55} This first interview, which was audio recorded, began at 3:07 a.m. Wyatt did not give Myers *Miranda* warnings at this time. Rather, at the start of the interview, Wyatt said: "Like I told you * * * we appreciate you * * * coming down here and * * * like I told you, *you're free to go at any time. You're not under arrest* or anything else." (Emphasis added.) When Myers said that he had been confused,

because the Clayton officers had told him he was being "detained," Wyatt repeated: "You understand, though, *you're not under arrest* * * *." (Emphasis added.)

{¶ 56} During the interview, Myers claimed to know nothing about Back's disappearance or the robbery of the Cates residence. The interview ended at 3:54 a.m., and Myers was driven back to Mosley's house.

> The fundamental import of the privilege [against self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but *whether he can be interrogated*. * * * Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

(Emphasis added.) *Miranda*, 384 U.S. at 478, 86 S.Ct. 1602, 16 L.Ed.2d 694. Thus, *Miranda* warnings are required "only when a suspect is subjected to both custody and interrogation." *Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, at ¶ 119.

{¶ 57} "What are now commonly known as *Miranda* warnings are intended to protect a suspect from the coercive pressure present during a custodial interrogation." *Cleveland v. Oles*, 152 Ohio St.3d 1, 2017-Ohio-5834, 92 N.E.3d 810, ¶ 9, citing *Miranda* at 469. Determining whether questioning is "a custodial interrogation requiring *Miranda* warnings demands a fact-specific inquiry that asks whether a reasonable person in the suspect's position would have understood himself or herself to be in custody while being questioned." *Oles* at ¶ 21.

{¶ 58} The trial court found that Myers was not in custody during the first interview, and we agree. When Wyatt noticed that Myers was handcuffed, he immediately had the cuffs removed, remarking that Myers was "here voluntarily." Myers was questioned in a conference room instead of an interrogation room, *see*

United States v. Littledale, 652 F.3d 698, 702 (7th Cir.2011), and was seated at a conference table with Wyatt and Barger. The door was open during part of the interview, and it does not appear that either detective was situated between Myers and the door. *See United States v. Mshihiri*, 816 F.3d 997, 1004 (8th Cir.2016); *United States v. Berres*, 777 F.3d 1083, 1092 (10th Cir.2015).

{¶ 59} Moreover, Myers was expressly informed at the beginning of the interview that he was not under arrest and was free to leave at any time. *See Swan*, 842 F.3d at 31-33; *United States v. Muhlenbruch*, 634 F.3d 987, 996-997 (8th Cir.2011); *Commonwealth v. Sanchez*, 476 Mass. 725, 736, 73 N.E.3d 246 (2017).

{¶ 60} A reasonable person, having just been released from handcuffs and expressly told that he was there voluntarily and was free to leave, would not have understood himself to be in custody. *Miranda* warnings were not required.

B. Validity of *Miranda* Waiver

{¶ 61} Myers had four more contacts with Wyatt and Barger on January 29.

{¶ 62} After the first interview with Myers, Wyatt and Barger interviewed Mosley and then Zennie. During Zennie's interview, Wyatt learned that Mosley had told Zennie that Myers had shot Back and Mosley had stabbed him. Wyatt instructed the Clayton officers at Mosley's house to detain both men. Myers was taken back to the Clayton police station around 7:40 a.m., placed in a holding cell, and handcuffed to a bench.

{¶ 63} At 7:42 a.m., Wyatt administered *Miranda* warnings to Myers. He asked Myers whether he understood the warnings, and Myers nodded his head. Myers almost immediately invoked his right to counsel; Wyatt ended the interview at 7:45 a.m., and he and Barger left the room.

{¶ 64} At 9:27 a.m., Myers tapped on the window in the holding cell, summoning Wyatt. Myers expressed a desire to help Wyatt, but Wyatt told him he could not talk to him or question him. Myers then asked Wyatt how he would go about getting an attorney. Wyatt told him that he could hire his own but that if he

could not afford to do so, the court would appoint counsel when he was charged. Myers asked whether he was going to be charged, and Wyatt said that he would be.

{¶ 65} Myers tapped on the window again at 10:02 a.m. When Wyatt responded, Myers told him he wanted to do what he could to help him. Wyatt asked whether that meant Myers wanted to talk to him. Myers nodded his head. Wyatt read Myers the *Miranda* warnings again and asked him whether he understood them. Myers said: "I think so." Wyatt asked: "Do you think so or do you understand?" Wyatt continued: "Basically what it amounts to is you can exercise those rights at any time. If you want to start talking and then stop you can do that. * * * Do you have any questions about it because I want to make sure you fully understand your rights?" Myers said: "Yeah. I do." Wyatt asked: "You do?" Myers said: "Yeah." Wyatt clarified this discussion at the hearing on Myers's motion to suppress: "The question was do you understand your rights and he said yes, I do." Myers then proceeded to answer Wyatt's questions, giving an account of how Mosley had killed Back.

{¶ 66} At about 1:30 p.m., Wyatt and Barger spoke with Myers for a fifth time. Wyatt read the *Miranda* warnings for the third time; Myers indicated that he understood them and answered Wyatt's questions.

{¶ 67} The 10:02 a.m. and 1:30 p.m. interviews of Myers were preceded by *Miranda* warnings. Myers nevertheless claims that the statements he made in those interviews should have been suppressed. He argues that he never validly waived his rights because (1) he was not given the *Miranda* warnings in written form (Wyatt read them from a card he carried), (2) Wyatt did not expressly ask him whether he wished to waive his rights, and (3) he never signed a written waiver.

{¶ 68} None of these objections are well taken. A *Miranda* waiver need not be in writing to be valid. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Nor must the accused specifically state that he waives his rights. *Id*. at 375-376; *Treesh v. Bagley*, 612 F.3d 424, 434 (6th

Cir.2010). "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis v. Thompkins*, 560 U.S. 370, 384, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010); *see also State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, 90 N.E.3d 857, ¶ 100-101.

{¶ 69} The state made that showing here. At the outset of the 7:42 a.m. interview, Wyatt read the *Miranda* warnings to Myers, and Myers acknowledged that he understood his rights. Myers's invocation of his right to counsel further demonstrates his understanding.

{¶ 70} The 10:02 a.m. interview took place after Myers summoned Wyatt and said he wanted to talk to him. Wyatt then read the *Miranda* warnings again. After stating that he fully understood the warnings, Myers proceeded to answer Wyatt's questions. Because Myers was informed of his *Miranda* rights and indicated that he understood them, his uncoerced statements to Wyatt validly established an implied waiver. *Butler* at 373.

{¶ 71} At the beginning of the 1:30 p.m. interview, Wyatt read the *Miranda* warnings again, and Myers again said that he understood his rights and voluntarily spoke to Wyatt. Again, his uncoerced statements under these circumstances were enough to establish a waiver.

C. Denial of Counsel

{¶ 72} Myers also contends that his later statements should have been suppressed because after he invoked his right to counsel, he was interrogated without counsel being appointed.

{¶ 73} Myers notes that he was never "given" an attorney on that day. "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Duckworth v. Eagan*, 492 U.S. 195, 204, 109 S.Ct. 2875, 106 L.Ed.2d 166

(1989). Once Myers invoked his right to counsel, his waiver of that right could not "be established by showing only that he responded to further police-initiated custodial interrogation" after he was advised of his rights. *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Rather, having expressed his desire to have counsel present, Myers could not be subjected to further interrogation until counsel was made available "unless [he] himself initiate[d] further communication, exchanges, or conversations with the police." *Id.* at 485.

{¶ 74} That is precisely what happened here. Wyatt terminated the 7:42 a.m. interview when Myers invoked his right to counsel shortly after the interview began. Less than two hours later, Myers summoned Wyatt and asked how he would go about getting an attorney. Wyatt told him he could hire one or one would be appointed for him after charges were filed. No questioning took place at this point.

{¶ 75} Half an hour later, Myers tapped on the glass again and told Wyatt he wanted to "help" the officers. Wyatt again administered *Miranda* warnings, and Myers gave an account of how Mosley had killed Back. Thus, Myers, after invoking his right to counsel, "initiate[d] further communication, exchanges, or conversations with the police," *Edwards* at 485. There was no violation of Myers's right to counsel.

D. Voluntariness

{¶ 76} Finally, Myers contends that his statements were involuntary under the totality of the circumstances.

{¶ 77} "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances * * *." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, *death penalty vacated on other grounds sub nom. Edwards v. Ohio*, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). Relevant circumstances 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." *Id*. However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

{¶ 78} Myers claims he was deprived of food and sleep during the interrogation. But the record does not support Myers's claim. Myers never indicated that he was hungry or asked for anything to eat until after the end of the final interview on January 29.

{¶ 79} Nor is there any evidence that Myers was deprived of sleep. Toward the end of his first interview, Myers stated that he was "very tired" and wanted to go back to Mosley's house to sleep. Within a few minutes, Wyatt terminated the interview and a Clayton police officer took Myers back to Mosley's house. When Mosley did not want Myers inside the house, Myers was allowed to sit in the back of Sergeant Garrison's SUV to keep warm. He fell asleep there. Wyatt testified that when he returned to Mosley's house to have Clayton police bring Mosley back to the police station, Myers appeared to be sleeping. Although the record indicates that Myers was not asleep during the entire time he was in the SUV, there is no suggestion that anyone prevented him from sleeping at any time.

{¶ 80} Myers had additional time to sleep in the holding cell at the Clayton police station between 7:46 a.m. and 1:30 p.m. During that time, the police left him alone, except when he initiated contact with them. The holding-cell video shows that he was lying down on a bench in the cell for about 70 minutes between the fourth and fifth interviews.

{¶ 81} Finally, there is no indication of any other form of police overreaching. Myers was given water and escorted to the bathroom when he requested it. He was not harmed, threatened, or promised anything. We conclude that Myers's statements were voluntary.

{¶ 82} Because the record supports none of Myers's claims and arguments in favor of suppression, we overrule his third proposition of law.

IV. DISCOVERY AND RELATED ISSUES

A. Delayed Disclosure and *Brady* Claim

{¶ 83} In his fourth proposition of law, Myers contends that the state violated his right to a fair trial by failing to provide timely discovery and by delaying disclosure of evidence favorable to him. *See* Crim.R. 16; *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

{¶ 84} On September 22, 2014, the first day of voir dire, defense counsel complained to the trial court that the state had provided large amounts of "additional discovery" since September 2. Among other things, counsel objected to the timeliness of the prosecution's disclosure that Mosley would be testifying for the state and that it planned to introduce a small notebook kept by Mosley. The notebook listed supplies the pair would need for the murder ("crowbar," "wire," and "duct tape") along with notes about their plan ("strangle," "no mess," "take clothes, money, phone, charger," "disappear," "state: figure out as we go," "woods: no public," "wrap up in blanket"). Myers asserts that the late disclosure of Mosley's planned testimony and the notebook amounted to "trial by ambush" and that he was deprived of a meaningful possibility of investigating and challenging the veracity of the notebook's contents.

{¶ 85} The prosecutor maintained that all discovery was turned over as soon as it became available to the state. Regarding Mosley's plea agreement, which required that he testify against Myers, the prosecutor said that Myers's defense counsel had been told of the plea agreement as soon as it was agreed upon. One of Myers's defense attorneys candidly admitted to the trial court, "I told [the prosecutor on September 2] I didn't think I needed a continuance. I had * * * Mr. Mosley's recorded statement from the Clayton Police Department, which was given to us in the initial discovery dump." The defense attorney explained that at the time

he said that to the prosecutor, he believed that he had "ample time to prepare for Mr. Mosley's testimony."

{¶ 86} As for the notebook, the prosecutor explained that it was only after Mosley agreed to plead guilty and the prosecutor starting preparing Mosley for trial that he learned of the notebook. The state then asked Mosley's attorney to contact Mosley's family, who located the notebook in Mosley's bedroom and turned it over on the evening of September 20. The prosecutor unsuccessfully tried to e-mail photographs of the notebook to defense counsel on Sunday, September 21.

{¶ 87} Under Crim.R. 16(L), the court has discretion to regulate discovery. Here, the court preliminarily determined that any items turned over after September 16 would not be admitted during trial "unless we have a hearing outside the presence of the jury with regard to that specific evidence as to why it should be admitted due to the lateness of both the collection and the obtaining of the information." Defense counsel did not object to the court's approach, and Myers has not directed us to any instance when he objected to evidence offered during trial—other than the notebook—on the basis of its having been turned over late in discovery. As for the notebook (and as we will also discuss regarding the next proposition of law), the trial court did hold a hearing regarding its admissibility prior to Mosley's testimony. The trial court concluded that its admission was not barred by any discovery violations and that it "was turned over to the defense as soon as practical under the circumstances." We conclude there was no abuse of discretion here.

{¶ 88} Myers also maintains that the state improperly failed to timely disclose exculpatory evidence. *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. As Myers sees it, the inclusion of Mosley on the state's witness list was evidence favorable to Myers "because Mosley had no credibility as a witness due to his receiving a plea bargain with the State on the eve of trial which took the possibility of the death penalty off the table and instead provided for life

imprisonment without the possibility of parole in exchange for testifying against Austin Myers." But Mosley's testimony—which detailed the plan, the murder, and the cleanup—was far from exculpatory for Myers. And even if it were, "*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose." *United States v. Bencs*, 28 F.3d 555, 560 (6th Cir.1994), citing *United States v. Word*, 806 F.2d 658, 665 (6th Cir.1986).

{¶ 89} Myers has demonstrated no abuse of discretion with respect to any discovery matters in the case or any alleged *Brady* violations. We overrule his fourth proposition of law.

B. Denial of a Continuance

{¶ 90} In his fifth proposition of law, Myers contends that in light of the state's allegedly late disclosure of evidence, the trial court should have granted his request for a continuance.

{¶ 91} As an initial matter, Myers suggests in his brief that the trial court improperly held an off-the-record discussion of his motion for a continuance. But it is clear from the transcript that the discussion of Myers's continuance request was on the record and that the off-the-record discussion Myers complains about actually related to Myers's motion for a handwriting expert. Furthermore, counsel did not object to the court's handling of the situation.

{¶ 92} "It is a basic due process right and indeed essential to a fair trial that a defense counsel be afforded the reasonable opportunity to prepare his case." *State v. Sowders*, 4 Ohio St.3d 143, 144, 447 N.E.2d 118 (1983). But "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." *Morris v. Slappy*, 461 U.S. 1, 11, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). "Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of

counsel." *Id.* at 11-12, quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). Moreover, the defendant must show how the denial of a continuance prejudiced him. *State v. Broom*, 40 Ohio St.3d 277, 288, 533 N.E.2d 682 (1988).

{¶ 93} We conclude that the court did not abuse its discretion here. As discussed above, the court told the parties that any items turned over late in discovery—including the notebook—would be inadmissible unless a further hearing was held. A hearing regarding the notebook was held the afternoon before Mosley testified—more than three days after the notebook had been disclosed. At the hearing, defense counsel challenged the admissibility of the notebook but did not renew the request for a continuance. There is no indication that the timing of the disclosure compromised Myers's ability to defend himself. Myers is unable to show prejudice, and the trial court did not abuse its discretion by denying the request for a continuance. We overrule Myers's fifth proposition of law.

C. Denial of Handwriting Expert

{¶ 94} After the trial court denied Myers's motion for a continuance, the defense moved for the appointment of a handwriting expert to determine whether Mosley had in fact written the notes in the notebook. In his seventh proposition of law, Myers contends that the trial court erred by denying the motion.

{¶ 95} "[D]ue process may require that a defendant be provided * * * expert assistance when necessary to present an adequate defense." *State v. Mason*, 82 Ohio St.3d 144, 149, 694 N.E.2d 932 (1998). A defendant requesting an expert must make a particularized showing that the requested assistance would aid in the defense and that denial of the assistance would result in an unfair trial. *Id*. at 150. Here, because defense counsel requested that his discussion with the judge of the motion for a handwriting expert be ex parte to prevent the prosecution from learning the defense's strategy and it was held off the record, there is little indication of the basis for the motion. On the record, defense counsel said, ""I don't know whose

handwriting it is, nothing and I'm not going to rely on Tim Mosley to say it's his." Counsel's statements amount to little more than raising a possibility that an expert might have helped Myers's case. We conclude that the trial court did not abuse its discretion when it refused to provide the handwriting expert. *See State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), paragraph four of the syllabus. The seventh proposition of law is overruled.

V. VOIR DIRE

{¶ 96} In his 14th proposition of law, Myers raises two claims with respect to the voir dire.

A. *Caldwell* Error

{¶ 97} Myers complains that during the death-qualification process (which was conducted in panels), the prosecutor asked a prospective juror whether he "could return a recommendation for death." The defense objected, and the trial court instructed:

> Ladies and gentlemen, [the prosecutor] has twice now used the term recommendation. It's not a recommendation, it's a verdict. Any verdict that is rendered by you should be considered by you as if it is absolute and will be carried out in this case. * * * [S]o don't take what the attorneys say in this case as being the facts or the law. You'll get that later in the proceedings.

Myers contends that the prosecutor's use of "recommendation" impermissibly diminished the jury's sense of responsibility, *see generally Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and that the trial court's instruction did not cure the problem.

{¶ 98} But Myers can demonstrate no prejudice as a result of his claimed error. None of the prospective jurors on the panel at the time of the alleged error ultimately served on the jury.

B. Excusal for Cause

{¶ 99} Myers also contends that the trial court erred by excusing prospective juror No. 163 for cause.

{¶ 100} Prospective juror No. 163 initially told the trial court that she was not religiously, morally, or otherwise opposed to capital punishment. But the transcript indicates that she was "crying" when the prosecutor asked: "Some people don't want to be put in that position, where they feel like they have the life of another person in their hands. * * * [D]o you feel that way?" She replied: "I am sorry. I just have two boys that are about this age."

{¶ 101} The prosecutor later asked several prospective jurors whether they "could follow the Court's instructions and return a verdict of death" if they found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. When he put the question to prospective juror No. 163, she said: "I just don't know." The trial court followed up: "[W]e want jurors who can follow the law, based on what I give to you. * * * [D]o you think you can do that?" She replied:

> Well, I mean, I feel like I can follow the law, but I feel, I just—I mean, the way I feel this way like about a death penalty and I mean, I always felt like if someone did something wrong, they should pay the price for it, but I tell you when I walked in there yesterday and saw that kid sitting there, I just, *I don't know what to do*. I just relate that to my own children and think, I mean, I can't explain it any different.

(Emphasis added.) Later the prosecutor asked: "Do you feel like * * * he's too young and that under no circumstances you could return a verdict of death, even if you believed that the aggravating circumstances outweighed the mitigating factors?" Prospective juror No. 163 said: "I think it [would] be extremely hard for me to decide because I know my heart says [yes] because of his age."

{¶ 102} The prosecutor then asked: "Do you feel like your ability * * * to fulfill your responsibilities as a juror would be substantially impaired by your convictions as to Mr. Myers[']s] age?" She answered: "[M]y head still says I want to say no to that *but my heart says yes*, I would have a really hard time getting past that." (Emphasis added.)

{¶ 103} Defense counsel later asked her: "[I]f the Judge gives you certain options and asks you to follow the law, * * * [do] you think that you're able to do that?" She replied: "I will do it to the best of my ability and I will follow the law. My heart might not want to do that, but I can—I mean, I think it would be troublesome, but you know, but—."

{¶ 104} Defense counsel then asked: "Would you agree that there are other things in your life that are very difficult perhaps that you may not want to do, but you follow your duty to do those?" Prospective juror No. 163 agreed that this was so, but she added: "But I never had to do something like that. * * * I'm in the business of saving lives, not—." (Prospective juror No. 163 was a registered nurse.) Finally, when asked, "[I]f you have that duty, [are you] able to do your duty as a citizen of our country?" she said, "Yes."

{¶ 105} The state challenged prospective juror No. 163 for cause. The defense opposed the challenge on the ground that "she had indicated by the end of the questioning that she was able to perform her duty with respect to acting as a juror."

{¶ 106} The trial court noted that prospective juror No. 163 "did break down crying at least on a couple of occasions during her testimony. * * * I think

she cried throughout the process, [and] looked down, particularly when the questions were directed to her." Though the court recognized that she had said that she could perform her duty, the court observed that "she was crying even as she answered that question and I don't think that that answer represents the totality of her answers to the question." Concluding that "her emotional state would substantially impair her ability and that she cannot unequivocally state that she will follow the law," the trial court excused prospective juror No. 163 for cause.

{¶ 107} A prospective juror may be excused for cause if the prospective juror's views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). A trial court's ruling on a challenge for cause will not be overturned on appeal if the record supports it. *State v. Wilson*, 29 Ohio St.2d 203, 211, 280 N.E.2d 915 (1972).

{¶ 108} Myers argues that the record does not support the trial court's ruling here. Myers argues that prospective juror No. 163's answers "showed she was unbiased," while her tears indicated only that she understood the gravity of a death sentence. The trial court, however, was in the best position to consider her emotional reactions in ruling on the challenge for cause. *See State v. Lawrence*, 44 Ohio St.3d 24, 30, 541 N.E.2d 451 (1989) (prospective juror who cried during voir dire was properly removed for cause as "unsuitable to serve due to her emotional state"); *State v. Greer*, 39 Ohio St.3d 236, 248, 530 N.E.2d 382 (1988) (prospective juror who exhibited "considerable emotional difficulty" with death penalty on voir dire was properly removed for cause).

{¶ 109} When asked whether her feelings would substantially impair her ability to perform her duty, prospective juror No. 163 said: "[M]y heart says yes." And while she did ultimately state that she would follow the law and do her duty, only once was she able to say so without qualification. At other times, she said: "I

just don't know"; "I feel like I can follow the law, but * * * when I walked in there yesterday and saw that kid sitting there, * * * I don't know what to do"; "But I never had to do something like that"; and "I will do it to the best of my ability and I will follow the law. My heart might not want to do that, * * * I think it would be troublesome."

{¶ 110} "[W]here a prospective juror gives contradictory answers on voir dire, the trial judge need not accept the last answer elicited by counsel as the prospective juror's definitive word." *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, ¶ 66. Prospective juror No. 163's varying answers, along with her emotional state, created a fact question for the trial court to resolve. *State v. Jones*, 91 Ohio St.3d 335, 339, 744 N.E.2d 1163 (2001). The court's finding was supported by the record and therefore was not an abuse of discretion. *Wilson*, 29 Ohio St.2d at 211, 280 N.E.2d 915.

{¶ 111} Because Myers's claims with respect to the voir dire lack merit, we overrule his 14th proposition of law.

VI. EVIDENTIARY ISSUES

A. Admissibility of Mosley's Notebook

{¶ 112} Myers's eighth proposition of law challenges the admission of Mosley's notes into evidence. He argues that the notebook was "improperly examined," that it was inadmissible character evidence, and that its probative value was outweighed by the danger of unfair prejudice. We reject each of these claims.

1. "Improperly Examined"

{¶ 113} Before Mosley's direct examination, the trial court questioned him outside the jury's presence under oath to determine the notebook's admissibility. The judge said to Mosley, "Tell me the circumstances under which you wrote this." Mosley testified that he had written the notes while in his room with Myers "planning to kill Justin Back." He said the notebook was in the same condition as

it had been when he wrote the notes and that he did not recall what had happened to pages that had been torn from the notebook.

{¶ 114} Myers complains that the trial court's inquiry was leading and that it "assumed Mosley wrote the document in the first place." Because he did not object to the trial court's questioning, Myers has forfeited all but plain error. Crim.R. 52(B). There was no error here; the Rules of Evidence did not apply to the court's inquiry into the admissibility of the notebook. *See* Evid.R. 104(A).

{¶ 115} Myers also complains that four pages were torn out of the notebook at some point and contends that the missing pages "had an altering effect on the writing." But nothing in the record demonstrates that the missing pages altered the writing on the portion that was admitted.

{¶ 116} Mosley's testimony was "sufficient to support a finding that the matter in question [was] what its proponent claim[ed]." Evid.R. 901(A); *see also* Evid.R. 901(B)(1) (testimony of witness with knowledge is valid authentication). While the missing pages may have affected the evidentiary weight of the notebook to be accorded by the jury, their absence did not render the notebook inadmissible.

2. Character Evidence

{¶ 117} Myers also argues that Mosley's notes were "improper character evidence," Evid.R. 404(A), and prejudiced him by depicting him as "unstable" and "generally dangerous." This is simply false. Neither the notes nor the testimony they corroborated were used to prove Myers's character "for the purpose of proving action in conformity therewith on a particular occasion." Evid.R. 404(A). Indeed, the notes were not used to prove his character at all; they were used to prove that Myers planned the murder, thus supporting the element of prior calculation and design.

3. Probative Value vs. Unfair Prejudice

{¶ 118} Finally, Myers argues that the notebook should have been excluded under Evid.R. 403(A), which requires exclusion of evidence whose "probative

value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Myers claims that Mosley's notes "were not probative, because they did not go to [Myers's] identity as an accomplice." He also argues that because he did not write the notes, they were not probative of prior calculation and design.

{¶ 119} Contrary to Myers's assertions, Mosley's notes were highly relevant: they corroborated Mosley's account of the planning session he and Myers conducted before the murder. Mosley's testimony was the only direct evidence on this point, so the corroboration provided by his contemporaneous notes had strong probative value. And they created no danger of unfair prejudice, confusion, or misleading the jury.

{¶ 120} We overrule Myers's eighth proposition of law.

B. Leading Questions on Direct Examination

{¶ 121} In his 13th proposition of law, Myers argues that the prosecutor improperly asked leading questions during the direct examination of several state witnesses. *See* Evid.R. 611(C).

{¶ 122} Although Myers cites transcript pages on which leading questions appear, he fails to identify any specific questions that he claims to be objectionable. Only one of the cited pages records a defense objection. Mosley testified that after leaving the Cates house the day before the murder, he and Myers briefly discussed their robbery plans, then drove past the Cates house "to scout it out," and finally "hopped on the highway" and drove back to Zennie's house. The prosecutor then asked: "The highway being [U.S. Route] 42, is that correct?" The defense objected. The objection was overruled, and Mosley said: "I think so."

{¶ 123} Although the question was leading, the trial court did not abuse its discretion by permitting it. *See State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 149. The question simply clarified Mosley's previous answer, identifying the "highway" he had mentioned.

{¶ 124} Defense counsel did not object to any other questions found on the transcript pages cited, so Myers has forfeited all but plain error. *See* Crim.R. 52(B). Because Myers does not identify specific questions as improper, we can neither evaluate his claims of error nor assess prejudice. Thus, Myers fails to demonstrate plain error. His 13th proposition of law is overruled.

C. Autopsy Photographs

{¶ 125} Myers contends in his 15th proposition of law that the trial court erroneously admitted repetitive and gruesome photographs of Back's body. He concedes, however, that his counsel did not object at trial to admission of the photographs. Thus, he has forfeited all but plain error. *See* Crim.R. 52(B).

{¶ 126} We have held:

> Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or * * * illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

State v. Maurer, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984), paragraph seven of the syllabus. We review a trial court's decision to admit photographs for an abuse of discretion. *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 69.

{¶ 127} Aside from a statement in his brief that the photographs were "repetitious and gruesome" and "inflamed the jury's emotions and distracted them from reviewing contested issues," Myers offers no analysis to show which

photographs were repetitive, why their prejudicial effect outweighs their probative value, or how they constitute plain error.

{¶ 128} A transcript citation in Myers's brief indicates that he is challenging the autopsy photographs used during the deputy coroner's testimony. Of these photographs, State's Exhibits 359, 364 through 377, and 383 through 391 are gruesome, but not unnecessarily so. They illustrated and supported the coroner's testimony with regard to Back's injuries and the cause of his death. Moreover, with one exception, the photographs of his body all show the wounds after the blood was washed off. As the deputy coroner explained at trial, the photos were selected in order to avoid using "overly graphic or gross" ones.

{¶ 129} Two pairs of autopsy photographs are arguably repetitive. State's Exhibits 367 and 374 both depict Back's left torso and head from slightly different angles, and it is not clear that either one has probative value not also found in the other. State's Exhibits 366 and 372 also appear to be repetitive. The deputy coroner testified that Exhibit 372 features "two wounds that we've already seen" in Exhibit 366. With those exceptions, the autopsy photos are not repetitive or cumulative.

{¶ 130} The admission of two pairs of repetitive photographs in this case does not constitute plain error. A showing of plain error requires "a reasonable *probability* that the error resulted in prejudice." (Emphasis sic.) *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22. Thus, Myers would have to show "that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004), quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As he makes no attempt to do so, we reject his 15th proposition of law.

VII. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

{¶ 131} Myers's 11th proposition of law asserts that the evidence of guilt at his trial was legally insufficient as to each count and also that his convictions are against the weight of the evidence.

A. Sufficiency

1. Aggravated Murder

{¶ 132} Myers contends that "[t]here was no credible evidence" showing that he engaged in prior calculation and design preceding Back's murder. But when evaluating the sufficiency of the evidence, we do not consider its credibility. "Rather, we decide whether, if believed, the evidence can sustain the verdict as a matter of law." *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶ 13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997).

{¶ 133} "Prior calculation and design" requires "a scheme designed to implement the calculated decision to kill." *State v. Cotton*, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978). Myers's words and actions, as Mosley described them and as corroborated by abundant other evidence in the record, show that Myers engaged in such a scheme to kill Back.

{¶ 134} Myers emphasizes that he did not know that Mosley had a knife until Mosley pulled it out and began stabbing Back. With respect to prior calculation and design, however, this is beside the point. That the murder was not accomplished in precisely the way he and Mosley had planned does not alter the fact that they did plan it.

{¶ 135} Myers also points to Mosley's statement that "[a]t the moment where [Myers] brought up the money and the safe, we had no intentions of killing anybody." But this testimony affects neither the sufficiency nor the weight of the evidence of prior calculation and design. Even if the initial plan was to, as Mosley put it, "get in and get out" and simply rob the Cates house, Mosley's testimony was

that Myers later "came up with the idea of killing Justin Back," after their first visit to Back's house on January 27. The pair spent the better part of the day and next morning planning and preparing for the murder.

{¶ 136} Myers argues that he did not buy the cold medicine, "bug wash," or syringes. But he tried to purchase these things, and that fact evinces prior calculation and design. He points out that the notebook belonged to Mosley and asserts that it contained only Mosley's thoughts, not those of Myers. But that assertion is inconsistent with the evidence: Mosley testified that his notes reflected their mutual planning and discussion. In short, none of Myers's arguments demonstrate that the evidence of prior calculation and design was insufficient as a matter of law.

2. Kidnapping

{¶ 137} Myers claims that the state failed to prove kidnapping, specifically the element of restraint, because "[t]he acts constitut[ing] the kidnapping had no significance apart from the murder offenses." Although Myers couches his argument in terms of evidentiary insufficiency, in substance his claim is that the kidnapping was an allied offense of similar import to the aggravated murder and therefore cannot be separately punished. *See generally State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892; *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266.

{¶ 138} Either way, Myers's claim is moot. The trial court merged his conviction on the kidnapping count with his convictions on the aggravated-robbery and aggravated-burglary counts. The court also merged the three felony-murder specifications into a single robbery-murder specification before submitting the case to the jury in the penalty phase. Thus, Myers was not separately punished for kidnapping.

3. Other Counts

{¶ 139} Myers contends that the state failed to prove aggravated robbery, aggravated burglary, grand theft of a firearm, evidence tampering, safecracking, and abuse of a corpse, because the state made "no showing that Myers knowingly participated with Mosley" in these acts. He offers no further analysis. We reject these claims: Mosley's testimony and other evidence presented by the state was sufficient to show that Myers acted with the requisite mens rea as to each of these offenses.

B. Manifest Weight of the Evidence

{¶ 140} A verdict can be against the manifest weight of the evidence even though legally sufficient evidence supports it. *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). Myers contends that his convictions are against the manifest weight of the evidence because they ultimately rest on Mosley's testimony. He insists that Mosley was not credible because he testified against Myers as part of a plea bargain to avoid a death sentence.

{¶ 141} Mosley's plea bargain obviously affects his credibility. But the state's evidence was unrebutted, so there were few if any conflicts in the evidence for the jury to resolve. Moreover, Mosley did not try to minimize his culpability—he admitted that he was the one who stabbed Back—and much of his testimony as to his and Myers's actions during January 27 and 28 was corroborated by other witnesses, store receipts, and security videos. In addition, the jury was told about Mosley's plea bargain and could use that information in assessing his credibility.

{¶ 142} " 'The discretionary power to grant a new trial' " on manifest-weight grounds " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Based upon our review of the record—including a weighing of the evidence and all reasonable inferences and consideration of the

credibility of the witnesses—we cannot conclude that the jury so clearly lost its way as to create a manifest miscarriage of justice. *See Thompkins* at 387. The evidence in this case does not weigh heavily against the convictions. We overrule Myers's 11th proposition of law.

VIII. PROSECUTORIAL MISCONDUCT

{¶ 143} In his tenth proposition of law, Myers contends that the state engaged in prosecutorial misconduct in closing argument during both phases of trial.

A. Guilt Phase

{¶ 144} Myers maintains that the two prosecutors who presented the state's closing argument during the guilt phase of the trial improperly (1) vouched for the credibility of the state's witnesses, (2) misstated evidence on two different occasions, (3) shifted the burden of proof to Myers, (4) called upon the jurors to protect society by fulfilling their sworn duty to find Myers guilty, and (5) referred to punishment. Myers did not object to any of the comments that he now claims were improper, so he has forfeited all but plain error.

1. Vouching

{¶ 145} It is improper for a prosecutor to vouch for the credibility of a witness at trial. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue. *See, e.g., State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 232. An attorney may not express a personal belief or opinion as to the credibility of a witness. *State v. Williams*, 79 Ohio St.3d 1, 12, 679 N.E.2d 646 (1997).

{¶ 146} Myers contends that one of the prosecutors vouched for Mosley's credibility in closing argument. He points to the following statements:

> Did [Mosley] have an opportunity to see the things about which he was testifying? He certainly did. Was he consistent? Yes he was. What was his demeanor like? When he came forward * * *, he was very forthcoming.
>
> * * *
>
> * * * [I]t's not inconsistent when somebody gives a statement and then at a later point they're asked for further detail and they respond honestly to that further detail and that's what we have in this case. Especially when those details are corroborated again by independent evidence.

{¶ 147} None of these comments were improper: they neither implied knowledge of out-of-court information nor placed the prosecutor's own credibility in issue. Instead, the prosecutor's arguments pointed out the strength of Mosley's testimony based on evidence presented in court, not the prosecutor's personal opinion. Each of the comments at issue dealt with considerations that the jury could properly consider in evaluating Mosley's credibility: his demeanor, consistency, and opportunity to observe, as well as the extent to which other evidence corroborated his testimony. Thus, we reject Myers's claim of misconduct by vouching.

2. Misstating Evidence

{¶ 148} Myers further contends that the prosecutors misstated the evidence in two instances.

{¶ 149} First, Myers points to a prosecutor's statement that "[a]s Myers tried to restrain [Back], Tim Mosley tried to choke him to death. * * * And when that failed, they turned to the knife." Because the evidence showed that only Mosley stabbed Back, Myers contends that the word "they" was improper. But "[i]solated comments by a prosecutor are not to be * * * given their most damaging

meaning." *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 170, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The prosecutor never claimed that Myers wielded the knife. The evidence shows that Myers did participate in the stabbing: he held Back while Mosley stabbed him. And, of course, the stabbing was in furtherance of their *mutual* purpose to kill Back; the prosecutor could justifiably say that "they turned to the knife."

{¶ 150} Second, Myers contends that the other prosecutor misstated the evidence when he said, "And as [Back is] simultaneously being held down by Austin Myers and strangled and stabbed by Tim Mosley, he keeps asking the same question over and over and over again. Why? Why? Please help me. Austin please stop."

{¶ 151} As Myers points out, Mosley did not testify that Back addressed his dying pleas specifically to "Austin" by name. Instead, Mosley testified, "Justin was trying to ask us why, he was pleading to stop and pretty much begging for his life."

{¶ 152} But Myers ignores *his own* statement to police made the day after the murder. Myers admitted that as Mosley was trying to strangle Back, Back said "Please stop" and "*Austin*, help me." (Emphasis added.) The difference between Myers's version and the prosecutor's was trivial. We conclude that Myers has not demonstrated plain error with respect to these comments.

3. Shifting Burden of Proof

{¶ 153} Myers also contends that the prosecutors' argument improperly shifted the burden of proof to the defense on two occasions.

{¶ 154} First, he asserts that the prosecution "improperly made comments that impl[ied] the jury needed to know what Myers was thinking at these proceedings, during and after the alleged murder of Justin Back." But Myers supplies no examples of such comments and provides no citation to the record in support of his contention.

{¶ 155} Second, Myers complains that one of the prosecutors pointed out that Myers had first told police that he was not present during Back's murder and had later changed his story. Myers suggests that the prosecutor thereby "implied Myers should have presented an alibi defense if he had one" and sent the jurors the message that Myers needed to prove an alibi defense he never presented in order to be acquitted.

{¶ 156} Myers's reading of the state's argument is a stretch. The prosecutor was noting that Myers had initially denied being at the murder scene before changing his story. Pointing out this fact implied nothing about an alibi defense. Nor did it shift the burden of proof. Myers has not demonstrated error.

4. "Sworn Duty" Statement

{¶ 157} Myers additionally argues that one of the prosecutors acted improperly in telling the jury in closing argument, "But, ladies and gentlemen, it's your sworn duty as jurors, based on the overwhelming evidence and the law, to find Austin Myers guilty of all of the charges." In Myers's view, the reference to the jury's "sworn duty" was improper because it implied that the jury had a duty to convict "in order to serve justice and protect society."

{¶ 158} It is not improper for a prosecutor to call on the jury to do its duty by convicting the defendant. "It [is] the jury's duty to convict if the evidence proves guilt beyond a reasonable doubt." *State v. Hicks*, 43 Ohio St.3d 72, 76, 538 N.E.2d 1030 (1989). And contrary to Myers's assertion, nothing in the prosecutor's remarks asked the jury to convict Myers in order to protect society. Myers has demonstrated no error.

5. Reference to Punishment during Guilt-Phase Argument

{¶ 159} Finally, Myers contends that the state improperly referred to punishment in the guilt phase by stating: "Your verdict at this time is not about punishment. That will come at a later time. Your verdict is about guilt or innocence only."

{¶ 160} Because "discussion of the death penalty [is] irrelevant" in the guilt phase, it is erroneous for a prosecutor to make references to the death penalty in guilt-phase closing arguments. *State v. Brown*, 38 Ohio St.3d 305, 316, 528 N.E.2d 523 (1988). But here, the prosecutor did not discuss the death penalty. Rather, he correctly stated that the verdict during the guilt phase was not about Myers's punishment. We conclude that Myers has not demonstrated plain error with respect to the comment.

B. Penalty Phase

1. Reasonable-Doubt Argument

{¶ 161} During the penalty-phase closing argument, one of the prosecutors attempted to distinguish between the margin by which the aggravating circumstance was required to outweigh the mitigating factors to justify a death sentence and the level of confidence applicable to the jury's finding that aggravation outweighed mitigation. He said:

> The State has proven its aggravating circumstance beyond a reasonable doubt, but in this sentencing phase, *it is not a matter of proven beyond a reasonable doubt in comparison to the mitigating factors*. In this phase, beyond a reasonable doubt is a measure of your conviction, that you are firmly convinced that the aggravating circumstance outweighs the mitigating factor[s]. I know that sounds somewhat confusing, but what's important to consider is *you don't have to find that the aggravating circumstance outweighs the mitigating factors by a tremendous degree*, what we would think of as the highest standard in the law. *You only have to find by whatever unit of measurement in your heart and mind that the aggravating circumstance outweighs the mitigating factors and that you are convinced that this is the correct determination.*

(Emphasis added.) Myers asserts that this argument was improper because it encouraged the jury to apply a "lesser legal standard" in determining whether he should receive a death sentence. Defense counsel objected to the prosecutor's argument as a misstatement of the law. As a result, the trial judge instructed: "Ladies and gentlemen, I'm going to ultimately give you the instructions on the law. The attorneys are going to argue what they think the law is." The judge then told the jury that if any statement made during closing arguments did not match the instructions, the jurors were to follow the judge's instructions.

{¶ 162} After the closing arguments, the trial court correctly instructed the jury on the weighing process and specifically on the burden of persuasion. The court instructed:

> In order for you to decide the sentence of death shall be imposed upon Austin Myers, the State of Ohio *must prove beyond a reasonable doubt* that the aggravating circumstance of which the defendant was found guilty is sufficient to outweigh the factors in mitigation of imposing the death penalty.

(Emphasis added.) Later, the court instructed:

> If all twelve of you find that the State of Ohio proved *beyond a reasonable doubt* the aggravating circumstance the defendant was guilty of committing is sufficient to outweigh the mitigating factors in this case, then it will be your duty to decide the sentence of death shall be imposed on Austin Myers. If you find the State of Ohio *failed to prove beyond a reasonable doubt* that the aggravating circumstance Austin Myers was guilty of committing is sufficient to

> outweigh the mitigating factors present in the case, then it will be your duty to decide *which of the * * * life sentence alternatives will be imposed*.

(Emphasis added.)

{¶ 163} Finally, the court instructed: "You should proceed to consider and choose one of the life sentence alternatives if any one or more of you conclude that the State has failed to prove *beyond a reasonable doubt* that the aggravating circumstance outweighs the mitigating factors." (Emphasis added.) Considering the court's instructions to the jury, we conclude there was no error here. *See State v. Loza*, 71 Ohio St.3d 61, 79, 641 N.E.2d 1082 (1994).

2. Comment on Unsworn Statement

{¶ 164} During the closing argument of the penalty phase, one of the prosecutors said: "They presented to you the unsworn statement of the defendant. What weight does that have, compared to the statements made by the defendant, to Detective Wyatt and to his own father after his arrest?" The defense did not object.

{¶ 165} Myers contends that the prosecutor's statement "implied that [the unsworn statement] was not as credible as" the testimony of a witness under oath. This contention is incorrect. The prosecutor was not comparing the unsworn statement to any sworn testimony but to Myers's own out-of-court statements to the police and to his father. Myers also asserts that the prosecutor's comment "denigrated" him for exercising his right to make an unsworn statement, but this claim is not supported by the record. Myers has not demonstrated plain error with regard to the comments.

3. "Taking Responsibility" Argument

{¶ 166} In the state's final closing argument, one of the prosecutors tried to explain why Myers is "more worthy of the death penalty than" Mosley. He argued that "Mosley accepted responsibility for his actions" by entering into a plea

agreement in which "he agreed that he would spend the rest of his life [in prison] without parole." The prosecutor also said that Mosley "gave a detailed confession" that "pointed out specifically what he had done" and "didn't try to minimize" his actions. The prosecutor then asked the jury to

> [c]ompare that to the unsworn statement of Austin Myers. * * * One thing that you did not hear him do in this statement on that stand, was take responsibility. At no point in time, did he acknowledge that what he did was wrong. * * * Why does [Mosley] get that deal and not Austin Myers? Tim Mosley's taking responsibility.

The defense did not object.

{¶ 167} Myers contends the statement was improper because it "switched [the] burden of proof to Myers." But nothing in the prosecutor's argument at this point addressed the burden of proof, either expressly or by implication.

{¶ 168} Myers also maintains that the prosecutor's argument implied that Myers should be penalized for exercising his right to trial. We disagree. The prosecutor was not criticizing Myers for not pleading guilty. He was calling the jury's attention to Myers's unsworn statement—made *after* the jury had found him guilty—in which Myers failed to accept responsibility.

{¶ 169} Moreover, the prosecutor's argument must be viewed in context. A principal theme of Myers's penalty-phase case for life was that he should be spared death because Mosley was more culpable and yet was not facing a death sentence. Defense counsel declared at the end of his closing argument:

> The prosecutor's office * * * has applied the scales of justice to Timothy Mosley * * * and they've given him the sentence of life without parole. We would ask you to do the same. Don't punish

> Austin Myers for having gone to trial. Punish Austin Myers commensurate with what Timothy Mosley has received and give him a sentence of life in prison.

{¶ 170} In short, the defense made the Myers-Mosley comparison the keystone of its case for a life sentence. The prosecutor's explanation of why, in the state's view, the comparison was not valid was given to counter the defense's argument and was not improper.

4. Arguing Facts Not in Evidence

{¶ 171} Finally, one of the prosecutors stated: "If it wasn't for Austin Myers, Tim Mosley may have never heard the name Justin Back. If it wasn't for Austin Myers, none of you may have ever heard the name Justin Back. If it wasn't for Austin Myers, Justin Back would still be alive today." Myers contends that this argument "improperly speculated on facts not in evidence." Again no objection was made to the statements. We conclude that there was no plain error. The evidence at trial showed that it was Myers who introduced Mosley to Back. Absent that introduction, the murder may not have occurred.

{¶ 172} Myers's tenth proposition of law is overruled.

IX. SENTENCING ISSUES

A. Eighth-Amendment Challenge

{¶ 173} In his first and second propositions of law Myers contends that his death sentence constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution because his sentence is comparatively disproportionate to the life sentence received by Mosley and because Myers was "a 19 year-old immature adolescent with behavioral issues" when he committed his crimes. His arguments are not persuasive.

{¶ 174} Myers concedes that the Eighth Amendment does not require comparative proportionality review in capital cases. *Pulley v. Harris*, 465 U.S. 37,

43-44, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Nonetheless, he argues that imposition of the death penalty is excessive because Mosley was more culpable. But the evidence of Myers's extensive involvement in the planning and execution of Back's murder belies this claim. Moreover, that Myers was not the principal offender—the term "principal offender" refers to the actual killer, *State v. Taylor*, 66 Ohio St.3d 295, 307-308, 612 N.E.2d 316 (1993)—does not preclude a death sentence. *See* R.C. 2929.04(A)(7).

{¶ 175} Myers further argues that the imposition of the death penalty is cruel and unusual in his case because he was 19 years old when he committed his crimes and had had some mental-health issues. The Eighth Amendment has been found to prohibit the death penalty for certain types of offenses and certain categories of defendants. Thus, persons younger than age 18 and those who suffer from intellectual disability may not be sentenced to death for any crime. *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Nor may a state execute a prisoner whose mental illness renders him unable to attain a rational understanding of the meaning and purpose of his execution. *Panetti v. Quarterman*, 551 U.S. 930, 958-960, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

{¶ 176} Although Myers argues that new developments in brain science indicate that age 18 is not the "proper cut off point for the death penalty," he does not propose that the categorical exclusion for those under age 18 be extended to 19-year-olds. Nor does he suggest that his mental-health issues rendered him unable to attain a "rational understanding" of the meaning and purpose of his execution, *id.* at 959. Instead, he seems to argue that his particular combination of circumstances make the death penalty excessive in his case. Many of the circumstances cited by Myers identify mitigating factors that we will consider in our independent review of the death sentence. But they do not demonstrate a

violation of the Eighth Amendment. Accordingly, we overrule Myers's first and second propositions of law.

B. Sentencing Opinion

{¶ 177} In his 12th proposition of law, Myers contends that the trial court violated R.C. 2929.03(F) by combining its judgment entry with the sentencing opinion in one document. R.C. 2929.03(F) states:

> The court or the panel of three judges, when it imposes sentence of death, shall state *in a separate opinion* its specific findings as to the existence of any of the mitigating factors set forth in division B of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. * * * The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed [with the clerk of the supreme court].

(Emphasis added.)

{¶ 178} In this case, the trial court filed an opinion captioned: "JUDGMENT ENTRY OF SENTENCE ON AGGRAVATED MURDER WITH DEATH SPECIFICATIONS PURSUANT TO R.C. § 2929.03(F)." (Capitalization sic.) That document constitutes the sentencing opinion required by R.C. 2929.03(F). It set forth the jury's findings on aggravating circumstances and the court's own findings on mitigating factors and explained why the court found that the remaining aggravating circumstance outweighed the mitigating factors.

{¶ 179} The same document also contains the four elements of a final, appealable order under Crim.R. 32(C). It sets forth the fact of the defendant's conviction of aggravated murder and the sentence imposed. The trial judge signed it, it bears a time stamp indicating entry on the journal by the clerk of the common pleas court, and it was filed with the clerk of this court. *See State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus. The record contains no other document that would constitute a final, appealable order under Crim.R. 32(C) with respect to the aggravated-murder conviction.

{¶ 180} Myers contends that because R.C. 2929.03(F) specifies that the trial court shall state its findings "in a separate opinion," the sentencing opinion may not be combined with the judgment entry in a single document but must be entirely "separate" from the judgment entry. He points to our statement in *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 17, that R.C. 2929.03(F) "requires that a separate sentencing opinion be filed in addition to the judgment of conviction." He further maintains that there is no final, appealable order in this case and we must remand for resentencing.

{¶ 181} But nothing in R.C. 2929.03(F) requires that the sentencing opinion be filed in an entry different from the judgment entry. Nor is *Ketterer* to the contrary. In *Ketterer*, we held that "in cases in which R.C. 2929.03(F) requires the court or panel to file a sentencing opinion, a final, appealable order consists of both the sentencing opinion * * * and the judgment of conviction." *Id.* at ¶ 18.

{¶ 182} But it does not follow that a final, appealable order in a capital case *must be* embodied in two separate documents. Nothing in *Ketterer* prohibits a sentencing opinion from also including a judgment of conviction that is a final, appealable order. Because the sentencing opinion incorporates the elements required by Crim.R. 32(C), it constitutes a final, appealable order. We overrule Myers's 12th proposition of law.

X. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 183} In his sixth proposition of law, Myers contends that his trial counsel rendered ineffective assistance during both phases of trial. To establish ineffective assistance, Myers must show (1) deficient performance by counsel, that is, performance falling below an objective standard of reasonable representation, and (2) prejudice—a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

A. Discovery

{¶ 184} Myers argues that the allegedly untimely discovery provided by the state and the trial court's denial of a continuance combined to deny him the effective assistance of counsel. He points to statements made by his trial counsel during the proceedings that their representation would be ineffective if they did not have enough time to thoroughly review the discovery provided in the weeks before trial. But despite his counsel's statements, Myers points to nothing in the record showing deficient performance by his counsel with respect to the items turned over during discovery. And even if he could point to deficient performance, he has not shown prejudice.

B. Guilt Phase

1. Decision Not to Cross-Examine Witnesses

{¶ 185} Myers complains that his trial counsel declined to cross-examine 13 of the state's witnesses. But "[t]rial counsel need not cross-examine every witness; indeed, doing so can backfire. * * * The strategic decision not to cross-examine witnesses is firmly committed to trial counsel's judgment." *State v. Otte*, 74 Ohio St.3d 555, 565, 660 N.E.2d 711 (1996).

{¶ 186} Defense counsel cross-examined Mosley, the crucial prosecution witness, vigorously and at length. The 13 witnesses whom counsel did not cross-examine gave much less significant testimony.

{¶ 187} Myers makes no attempt to explain how trial counsel's decision not to cross-examine the other witnesses was either unreasonable or prejudicial. *See id*. He does not suggest what questions counsel should have asked or what information cross-examination would have elicited. *See State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 272. Nor does he identify any weak spots or contradictions in the testimony of these witnesses that cross-examination might have exposed. Myers has failed to establish that his counsel were ineffective in declining to cross-examine these witnesses.

2. Declining to Make an Opening Statement

{¶ 188} After the state made its opening statement, defense counsel stated, "[W]e'd like to reserve any opening statement * * * until the beginning of our case." When the state's case-in-chief was finished, defense counsel waived an opening statement and rested without presenting evidence. Myers contends that his counsel rendered ineffective assistance by waiving an opening statement.

{¶ 189} But "trial counsel's failure to make an opening statement * * * does not automatically establish the ineffective assistance of counsel." *Moss v. Hofbauer*, 286 F.3d 851, 863 (6th Cir.2002). Reserving an opening statement at the beginning of trial has the advantage of not disclosing the defense's trial strategy before the prosecution presents its case. *Id*. And if, as here, the defense ultimately decides not to put on evidence, "an opening statement [is] unnecessary." *Id*.

{¶ 190} Myers argues that declining to make an opening statement was ineffective assistance because counsel thereby failed "to give the jury a clear picture of the case," "to arouse the interest of the jurors in a general theory of the defense," "to build rapport with the jurors," and to let them know "that there [would] be two

sides to the case." But such arguments can be made anytime a defense attorney declines to give an opening statement.

{¶ 191} Myers "has not articulated how the absence of an opening statement prejudiced him." *See Moss* at 864. Because the defense did not put on a case-in-chief, its case was based on attacking perceived weaknesses in the state's evidence, especially Mosley's testimony. Defense counsel were able to do this in closing argument. Myers's "conclusory allegations are insufficient to justify a finding that an opening statement would have created the reasonable probability of a different outcome in his trial," *id*.

3. Breaking a "Promise" to the Jury

{¶ 192} Next, Myers argues that his trial counsel were ineffective because they "told the jury at the beginning" that there would be a defense case and then failed to put on evidence as "promised." Breaking this promise, Myers says, "cost them credibility" and "lost the jury."

{¶ 193} In fact, counsel made no such promise. What counsel said was: "Your Honor, we'd like to reserve any opening statement we give until the beginning of our case, please." Myers reads this as an implied promise that the defense would offer a "case." But it is unlikely that the jury understood it that way. *See State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 283 (statement that jury would "*probably* hear" certain evidence was not a direct promise to present such evidence [emphasis sic]).

{¶ 194} And even if counsel's statement could somehow be interpreted as a promise to offer a case, there is no "*per se* rule that unfulfilled promises * * * will result automatically in a finding of deficient performance of counsel and prejudice to a defendant." *Edwards v. United States*, 767 A.2d 241, 248 (D.C.2001). To justify a finding of prejudice under *Strickland*, a broken promise of this type must be "specific, significant and dramatic." *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 78 (1st Cir.2009).

{¶ 195} Defense counsel's reference to "the beginning of our case" did not include any promise of "specific, significant and dramatic" evidence, witnesses, or testimony. *Compare Lang* at ¶ 284-285 (unfulfilled penalty-phase promise to present evidence that defendant had considered suicide was not shown to be prejudicial) *with English v. Romanowski*, 602 F.3d 714, 729-730 (6th Cir.2010) (unfulfilled promise to call defendant's girlfriend to support self-defense claim was prejudicial), and *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257-259 (7th Cir.2003) (prejudice resulted from unfulfilled promises that defendant would testify and defendant's gang affiliation would be disproved). Hence, we have no basis for finding prejudice.

{¶ 196} Each of Myers's guilt-phase ineffective-assistance claims lacks merit.

C. Penalty Phase

{¶ 197} Myers contends that his counsel rendered ineffective assistance in the penalty phase by failing to present any expert testimony.

{¶ 198} He asserts that his counsel should have adduced expert testimony to explain the meaning of his self-harming behavior in his early teens and how brain development affects the decision-making of young people. Yet nothing in the record shows what such an expert "would have said in the penalty phase," *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 111. Thus, Myers "has not demonstrated prejudice from missing such testimony," *id.*

{¶ 199} Moreover, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674. At trial, the defense requested and received funds to hire a consulting psychologist. The psychologist the defense chose was appointed, but the record does not show what she told Myers's counsel regarding her conclusions. Hence, there is nothing to show deficient performance by counsel.

{¶ 200} Myers's ineffective-assistance claims do not have merit. We overrule his sixth proposition of law in its entirety.

XI. SETTLED ISSUES

{¶ 201} Myers's 17th and 18th propositions of law raise previously decided issues, which we treat summarily. *See generally State v. Poindexter*, 36 Ohio St.3d 1, 520 N.E.2d 568 (1988), syllabus; *State v. Spisak*, 36 Ohio St.3d 80, 81, 521 N.E.2d 800 (1988).

{¶ 202} In his 17th proposition of law, he argues that R.C. 2901.05(D)'s definition of "reasonable doubt," which the trial court's instructions conformed to, unconstitutionally reduces the state's burden of persuasion. But, as Myers concedes, we have "repeatedly affirmed" its constitutionality. *Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, at ¶ 122. His 18th proposition of law repeats a number of oft-rejected arguments against the constitutionality of the death penalty and the Ohio statutes governing its imposition as well as previously rejected arguments that the death penalty violates obligations under various international charters, treaties, and conventions to which the United States is a party. *See*, *e.g.*, *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 106, 109-120; *Jenkins*, 15 Ohio St.3d at 168-179, 473 N.E.2d 264. The 17th and 18th propositions of law are overruled.

XII. CUMULATIVE ERROR

{¶ 203} In his 16th proposition of law, Myers claims that the cumulative effect of the errors alleged in this case denied him a fair trial. Under the doctrine of cumulative error, "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223. However, because Myers "offers no further analysis, this proposition lacks substance." *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239,

¶ 103; *see also State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 197. Myers's 16th proposition of law is overruled.

XIII. INDEPENDENT SENTENCE REVIEW

{¶ 204} R.C. 2929.05 requires us to independently review Myers's death sentence. We must determine whether the evidence supports the aggravating circumstances found by the jury, whether the aggravating circumstances outweigh the mitigating factors, and whether the death sentence is proportionate to death sentences affirmed in similar cases. R.C. 2929.05(A).

A. Aggravating Circumstances

{¶ 205} The jury found three aggravating circumstances under R.C. 2929.04(A)(7) (murder while committing aggravated robbery, aggravated burglary, and kidnapping). The state elected to proceed on only the aggravated-robbery specification.

{¶ 206} The record supports the jury's finding of this aggravating circumstance. Mosley testified that he and Myers planned to commit robbery by stealing Mark Cates's safe and to kill Back as part of the robbery. The testimony of Mark and Sandra Cates corroborated the aggravated robbery and its connection with the aggravated murder. When they arrived home on January 28, 2014, their son was missing, and so were various items of their property, including the safe. Police found traces of human blood in the kitchen and living room. Numerous items belonging to the Cateses were discovered when police searched Mosley's garage. And, as already discussed, there was ample evidence of Myers's prior calculation and design.

B. Mitigating Factors

1. Statutory Mitigating Factors, R.C. 2929.04(B)

{¶ 207} Under R.C. 2929.04(B)(4), "[t]he youth of the offender" is a mitigating factor. Born on January 4, 1995, Myers was 19 years and 24 days old at the time of the murder. We find that the (B)(4) factor exists in this case. In addition,

the trial court found that Myers had never previously been incarcerated for any reason. We therefore find that the mitigating factor in R.C. 2929.04(B)(5) ("lack of a significant history of prior criminal convictions and delinquency adjudications") exists.

{¶ 208} Under R.C. 2929.04(B)(6), "[i]f the offender was a participant in the offense but not the principal offender," the sentencing authority must consider "the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim." It is undisputed that Mosley was the only one who stabbed Back and that Back died because he was stabbed. Thus, as noted earlier, Myers was not the principal offender, and the (B)(6) mitigating factor must be considered.

{¶ 209} Myers was diagnosed with depressive disorder less than five years before the murder and had engaged in self-harm. Although nothing in the record connects the offense with any "mental disease or defect," R.C. 2929.04(B)(3), we consider Myers's history of depression to be an "other factor" under R.C. 2929.04(B)(7). The mitigating factors in R.C. 2929.04(B)(1) (victim inducement) and (B)(2) (duress, coercion, or strong provocation) do not apply.

2. Nature and Circumstances of the Offense

{¶ 210} We find that the nature and circumstances of the aggravated murder offer nothing in mitigation.

3. Offender's History, Character, and Background

{¶ 211} At the mitigation hearing, Myers called three witnesses: Danielle Copeland, his mother, Gregory Myers, his father, and one of his younger brothers. Myers also made an unsworn statement.

{¶ 212} Myers is the oldest of the five children of Danielle and Gregory. His mother described his childhood as normal. Both parents testified that they tried to teach him right from wrong, disciplining him when he needed it. He developed an early interest in the piano, "had a great ear for music," took lessons, and

performed at recitals. He was classified as "gifted" in many areas. Before Myers entered the fifth grade, he tested in the 98th percentile nationally in math and science, in the 99th percentile in reading and writing, and in the 97th percentile in social studies.

{¶ 213} Gregory and Danielle's marriage began to deteriorate in 2006; by the end of 2007, Danielle considered their relationship over. Danielle had an affair with a coworker and became pregnant. Gregory moved out in July 2009, when Myers was 14, and the couple later divorced.

{¶ 214} Meanwhile, Myers developed behavior problems. His grades declined, and in May 2009, he briefly ran away from home. The police officer who brought him home informed his mother that Myers had told the officer that Myers had been cutting himself and shooting himself in the legs with a pellet gun.

{¶ 215} Danielle took him to Kettering Behavioral Medicine Center Youth Services, an inpatient facility, where he stayed for a week. He was diagnosed with "depressive disorder not otherwise specified" and "substance induced mood disorder" involving abuse of Benadryl and was prescribed Risperdal and Prozac. His mother testified that the medications seemed to help.

{¶ 216} While at Kettering in 2009, Myers told a doctor that his father had physically abused him. But this claim was disputed by both parents.

{¶ 217} In August 2009, Myers sought and received his mother's permission to move in with his father. After Myers moved in with his father, his father took him off his medications and discontinued his psychological counseling. Myers's mother felt that he needed more structure and "management" than his father gave him.

{¶ 218} Myers's parents and brother all testified about his strong family relationships. He loved and was loved by his siblings and his step-siblings and provided them with guidance, advice, and emotional support. He continued to communicate with his family while in jail.

4. Remorse

{¶ 219} In a brief unsworn statement, Myers apologized to Back's family and expressed sympathy for their "pain and suffering." He said that his execution would not "fix anything" or "bring Justin back" but would "only * * * cause more pain and suffering" to innocent people: his parents, brothers, and sisters. Myers said: "I don't want to hurt people. I am not asking you to spare my life so I can hurt anyone. I want to help people. I want to help stop tragedies like this from happening." He asked for "a chance for me to become a better person."

5. Sentence Evaluation

{¶ 220} We find little in Myers's history, character, and background that is mitigating. He came from a broken home, and the circumstances under which his parents divorced must have been painful. But he had a loving family and a middle-class upbringing that included taking music lessons. He was also a gifted student. He had advantages in life that few capital defendants have had.

{¶ 221} We do give weight to the fact that Myers has the love and support of his family and to his lack of a significant criminal or juvenile record. *See*, *e.g.*, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 196 (love and support of family); *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 280 (lack of significant record). His expression of remorse, however, deserves little weight. *See State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 113.

{¶ 222} The R.C. 2929.04(B)(6) factor, degree of participation, is not entitled to significant weight on the facts of this case. Even though Myers did not inflict the fatal wounds, he had a large role in the offense. He came up with the idea of stealing the safe and of killing Back to get it. He chose that as an easy way to make some money over the alternative of robbing or burglarizing a drug dealer. He rejected Mosley's proposal to burglarize the Cateses' house on January 27, when they knew no one was home. He came up with the initial idea of killing Back,

and he brainstormed with Mosley to arrive at the plan of making and using a garrote. He bought the materials to make the garrote.

{¶ 223} Myers also extensively participated "in the acts that led to the death of the victim," *id*. He restrained Back while Mosley slipped the garrote over Back's head and continued to restrain him when Mosley, having failed in his attempt to strangle Back, pulled his knife and began stabbing him.

{¶ 224} Myers's strongest mitigating factor is his youth. He was just past his 19th birthday when he committed the murder. "This factor is entitled to some weight, especially since eighteen is the minimum age for death penalty eligibility." *Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶ 98.

{¶ 225} In a recent case, *State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, an offender who committed murder at age 19 successfully argued that the aggravating circumstances in his case did not outweigh the mitigating factors. But in *Johnson*, the mitigating factor of the defendant's youth was joined with the mitigating factors that he had a "corrosive upbringing," *id*. at ¶ 138, by a clan of criminals who taught him to "lead a criminal lifestyle," *id*. at ¶ 137, he had a low IQ, *id*. at ¶ 121, 135, and he had been abused and neglected. Also, his family members were addicted to drugs and alcohol and had "mental-health issues," *id*. at ¶ 137. Johnson's upbringing contrasts starkly with Myers's background.

{¶ 226} We find that the mitigating factors collectively deserve, at most, modest weight in this case. Accordingly, we find that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

C. Proportionality Review

{¶ 227} Finally, we find that the death sentence is not disproportionate to sentences imposed in similar cases. R.C. 2929.05(A). This court has affirmed death sentences imposed on other defendants who were 19 years old when they committed murder and who were found guilty of only one robbery-murder

aggravating circumstance. *State v. Woodard*, 68 Ohio St.3d 70, 79, 623 N.E.2d 75 (1993); *State v. McNeill*, 83 Ohio St.3d 438, 453-454, 700 N.E.2d 596 (1998).

{¶ 228} Although Myers argues that his death sentence is disproportionate to Mosley's life sentence, we reject this argument. Cases of defendants who did *not* receive a death sentence at trial—including codefendants—are not "similar cases" to be included in the statutorily mandated proportionality review. *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 94.

{¶ 229} Myers cites *State v. Getsy*, 84 Ohio St.3d 180, 702 N.E.2d 866 (1998), to support his assertion that "[t]his Court has recognized the extreme unfairness of a co-defendant receiving a lesser sentence when he is the principal offender." But that is not what happened—indeed, it is the converse of what happened—in *Getsy*.

{¶ 230} In that case, the principal offender, Getsy, was the one who received a death sentence. Although this court affirmed his death sentence, the court thought it "troubling" that Getsy's codefendant, who was *not* a principal offender, "did not receive the death sentence even though he initiated the crime." *Id*. at 209. Thus, to the extent that *Getsy* is relevant here, it supports a proposition distinctly unhelpful to Myers: the person who instigates and plans an aggravated murder may be at least as culpable as the one who actually carries it out.

XIV. CONCLUSION

{¶ 231} We find no reversible error in the proceedings below. We affirm the convictions and the sentence of death.

Judgment affirmed.

O'CONNOR, C.J., and O'DONNELL, KENNEDY, FRENCH, RICE, and FISCHER, JJ., concur.

CYNTHIA W. RICE, J., of the Eleventh District Court of Appeals, sitting for O'NEILL, J.

David P. Fornshell, Warren County Prosecuting Attorney, and Kirsten A. Brandt, Assistant Prosecuting Attorney, for appellee.

Timothy J. McKenna and Roger W. Kirk, for appellant.

OCT 16 2014

COMMON PLEAS COURT
WARREN COUNTY, OHIO
FILED

2014 OCT 16 PM 3:38

JEAN SPANTH
CLERK OF COURTS

(A)

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO, Plaintiff, v. AUSTIN GREGORY MYERS, Defendant	:	CASE NO. 14CR29826 JUDGMENT ENTRY OF SENTENCE ON AGGRAVATED MURDER WITH DEATH SPECIFICATIONS PURSANT TO R.C. § 2929.03(F)

This matter is before the Court for Sentencing on October 16, 2014. Present before the Court is the Defendant Austin Gregory Myers, represented by his attorneys Greg Howard and John Kaspar. The State is represented by County Prosecutor David Fornshell, John Arnold and Travis Vieux.

The case was tried to a jury beginning on September 22, 2014. In the Trial Phase, the jury returned a verdict of guilty on two counts of Aggravated Murder with Specifications, Kidnapping (Count Three), Aggravated Robbery (Count Four), Aggravated Burglary (Count Five), Grand Theft of A Firearm (Count Six), Tampering With Evidence (Count Seven), Safecracking (Count Eight) and Abuse of a Corpse (Count Nine). The Defendant was also found guilty on all the firearm specifications.

The Court found Counts One and Two of Aggravated Murder merge for the purposes of sentencing. The Court also found the Aggravated Murder specifications merge. The State of Ohio elected to proceed on Aggravated Murder (Count One) and the Aggravated Robbery Specification (Third Specification) to Count One. In the Sentencing Phase, the jury unanimously recommended a sentence of death be imposed.

The Court inquired of the Defendant as to whether he had anything to say in mitigation or as to why his sentence should not be imposed.

FACTS

On January 27, 2014, the Defendant Austin Gregory Myers ('Myers') and his co-defendant Timothy Mosley ('Mosley') planned to rob the home of Justin Back – a

WARREN COUNTY
COMMON PLEAS COURT
JUDGE DONALD E. ODA II
500 Justice Drive
Lebanon, Ohio 45036

Appendix E

childhood friend of Myers. They visited the home of Justin Back in Waynesville, Ohio, where he lived with his mother, Sandy Cates and stepfather, Mark Cates. They were surprised to discover he was at home. They stayed for a short time, then left when Justin Back and Mark Cates had to leave to meet with a Navy recruiter.

Shortly thereafter, they formulated a plan to kill Justin Back and burglarize the home. As part of that plan, they originally attempted to purchase cold medicine, poison and syringes from stores in Waynesville. They were unsuccessful in these attempts when the debit card they were attempting to use was declined. Later that evening, they ended up borrowing $20.00 from a mutual friend, Logan Zennie ('Zennie'). With that money, they purchased wire cable and two handles to form a garrote or choke wire. It was Zennie who actually fashioned the garrote.

The following day, on Tuesday, January 28, 2014, Myers and Mosley purchased items to cover up the burglary, robbery and murder, specifically: septic enzymes, rubber gloves and ammonia from the Dollar General Store in Clayton. They traveled to Waynesville and Justin Back let them in the house under the pretense of hanging out and watching movies. The plan was for Myers to distract Justin Back in the kitchen area and for Mosley to come up behind him and strangle him with the garrote.

The two put this plan in motion sometime between the hours of 1:00 and 2:00 p.m. Myers lured the victim into the kitchen and Mosley approached him from behind. When Mosley attempted to use the garrote, he missed. The wire instead ended up across Justin Back's chin. Myers was attempting to restrain Justin Back's arms and a fight ensued where all three men ended up on the kitchen floor. In a panic, Mosley retrieved a knife from his pocket and proceeded to stab Justin Back in the back and chest. Justin Back died from blood loss on his kitchen floor as a result of the stab wounds.

Myers and Mosley cleaned up the crime scene and stole numerous items from the house, including jewelry, a safe, laptop, iPod, a gun and other items of personal property. It was their plan to make it appear as though Justin Back ran away. They wrapped the body in a blanket and put it in the trunk of Mosley's car. They dumped the body in Preble County in a secluded, wooded area near Fudge Road known as Cry Baby Bridge. Prior to leaving the body, Myers shot two rounds into Justin Back's dead body and placed the septic enzymes on the body to aid in decomposition.

The two were apprehended by law enforcement that same night. Both gave statements to police initially denying any involvement, but they eventually implicated themselves in most aspects of the theft and murder.

Both Myers and Mosley were charged with Aggravated Murder, Kidnapping, Aggravated Robbery, Aggravated Burglary, Theft of a Firearm, Safecracking and Abuse of a Corpse. Mosley reached a plea agreement in the week before trial in

which he agreed to testify against Myers and plead guilty to all charges in exchange for the dismissal of the death specifications.

AGGRAVATING CIRCUMSTANCE

The Aggravating Circumstance in this case is that the Aggravated Murder was committed with prior calculation and design and was committed while Myers was committing, attempting to commit and/or fleeing immediately after committing or attempting to commit the offense of Aggravated Robbery. At the Sentencing Phase, the State reintroduced some of the evidence submitted at the Trial Phase and no other evidence.

The Aggravating Circumstance in this case is significant. The Aggravated Murder was committed in the course of an Aggravated Robbery – meaning Myers and Mosley intended to inflict serious physical harm upon the victim in the course of a theft offense.

The offense was committed with Prior Calculation and Design. This fact, in and of itself, is not an Aggravating Circumstance. However, because the Defendant was not the principal offender in this case, the Court must consider whether the Aggravated Murder was committed with Prior Calculation and Design. The offense was planned out carefully over the course of two days. Myers and Mosley carefully considered a number of different methods by which to kill the victim and take property belonging to him and his family. This is not a case where a murder happens spontaneously in the course of the commission of another felony. Myers and Mosley entered the Back/Cates residence with a specific plan to kill.

The weight to be given to the Aggravating Circumstance is considerable.

MITIGATING FACTORS PRESENTED BY THE DEFENSE

The defense presented the following mitigating factors on behalf of Myers: 1) the youth of the Defendant; 2) the lack of significant prior criminal history or juvenile delinquency adjudications; 3) the love and support of his family; 4) the plea agreement of Mosley. The Court will address each of these factors in turn.

The youth of the Defendant is a significant mitigating factor. The Defendant is 19 years of age. Because of his youth, he lacks insight. The Defendant does not understand how precious life is – at his age, it would be virtually impossible for him to have such an appreciation. Likewise, the Defendant, because of his youth, has no concept of death. This is clear from his unsworn statement. Because he has had no time to appreciate his accomplishments, to reflect on his actions or even contemplate his own existence, he has no respect for death. His statements to the jury "wishing he could go back in time;" "If you kill me, it won't fix anything;" "It won't bother me;" "It won't hurt me;" "I won't feel anything." These are the statements of a child. The youth of the Defendant was given substantial weight by the Court

The lack of prior criminal history or juvenile delinquency adjudications is also a significant mitigating factor and was given substantial weight by the Court. There was no evidence presented at trial that Myers had ever been previously convicted of any criminal offense or adjudicated delinquent for any offense. It is not uncommon for the Court to see criminal defendants, even at age 19, with considerable misdemeanor and felony criminal records beginning at a young age. It is likewise not uncommon for the Court to see criminal defendants who begin with smaller crimes that gradually increase in frequency and intensity. The evidence suggests this is the first time the Defendant has been incarcerated for any reason. This fact merits significant weight in the balancing process.

The love and support of family was considered by the Court but is not a significant mitigating factor. The Court has considered the testimony of Myers family, the letters he has written and the potential that Myers could have to be a good influence on his siblings. The Court has reviewed the letters from the Defendant to his family offered in mitigation and finds them to be of little value with respect to mitigation. The Court has considered the love and support of family as a mitigating factor, but gives it almost no weight.

The plea agreement of Timothy Mosley is a troublesome mitigating factor. Mosley is the principal offender in this case, i.e. he is the actual killer. He is the one who snuck up behind Justin Back and tried to strangle him with the garrote. After this failed, Mosley is the one that pulled a knife from his pocket and stabbed Justin Back no less than 21 times. This murder weapon was not produced at trial despite more than 400 exhibits offered by the State. There was no testimony as to what became of this knife. In fact, it was barely mentioned at the trial. While Myers and Mosley planned this crime together, it was Myers who selected Justin Back as the victim. The Court also notes that in every picture and nearly at all times in the video surveillance, it was Myers in front and Mosley following behind. Because of the plea agreement with the State, the Court cannot consider death as a possible penalty for Mosley, as deserving as he may be of such a sentence. But, a person who contracts a murder for hire, for example, is not less culpable than the actual killer. Under such circumstances, he is more culpable because without his acts and the continuous chain of events following, the victim would still be alive. This is true of Justin Back. Without Myers, Mosley had no real predisposition to kill – certainly no reason to kill Justin Back. The evidence clearly shows the murder was Myers' idea. He selected Justin Back as the victim. He selected the Cates home as the location for the Aggravated Robbery. He does not escape culpability just because Mosley cannot be put to death for his crimes. But, the Court must consider, in light of Mosley's plea deal, whether a life sentence is a more appropriate penalty in this case for Myers, who was not the principal offender/actual killer. The Court finds the fact that Mosley is receiving a life sentence for his involvement in the crimes to be a mitigating factor of some significance in the weighing process.

The Court has considered the statements made at today's hearing in mitigation.

The Court has not considered any victim impact evidence in the weighing process, nor has the Court considered the aggravated murder itself as an aggravating circumstance.

THE JURY'S VERDICT

The jury did their job in this case. They were thoughtful and deliberate. The Court is proud of their service and humbled at the gravity with which they undertook this difficult decision. Whether the Court ultimately agrees with their decision or not does not mean they were not correct in their evaluation of the Aggravating Circumstance and the Mitigating Factors.

In Ohio, the death penalty is not handed down by a jury. It is imposed by a judge. This is how the system is designed to work. The judge cannot even consider the death penalty until a jury has considered the case and unanimously determined death is appropriate. However, the law requires the judge make a separate and independent determination as to the appropriateness of death as a sentence in this case without deference to the verdict of the jury.

The law does not allow a jury to be told their verdict is a recommendation for good reason: to do so would allow them to shift the responsibility to the judge - thus denying the gravity, immediacy and permanency of their decision. In the same vein, the law does not allow judges to give deference or weight to the jury's verdict in a capital case for the same reason: to do so would allow the Court to shift its responsibility to the jury and shirk the ultimate responsibility for the sentence.

OTHER MITIGATING FACTORS

The Court has carefully considered the nature and circumstances of the offense to determine if there is any mitigating value. There is not. The crime itself was carried out with precision and planning in a brutal fashion. Therefore, the Court finds no mitigating value in the nature and circumstances of the offense and therefore gives this potential mitigating factor no weight in the decision.

The Court has considered the troubled childhood of the Defendant to determine if there is any mitigating value. The evidence showed that Myers came from a dysfunctional home life and the circumstances of his parents' estrangement and ultimate divorce appear to have had a significant impact on him in his formative years. However, the Court notes that many children come from divorced parents and blended families. The Defendant stated to Dr. Chung in his examination at the Kettering Hospital Youth Services that his father physically abused him. This seems at odds with the rest of the evidence and the Defendant's choice to go live with his father shortly thereafter. The Court gives this potential mitigating factor some weight against the Aggravating Circumstance, but not much.

The Court finds the absence of other Aggravating Circumstances to be a mitigating factor, even though it was not raised by the defense. This is a not a case where the

victim was the president or governor. The victim was not a child under the age of 13 or a police officer. The Aggravated Murder was not committed as an act of terrorism, to escape detection for a separate crime or in the killing of two or more people. This is not to say the pain and loss of the Cates family are somehow less. They aren't. This does not mean the death of Justin Back is less tragic. It isn't. However, the law recognizes these classes of victims and categories of offenses as direct attacks on civilized society that go above and beyond an Aggravated Murder without those same qualities. To that extent, there is some mitigating value to the lack of other Aggravating Circumstances in this case.

The Court has carefully considered the testimony, exhibits and statement of the Defendant for any remorse and finds none. "I am sorry this happened" and "I made a horrible mistake" are not an apology nor are they a statement of genuine remorse. Therefore, the Court finds no mitigating value for any remorse of the Defendant and therefore gives this potential mitigating factor no weight in the decision.

THE WEIGHING PROCESS

The Court has considered all the evidence and balanced the Aggravating Circumstance against the Mitigating Factors set forth above.

The Court finds the State has proven beyond a reasonable doubt the Aggravating Circumstance outweighs the Mitigating Factors. Therefore, the sentence of death shall be imposed on Austin Gregory Myers on the charge of Aggravated Murder and the specification.

This matter shall be automatically appealed to the Ohio Supreme Court pursuant to R.C. § 2929.05

JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

Copies to be filed with the Court of Appeals and the Ohio Supreme Court

10-17-14

(B)

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	
	:	AMENDED JUDGMENT ENTRY AND
Defendant	:	SENTENCE ON FELONY COUNTS
	:	AND SPECIFICATIONS

This matter is before the Court for Sentencing on October 16, 2014. Present before the Court is the Defendant Austin Gregory Myers, represented by his attorneys Greg Howard and John Kaspar. The State is represented by County Prosecutor David Fornshell, John Arnold and Travis Vieux.

The Court has, by separate Judgment Entry, set forth the sentence for the Aggravated Murder and Death Penalty Specification. With respect to the remaining counts, the Court has considered the record and the principles and purposes of sentencing under R.C. §2929.11. The Court has balanced the seriousness and recidivism factors under R.C. §2929.12 and considered the factors under R.C. §2929.13. The Court inquired if the Defendant had anything to say in mitigation regarding the sentence.

The Court finds the Defendant is not amenable to an available community control sanction and that prison is consistent with the purposes and principles of R.C. §2929.11.

It is hereby **ORDERED** that Defendant is hereby sentenced to a total of fifteen (15) years in prison, set forth as follows:

1) The Court finds Count Three – Kidnapping, R.C. § 2905.01(A)(2), a felony of the first degree (victim not released in a safe place); Count Four – Aggravated Robbery, R.C. § 2911.01(A)(3), a felony of the first degree;

and Count Five – Aggravated Burglary, R.C. § 2911.11(A)(1) a felony of the first degree merge for the purposes of sentencing. The defendant is sentenced to eleven (11) years in prison for the offenses of Kidnapping, Aggravated Robbery, and Aggravated Burglary.

2) Count Six Grand Theft of a Firearm, R.C. §2913.02(A)(1), a felony of the third degree: The defendant is sentenced to 36 months in prison.

3) Count Seven Tampering With Evidence, R.C.§2921.12(A)(1)a felony of the third degree: The defendant is sentenced to 36 months in prison.

4) Count Eight Safecracking, R.C. §2911.31(A), a felony of the fourth degree: The defendant is sentenced to 12 months in prison.

5) Count Nine Abuse of a Corpse, R.C. §2927.01(B), a felony of the fifth degree: The defendant is sentenced to 12 months in prison.

6) These prison terms shall be served concurrently with one another and concurrently with the sentence for Aggravated Murder with Specifications.

7) The defendant was also convicted of specifications to counts 4, 5, 6 (violations of R.C. 2941.141 1 year firearm) and count 9 (violation of R.C. 2941.145(A) 3 year firearm). As to the Firearm Specification to Count Nine, the Court imposes a sentence of 3 years in prison, to be served consecutively to all other sentences.

8) The Court finds the remaining Firearm Specifications merge. The Court imposes a sentence of one year in prison, to be served consecutively to all other sentences.

The Court finds the Defendant does not have nor is he reasonably expected to have the means to pay the financial sanctions, fines and court costs. There is no fine and costs are waived.

The Defendant is not eligible for a Risk Reduction Sentence pursuant to R.C. §2929.143.

Defendant shall receive jail time credit in the amount of 261 day(s) as of this date.

The Defendant shall submit a DNA sample pursuant to R.C. §2901.07.

The Defendant is also subject to a mandatory period of post-release control with a maximum term of five years.

The Defendant is hereby notified that a violation of any post-release control rule or condition can result in a more restrictive sanction when released, an increased duration of supervision or control, up to the maximum set out above and/or re-imprisonment even though the Defendant has served the entire stated prison sentence. Re-imprisonment can be imposed in segments of up to 9 months but cannot exceed a maximum of one-half of the total term imposed for all of the offenses set out above. The Defendant was also notified that commission of a new felony while subject to this period of control or

supervision may result in an additional prison term consisting of the maximum period of unserved time remaining on post-release control as set out above or 12 months whichever is greater. This prison term must be served consecutively to any term imposed for the new felony. The sentence imposed by the Court automatically includes any extension of the stated prison term by the Parole Board.

The Defendant did cause or threaten to cause physical harm to a person. Any Temporary Protection Order issued in this case is hereby terminated.

The Defendant shall be conveyed by the Warren County Sheriff to the custody of the Ohio Department of Rehabilitation and Corrections forthwith.

JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

TO THE CLERK
SERVE NOTICE OF JUDGMENT
PURSUANT TO CIVIL RULE 58(B)

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	
	:	ORDER DISMISSING DEFENDANT'S
Defendant.	:	POST-CONVICTION PETITION;
	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW

This matter is before the Court on a post-conviction petition pursuant to R.C. § 2953.21.

A post-conviction proceeding is not an appeal of a criminal conviction, but rather, a collateral civil attack on a criminal judgment. *State v. McKelton*, 2015-Ohio-4228, ¶¶ 9-10 (12th Dist. Butler). Pursuant to R.C. § 2953.21, the Court may dismiss the petition without hearing, grant summary judgment to either party, or hold an evidentiary hearing on the petition. See *State v. Francis,* 12th Dist. Butler No. CA2014–09–187, 2015–Ohio–2221, ¶ 10.

The purpose of a post-conviction petition is to address constitutional challenges that may be otherwise impossible to reach because the evidence supporting those claims is not contained in the record of the petitioner's conviction, thereby preventing appellate courts from considering such evidence. *State v. Short*, 2nd Dist. Montgomery No. 27399, 2018-Ohio-2429, ¶ 38.

As noted by the Ohio Supreme Court, pursuant to R.C. § 2953.21(C), a trial court properly denies a defendant's petition for post-conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief. Substantive grounds for relief exist where there was a denial or infringement of the petitioner's constitutional rights so as to render the judgment void or voidable." *State v. McKelton*, 2015-Ohio-4228, ¶¶ 9-10 (12th Dist. Butler) (internal citations omitted).

Appendix F

In reviewing a petition for post-conviction relief filed pursuant to R.C. § 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact. *Id.* at paragraph one of the syllabus. If the court summarily dismisses the petition without holding an evidentiary hearing, it must make and file findings of fact and conclusions of law with respect to such dismissal. R.C. § 2953.21(C); *State v. Francis*, 12th Dist. No. CA2013-05-078, 2014-Ohio-443, 8 N.E.3d 371, ¶¶ 11-13.

FINDINGS OF FACT

In making these findings of fact, the Court has reviewed and considered:

1) The entirety of the filings associated with the post-conviction request, including the petition, the supporting affidavits and documentary evidence associated with the filing of the petition.
2) The entirety of the filings associated with the direct appeal, including the briefs, trial transcript and decision of the Ohio Supreme Court.
3) The entirety of the filings from the trial court proceedings, including the indictment, the Court's journal entries, orders and pretrial decisions, the journalized records of the clerk of the court , and the court reporter's transcript of both the trial and pretrial proceedings.

On or about January 27, 2014, Austin Myers ("Myers") and his co-defendant, Timothy Mosley ("Mosley") planned to burglarize the home of the victim in this case, Justin Back ("Back"). That morning Myers was supposed to be at an orientation for a new job but he overslept. In need of money, he and Mosley began to plot burglarizing the home of a childhood friend of Myers, the Back home, with an alternative home of a known drug dealer. Ultimately, they chose to burglarize the Back home.

Myers and Mosley drove to the Back home in Waynesville. They approached the front door and knocked, they were surprised when Mr. Back answered the door. They went inside to visit with Mr. Back but only for a brief time before leaving. After leaving the Back home, Myers suggested they return to the home, kill Back and steal the contents of a safe that Myers knew was in the home.

The two began to plan the murder of Justin Back. They initially considered killing Back by injecting him with cold medicine. In furtherance of this plan, they went to a store and attempted to purchase cold medicine and a bottle of bug wash. However, Myers' credit card was declined. The two left that store and went to the Waynesville Pharmacy where they inquired about syringes, specifically "the kind with needles." They briefly stood in line then got out of line and left the store empty-handed. Myers and Mosley then drove

to a CVS pharmacy in Centerville because Myers had received a phone call indicating he won some money. The two travelled back to Waynesville in an attempt to collect the money, again without success. They subsequently returned to the Back home and began to watch a movie. When Back's step-father arrived home, Back informed Myers and Mosley he had to leave to go to a meeting with a Navy recruiter.

Myers and Mosley continued to discuss their plan of murdering Back and burglarizing the Back home. They decided they would strangle Back, take the safe and make it appear as though Back had run away. Myers and Mosley borrowed money from their friend, Logan Zennie, and went to Lowe's to purchase the materials to make a garrote.

The next morning, after driving by the Back home, Myers and Mosley went to Dollar General to purchase rubber gloves, ammonia, and septic enzymes. They believed the septic enzymes would help to decompose the body in the cold weather. Myers wanted to wait until 1:00 p.m. to kill Back, so the pair walked around antique stores in Waynesville, then got gas with their remaining $7.00.

Around 1:00, they arrived at the Back home, where Myers planned to distract Back while Mosley strangled him from behind. After they arrived, Back offered them a drink which Myers accepted. While Back was reaching in to the refrigerator for a drink, Mosley came up behind him and tried to pull the garrote around his throat. However, the garrote got stuck on Back's chin. Myers helped restrain Back while Mosley stabbed him repeatedly. While Back begged for his life, Myers simply told him it would be over soon.

Myers was not the principal offender in the aggravated murder of Back. However, the aggravated murder was committed with Prior Calculation and Design. The offense was planned out carefully over the course of two days. Myers and Mosley considered a number of different methods by which to kill Back and take property belonging to him and his family. The murder did not take place spontaneously in the course of the commission of another felony. Myers and Mosley entered Back's residence with a specific plan to kill him. The crime itself was carried out with precision and planning in a brutal fashion.

Mosley was the principal offender, i.e. the actual killer. He is the one who snuck up behind Justin Back and tried to strangle him with the garrote. After this failed, Mosley is the one that pulled a knife from his pocket and stabbed Justin Back no less than 21 times. Myers and Mosley planned this crime together. But, it was Myers who selected Justin Back as the victim. Myers appeared in all the video surveillance evidence to always be in the lead, with Mosley following behind. Without Myers, Mosley had no real predisposition to kill Back. Likewise, Myers selected the Back home as the location for the Aggravated Robbery.

After the murder, the two then wrapped Back's body in a rug, cleaned up the home and found the safe. They then took the body and placed it in Mosley's trunk, and left the

home with safe and various other stolen items. They stopped at Mosley's house and changed clothes. Then after stopping at UDF for gas and food, they dumped the body where they believed it would not be found. They poured ammonia and septic enzymes on Back's body and shot the body twice before the gun jammed.

Myers and Mosley were apprehended by law enforcement that same night. Both gave statements to police. Each of them initially denied any criminal activity, but they eventually implicated themselves in most aspects of the theft and murder.

At no time during the police investigation, nor at any of the court proceedings – including, but not limited to his unsworn statement – did Myers ever show any remorse.

Myers was indicted on February 24, 2014, for charges of Aggravated Murder with Capital Specifications, Kidnapping, Aggravated Robbery with gun specification, Aggravated Burglary with gun specification, Grand Theft of A Firearm, Tampering with Evidence, Safecracking, and Abuse of a Corpse with a gun specification. He was represented by two competent, experienced attorneys certified by the Ohio Supreme Court to handle such cases.

Mosley was also indicted on similar charges. But, he reached a plea agreement approximately a week before the trial of Mr. Myers in which he agreed to testify against Myers. He pled guilty to all charges in exchange for the dismissal of the death specifications.

Myers case was tried to a jury, and he was convicted on all counts at the trial phase, including the capital specifications, on October 2, 2014.

The sentencing phase of the trial began on October 6, 2014. Myers presented a number of witnesses and made an unsworn statement by way of mitigation. Myers was, at the time of the trial, 19 years old. He had no prior criminal history or criminal adjudications.

The jury ultimately returned with a unanimous verdict with the sentence of death and the matter was set for sentencing on October 16, 2014.

Myers was sentenced to death on October 16, 2014. The defendant's conviction and death sentence was appealed to the Ohio Supreme Court. The conviction and sentence were affirmed on appeal by the Ohio Supreme Court on May 17, 2018.

CONCLUSIONS OF LAW

Myers filed his petition to vacate or set aside his sentence on November 10, 2016.

Revised Code § 2953.21 provides for the filing of a post conviction petition for relief from conviction by any person convicted of a criminal offense who claims there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. A person who has been sentenced to death may ask to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death. The Petitioner has set forth sixty grounds for relief in his petition. Many of these claims are similar issues raised in the original appeal to the Ohio Supreme Court. The grounds for relief are as follows:

I. Ohio's post-conviction procedures are constitutionally inadequate.

II. The death penalty is per se unconstitutional.

III. Ohio's death penalty scheme is unconstitutional.

IV. Felony-murder is unconstitutional as a capital specification.

V. Ohio's capital felony-murder statute is unconstitutional because it fails to adequately account for youth in violation of the Eighth and Fourteenth Amendments.

VI. Denial of effective assistance of trial counsel for failing to pursue a first phase youth-based defense theory in anticipation of mitigation.

VII. Ohio's death penalty is incompatible with modern standards of decency.

VIII. Myers' sentence is disproportionate compared to others convicted of similar crimes in violation of his 8th and 14th Amendment rights.

IX. The trial court erred in failing to follow Ohio sentencing law.

X. Denial of effective assistance of counsel for failing to consult with or retain a fact investigator.

XI. Denial of effective assistance of counsel for failing to fully cross-examine Tim Mosley.

XII. Denial of effective assistance of counsel for failing to fully cross-examine Detective Wyatt and Sergeant Garrison.

XIII. Denial of effective assistance of counsel for failing to investigate and present a crime scene/police procedures expert to challenge the State's case.

XIV. Denial of effective assistance of counsel for failing to investigate and present a police procedures expert to challenge *Miranda* issues.

XV. Denial of effective assistance of counsel for failing to investigate and present an expert to evaluate Myers' understanding of his *Miranda* rights.

XVI. Denial of effective assistance of counsel for failing to achieve a change of venue for Myers' capital trial.

XVII. Denial of effective assistance of trial counsel for failing to fully challenge the chain of custody of Tim Mosley's journal.

XVIII. Cumulative effect of the denial of effective assistance of counsel at the trial phase.

XIX. Denial of effective assistance of counsel for failing to consult with or retain a mitigation specialist in a timely fashion.

XX. Denial of effective assistance of counsel for failing to consult with or retain a competent mitigation specialist.

XXI. Denial of effective assistance of counsel for failing to fully investigate and present expert psychological testimony during the mitigation phase of Myers' capital trial.

XXII. Denial of effective assistance of counsel for failing to fully present Bryce Myers' testimony during the mitigation phase of Myers' capital trial.

XXIII. Denial of effective assistance of counsel for failing to present Sandra Hodson's testimony during the mitigation phase of Myers' capital trial.

XXIV. Denial of effective assistance of counsel for failing to present Derek Copeland's testimony during the mitigation phase of Myers' capital trial.

XXV. Denial of effective assistance of counsel for failing to present the testimony of Becky Myers during the mitigation phase of Myers' capital trial.

XXVI. Denial of effective assistance of counsel for failing to present the testimony of China Hoover during the mitigation phase of Myers' capital trial.

XXVII. Denial of effective assistance of counsel for failing to present the testimony of Christ Salchak during the mitigation phase of Myers' capital trial.

XXVIII. Denial of effective assistance of counsel for failing to present the testimony of Diane Atkins during the mitigation phase of Myers' capital trial.

XXIX. Denial of effective assistance of counsel for failing to present the testimony of Dolores Muldoon during the mitigation phase of Myers' capital trial.

XXX. Denial of effect assistance of counsel for failing to present the testimony of George Caras during the mitigation phase of Myers' capital trial.

XXXI. Denial of effective assistance of counsel for failing to present the testimony of Reverend Lorenzo Burke during the mitigation phase of Myers' capital trial.

XXXII. Denial of effective assistance of counsel for failing to present the testimony of Jack Daughtery during the mitigation phase of Myers' capital trial.

XXXIII. Denial of effective assistance of counsel for failing to present the testimony of Greg Myers during the mitigation phase of Myers' capital trial.

XXXIV. Denial of effective assistance of counsel for failing to present the testimony of Danielle Copeland during the mitigation phase of Myers' capital trial.

XXXV. Denial of effective assistance of counsel for failing to present the testimony of Pam Norman during the mitigation phase of Myers' capital trial.

XXXVI. Denial of effective assistance of counsel for failing to present the testimony of Logan Zennie during the mitigation phase of Myers' capital trial.

XXXVII. Denial of effective assistance of counsel for failing to present the testimony of Mary Hayes during the mitigation phase of Myers' capital trial.

XXXVIII. Denial of effective assistance of counsel for failing to present the testimony of Mary Fessler during the mitigation phase of Myers' capital trial.

XXXIX. Denial of effective assistance of counsel for failing to present the testimony of Michael Frazier during the mitigation phase of Myers' capital trial.

XL. Denial of effective assistance of counsel for failing to present the testimony of Mike Myers during the mitigation phase of Myers' capital trial.

XLI. Denial of effective assistance of counsel for failing to present the testimony of Tom Olson during the mitigation phase of Myers' capital trial.

XLII. Denial of effective assistance of counsel for failing to present the testimony of Christopher Hinkle during the mitigation phase of Myers' capital trial.

XLIII. Denial of effective assistance of counsel for failing to present the testimony of Michael Myers during the mitigation phase of Myers' capital trial.

XLIV. Denial of effective assistance of counsel for failing to consult with and present an expert in adolescent brain development.

XLV. Denial of effective assistance of trial counsel for failing to effectively present youth as a mitigation factor during the sentencing phase of trial.

XLVI. Myers' rights under the 8th and 14th Amendments were violated when the trial court failed to consider the mitigating factors of youth in the crime.

XLVII. Based on his youth and individual characteristics, the death penalty is a disproportionate punishment for Myers.

XLVIII. The death penalty is per se unconstitutional for a youthful offender convicted of committing a crime prior to turning 21-years-old.

XLIX. Cumulative effect of the denial of effective assistance of counsel during the mitigation phase of Myers' capital trial.

L. Myers' Due Process Rights were violated when attorney-client discussions were potentially broadcast via the Court's audio/video recording system.

LI. Myers' Due Process Rights were violated when the trial court failed to grant a continuance for trial counsel to obtain a mitigation specialist.

LII. Myers' Due Process Rights were violated when the trial court failed to grant a continuance for trial counsel to investigate Tim Mosley's journal.

LIII. Myers' Due Process Rights were violated when the trial court admitted Tim Mosley's notebook at trial.

LIV. Myers' Due Process rights were violated when his involuntary statements were admitted during the trial phase of his capital trial.

LV. Myers' Due Process Rights were violated when his statements were admitted against him during trial when *Miranda* was not met.

LVI. Pretrial publicity in Warren County prejudiced Myers' fundamental rights to due process and a fair trial.

LVII. Ohio's death penalty law is unconstitutional under *Hurst v. Florida.*

LVIII. Professional misconduct prejudiced Myers' fundamental rights to due process and a fair trial and continues to prejudice Myers' appellate review.

LIX. Myers' Due Process Rights were violated when the jury was not instructed that they could consider his co-defendant's plea deal as a mitigating factor.

LX. Cumulative error.

The Court is familiar with the facts of the case – having served as the trial judge and being present for the entirety of the trial proceedings. As noted above, the Court has reviewed the entire record in this case, and all exhibits and authority filed and cited in the post-conviction petition. Because the Court is able to resolve the claims based on the evidence presented at trial and included with the petition, no evidentiary hearing is required.

The Petitioner has set forth a number of grounds alleging certain procedures and statutory schemes are unconstitutional, including the post-conviction petition process and the statutory scheme of the death penalty.

I. Ohio's post-conviction procedures are constitutionally inadequate

The petitioner contends that Ohio's post-conviction procedures do not provide an adequate corrective process for failing to be swift, simple and easily invoked, eschew rigid and technical doctrines of res judicata, forfeiture, waiver or default; for failing to provide for full fact hearings to resolve disputed factual issues.

Citing the Ohio Supreme Court decision in *Freeman v. Maxwell* (1965), 4 Ohio St.2d 4, 6, 210 N.E.2d 885, the Twelfth District Court of Appeals has consistently held that statutory procedure for post-conviction relief does contain an adequate corrective process. *State v. Lindsey*, 12th Dist. Brown No. CA2002-02-002, 2003-Ohio-811, ¶ 13. See also, *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, 2013 WL 4806935, ¶ 34, *State v. Ketterer*, 92 N.E.3d 21, ¶ 27, 2017-Ohio-4117 (12th Dist.).

Therefore, this ground for relief is overruled.

Grounds for relief II, III, IV, VII, and LVII (2, 3, 4, 7, and 57) all relate to whether the statutory scheme of Ohio's death penalty is constitutional. They will be addressed together.

II. The death penalty is per se unconstitutional

The petitioner argues that his conviction and sentences are void and/or voidable because the death penalty is per se unconstitutional because of several fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application; and (3) unconscionably long delays that undermine the death penalty's penological purpose.

III. Ohio's Death Penalty Scheme is unconstitutional

The petitioner argues the death penalty scheme is per se unconstitutional because it allows for racial disparities in capital indictment practices and in the actual infliction of the death penalty.

IV. Felony Murder is Unconstitutional as a capital specification

The petitioner argues Ohio's felony-murder statute is unconstitutional as a capital specification because it fails to provide adequate safeguards to narrow the class of offenders to whom the death penalty can be applied reliably and not arbitrarily and it allows for invidious racial discrimination in its application.

VII. Ohio's death penalty is incompatible with modern standards of decency.

The petitioner argues that Ohio's death penalty is incompatible with modern standards of decency in that it is arbitrarily applied, resulting in dramatic disparities in Ohio and across- the ever-decreasing segments of the country that still permit its use.

The Ohio Supreme Court has held that the doctrine of res judicata bars a convicted defendant who was represented by counsel from litigating in a post-conviction petition proceeding, any defense or any claimed lack of due process that could have been raised at trial or on appeal of that judgment. See *State v. Lawson*, 103 Ohio App.3d 307, 313, 659 N.E.2d 362, 366 (12th Dist.1995) citing *State v. Perry*, 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104 (1967).

> However, "there is an exception to the res judicata bar when the petitioner presents competent, relevant, and material evidence outside the record *that was not in existence and available to the petitioner in time to support the direct appeal.* Evidence outside the record, or evidence dehors the record, must demonstrate that appellant could not have appealed the constitutional claim based upon information in the original record and such evidence must not have been in existence and available to the petitioner at the time of trial. *State v. Boles*, 12th Dist. Brown No. CA2016-07-014, 2017-Ohio-786, ¶ 20, appeal not allowed, 151 Ohio St.3d 1453, 2017-Ohio-8842, 87 N.E.3d 221, ¶ 20 (2017)(internal citations omitted.)

The Defendant challenged the constitutionality of the death penalty in his trial or in his appeal to the Ohio Supreme Court in many of these same arguments. He could have raised all of them. Failure to do so results in these claim being denied based on the doctrine of res judicata.

Even if these claims were not denied on the basis of res judicata, they would still fail as the Ohio Supreme Court has upheld the constitutionality of the Ohio death penalty scheme in all of these claims. See *State v. Jenkins,* 15 Ohio St.3d 164, 169, 473 N.E.2d 264 (1984), citing *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (rejecting the claim that Ohio's death-penalty scheme is unconstitutional because it gives prosecutors unfettered discretion to indict); *State v. Steffen*, 31 Ohio St.3d 111, 114, 509 N.E.2d 383, 388 (1987)(rejects statistics on racial disparity to find the death penalty unconstitutional, individuals must show that racial consideration in his sentencing violated equal protection) , *State v. Short,* 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 137, and *State v. Mink,* 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 103 (both rejecting the claim that Ohio's death penalty is applied in a racially discriminatory manner); *State v. Buell,* 22 Ohio St.3d 124, 136, 489 N.E.2d 795 (1986) (rejecting an equal-protection challenge based on the geographic disparity of death sentences); and *Mink* at ¶ 103; *Jenkins,* 15 Ohio St.3d at 168, 473 N.E.2d 264 (rejecting the claim that the death penalty is unconstitutional because it is neither the least restrictive punishment nor an effective deterrent). *State v. Glenn,* 28 Ohio St.3d 451, 453, 504 N.E.2d 701 (1986), (rejected the argument that allowing juries to weigh aggravating and mitigating factors leads to arbitrary and capricious imposition of

the death penalty); *State v. Mapes,* 19 Ohio St.3d 108, 116–117, 484 N.E.2d 140 (1985), (*Use of the same jury at trial and sentencing burdens a defendant's rights to counsel and an impartial jury*); State v. Kirkland, *140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶¶ 104-112 (2014). State v. Tompkins*, 12th Dist. Butler No. CA2014-07-159, 2015-Ohio-2316, ¶ 20 (felony-murder statute is constitutional).

LVII. Ohio's DP law is unconstitutional under *Hurst v. Florida.*

The defendant also challenges the constitutionality of the Ohio death penalty under *Hurst v. Florida.* The Ohio Supreme Court has held unlike *Hurst* and *Ring*, the Ohio death penalty scheme requires the critical jury findings that were missing in *Hurst.*

Because the statutory scheme of Ohio's death penalty is different from that overturned in *Hurst*, the Ohio death penalty does not violate the Sixth Amendment. *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56 (2018), cert. denied, 139 S.Ct. 456, 202 L.Ed.2d 351 (2018). Therefore, this ground for relief is dismissed.

The Petitioner acknowledges that the Ohio Supreme Court has held that Ohio's death penalty is constitutional for the stated reasons in his direct appeal to the Ohio Supreme Court. *See State v. Myers, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138 (2018).*

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in counts II, III, IV, VII, and LVII (2, 3, 4, 7, and 57) and they are therefore, dismissed.

Next, the Petitioner challenges his conviction and sentence based on his youth at the time of the crime. This challenge includes grounds for relief V, VIII, IX, XLVI, XLVII, XLVIII (5, 8, 9, 46, 47 and 48).

V. Ohio's capital felony-murder statute is unconstitutional because it fails to adequately account for youth in violation of the Eighth and Fourteenth Amendments

The Petitioner argues that it is unconstitutionally cruel and unusual punishment to impose a death sentence on upon a youthful offender. This argument contains a number of subcategories including:

1. Youth is a condition defined by specific characteristics;

2. Age 18 is a conservative estimate of the dividing line between adolescence and adulthood;

3. There is a consensus that persons under 21 at the time of their offense do not possess the requisite level of culpability necessary for the government to impose a death sentence upon them;

4. There is an unacceptable risk that the brutal nature of a capital crime will render sentence unable to afford mitigating arguments based on youth their proper weight;

5. There are insufficient penological justifications for the execution of youthful offenders, and, in application, minorities are disproportionately executed;

6. Drawing the line at age 18 arbitrarily excludes those who possess all the characteristics deemed worthy of protection under the categorical ban.

XLVI. Myers' rights under the 8th and 14th Amendments were violated when the trial court failed to consider the mitigating factors of youth in the crime.

XLVII. Based on his youth and individual characteristics, the death penalty is a disproportionate punishment for Myers.

XLVIII. The death penalty is per se unconstitutional for a youthful offender convicted of committing a crime prior to turning 21-years-old.

The Ohio Supreme Court has already addressed whether the sentence of death for Myers based on his age is a violation of the Eighth Amendment and found that it is not a violation of his constitutional rights. Therefore, this argument is barred by res judicata.

Further, the Supreme Court of the United States has addressed the age of youthful offenders in a number of contexts and has not chosen to extend the ban on the death penalty to individuals who are over the age of eighteen at the time of the crime. The petitioner has submitted evidence related to the developments in brain science, however, the Ohio Supreme Court and the United States Supreme Court have considered these new developments and similar arguments to the ones set forth by the Petitioner. The United States Supreme Court acknowledged that individuals over eighteen may still exhibit signs of a juvenile but also found that since eighteen is the line society draws for many purposes between childhood and adulthood, that was the age that the line for the death penalty ought to rest. *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 1197–98, 161 L.Ed.2d 1 (2005).

The Court finds these arguments without merit and dismisses same.

VIII. Myers' sentence is disproportionate compared to others convicted of similar crimes in violation of his 8th and 14th Amendment rights.

IX. The trial court erred in failing to follow Ohio sentencing law.

Both of these arguments were raised in his appeal and were addressed by the Ohio Supreme Court and therefore they are barred by the doctrine of res judicata.

The Petitioner then sets forth a number of claims related to the ineffective assistance of counsel. In grounds VI, and X through XVIII (6,10-18), he lists a number of alleged violations that refer to the trial phase.

VI. Denial of effective assistance of trial counsel for failing to pursue a first phase youth-based defense theory in anticipation of mitigation.

X. Denial of effective assistance of counsel for failing to consult with or retain a fact investigator

XI. Denial of effective assistance of counsel for failing to fully cross-examine Tim Mosley

XII. Denial of effective assistance of counsel for failing to fully cross-examine Detective Wyatt and Sergeant Garrison

XIII. Denial of effective assistance of counsel for failing to investigate and present a crime scene/police procedures expert to challenge the State's case

XIV. Denial of effective assistance of counsel for failing to investigate and present a police procedures expert to challenge Miranda issues

XV. Denial of effective assistance of counsel for failing to investigate and present an expert to evaluate Myers' understanding of his Miranda rights

XVI. Denial of effective assistance for failing to achieve a change of venue for Myers' capital trial

XVII. Denial of effective assistance of trial counsel for failing to fully challenge the chain of custody of Tim Mosley's journal.

XVIII. Denial of effective assistance of counsel for failing to consult with or retain a competent mitigation specialist.

In a post-conviction petition asserting ineffective assistance of counsel, such as the case here, the petitioner must first show that his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial. *State v. Widmer,* 12th Dist. Warren No. CA2012–02–008, 2013–Ohio–62, ¶ 132. A trial counsel's performance will not be deemed ineffective unless the petitioner demonstrates that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *State v. Ullman,* 12th Dist. Warren No. CA2002–10–110, 2003–Ohio–4003, ¶

43; *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). A petitioner's failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *State v. Ayers,* 12th Dist. Warren Nos. CA2010–12–119 and CA2010–12–120, 2011–Ohio–4719, ¶ 49; *State v. Madrigal,* 87 Ohio St.3d 378, 389 (2000)." *State v. Davis*, 12th Dist. No. CA2012-12-258, 2013-Ohio-3878, ¶¶ 12-14 (Butler County).

The Twelfth District has held that a post-conviction petition that alleges a flawed trial strategy is not the basis of a finding of ineffective assistance of counsel. *State v. Kinsworthy*, 12th Dist. Warren No. CA2013–06–053, 2014-Ohio-1584, 2014 WL 1489250, ¶ 43. See also *State v. Casey*, 12th Dist. No. CA2017-08-013, 2018-Ohio-2084, 113 N.E.3d 959, ¶¶ 33-34. Even establishing another attorney would have employed a different strategy does not mean the strategy used by defense counsel fell below the objective standard of reasonableness. There is a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *State v. Casey*, 12th Dist. No. CA2017-08-013, 2018-Ohio-2084, 113 N.E.3d 959, ¶¶ 33-34. *See* also *State v. Murphy*, 12th Dist. Butler No. CA2009–05–128, 2009-Ohio-6745, 2009 WL 4896231, ¶ 43 ("the fact that the trial strategy was ultimately unsuccessful or that there was another possible and better strategy available does not amount to ineffective assistance of counsel").

The defendant has shown neither error nor resultant prejudice as a result of the trial strategy used by defense counsel. Hindsight is always perfect to near perfect. In this case, trial counsel made a strategic decision in the use of experts including an investigator. Trial counsel cross-examined Mosley and challenged the Petitioner's own confession by way of suppression. Whether or not to question Detective Wyatt and Sergeant Garrison was also a strategic decision, and therefore cannot be the basis of a finding of ineffective assistance.

Additionally, even if the defense had requested an expert to evaluate Myers understanding of his Miranda rights, based on the evidence presented at the motion to suppress hearing it is unlikely that the Court would have granted that request since the Court denied the motion to suppress.

The failure to request a crime scene/ police procedures expert or another expert to challenge Miranda issues was not such error as to deny the petitioner's constitutional rights. The petitioner was not entitled to any such expert and it is unlikely that the Court would have approved that request in this case.

Additionally, all of these alleged failures are part of the strategy of the defense counsel.

As to the journal, counsel for the defendant did challenge the authenticity of the journal and moved the Court for a continuance to allow him to get a handwriting expert. That motion was denied. Even if the motion had been granted, there was overwhelming evidence of the prior calculation of the murder, including all the video evidence of the

defendants' attempts to acquire the tools necessary to murder Justin Back. Therefore, the Court finds the defendant has failed to show any prejudice or error in these regards.

The Petitioner claims his counsel was ineffective in failing to achieve a change of venue for the trial. The defense filed a motion seeking to change the venue. The Court held in its pre-trial entry denying the motion that in accordance with *State v. Lundgren,* 73 Ohio St. 3d 474, 1995-Ohio-227, the motion was denied subject to reconsideration if a jury could not be sat. That motion was thereafter denied after the Court was able to successfully seat a jury in accordance with *State v. Lundgren* 73 Ohio St. 3d 474, 1995-Ohio-227, 479 653 N.E.2d 304.

Trial counsel did not substantially violate any of his duties as defense counsel during mitigation. The presentation of witnesses and evidence during mitigation is a matter of strategy. The Petitioner challenges the competency of the mitigation expert and the timeliness of defense counsel's obtaining the expert. The Court would note that the mitigation expert was a trained attorney who has handled a number of capital cases and therefore has the ability to determine what evidence is effective in the mitigation phase.

In Ohio, a properly licensed attorney is presumed competent. In order to overcome this presumption, the petitioner must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance. *State v. Davis* (1999), 133 Ohio App.3d 511, 516, 728 N.E.2d 1111. To demonstrate prejudice, 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 undermine confidence in the outcome." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶¶ 61-62 (2006).

The Court finds that the Petitioner has failed to show that his attorneys failed to competently complete any of their duties as his attorneys. Even if the Court agreed that representation of the defendant was deficient, the Court finds the defendant failed to show that the errors were so serious as to deprive the defendant of a fair trial.

For these reasons, these grounds of relief must fail.

Next, the Petitioner sets forth additional grounds related to the ineffective assistance of his counsel during the mitigation phase. Specifically grounds XIX through XLV and XLIX (19-45, and 49). Most of the grounds relate to the failure to present testimony from twenty-two witnesses who are family, friends, or former educators. For the same reasons as previously mentioned, the Court finds that the failure to present testimony from each of these witnesses was a matter of strategy and not such a failure of the duties of counsel to represent a constitutional violation. A defendant in a capital case cannot get the benefit of using one trial strategy and then in a post-conviction petition claim that the strategy failed and then seek to use a different strategy since the initial strategy did not succeed.

The Petitioner also challenges the failure of counsel to present an expert in adolescent brain development. The defense had the opportunity to meet with a psychological expert. Counsel did argue youth in mitigation and the Court instructed the jury on youth as a mitigating factor.

The decision not to put on an expert and to rely on requesting a jury not to give a harsher punishment than the co-defendant is a matter of strategy.

Therefore, the Court finds these grounds must fail.

Grounds L through LV (50-55) allege violations of the Petitioner's Due Process Rights.

In ground 50, the petitioner argues his due process rights were violated when attorney-client discussions were potentially broadcast via the Court's audio/video system. There is NO evidence that any conversation of counsel was ever overheard. As a precautionary measure, the Court conducted an investigation, on the record, into the issue and determined that the mute button was sufficient to prevent anyone from overhearing any conversation between counsel and the petitioner. This ground for relief is dismissed.

In ground 51, the Petitioner challenges the failure of the Court to grant a continuance to get a mitigation expert. The Court granted the defense request for a mitigation expert and the defendant had the assistance of a mitigation expert and therefore this ground is dismissed.

In Grounds 52 and 53, the petitioner challenges the Court's denial of the motion to continue to investigate Mosley's journal and the admission of the notebook. As the Court has held, there was sufficient evidence to establish the planning and preparation that went into this murder, even if the Court had excluded the journal. This ground for relief is dismissed.

In Grounds 54 and 55, the Petitioner challenges the Court's denial of the motion to suppress, arguing the Petitioner's due process rights were violated when his "involuntary statements" were admitted when Miranda was not met. The Court finds the defendant has failed to establish sufficient operative facts to establish substantive grounds for relief.

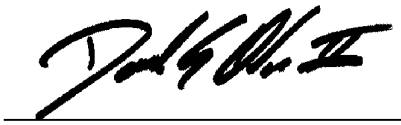
In Ground 56, the petitioner argues his due process rights were violated by the pretrial publicity. The Court and the attorneys in this matter questioned the jurors regarding pre-trial publicity, the amount of pre-trial publicity in this case, was not so extraordinary to deprive the defendant of due process. This argument is without merit and must fail.

In Ground 58, the Petitioner argues that professional misconduct has prejudiced Myers' fundamental right of Due Process. The Court finds the defendant has failed to establish sufficient operative facts to establish substantive grounds for relief.

In Ground for relief 59, the Petitioner argues his due process rights were violated when the jury was not instructed that they could consider his co-defendant's plea deal as a mitigating factor. The court instructed the jury that they could consider any additional factors that were not specifically mentioned. This argument is without merit.

In Ground for relief 60, the defendant argues cumulative error. The Court has considered the numerous arguments of the Petitioner and finds this argument must fail.

The Court finds the defendant has failed to establish sufficient operative facts to establish substantive grounds for relief and the Petition is therefore dismissed.



Donald E. Oda II, Judge
Warren County Common Pleas Court

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Respondent,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	
	:	ENTRY AND ORDER DENYING
Petitioner.	:	PETITIONER'S SUPPLEMENTAL MOTION FOR DISCOVERY

Pending before the Court is the supplemental motion of the petitioner to conduct discovery. The State has opposed this motion.

In the first motion for leave to conduct discovery filed November 8, 2016, the petitioner is seeking:

a. Records, deposition, and/or subpoena duces tecum of the custodian of the Warren County Juvenile Court regarding the Warren County juvenile Court file in the 2016 matter In re: Bryce Myers, Case No. unknown;

b. Records, deposition, and/or subpoena duces tecum of the custodian of the Warren County Children's Services records regarding the Myers/Copeland family as a whole and as individuals. The individuals are: 1) Austin Myers, DB 1/4/95; 2) Bryce Myers, DOB [redacted]; 3) Carson Myers, DOB [redacted]; 4) Eva Myers, DOB [redacted]; 5) Kami Myers, DOB: [redacted]; Danielle Copeland, DOB: [redacted]; 7) Gregory Myers, DOB [redacted]; 8) Ed Beck, DOB [redacted]; and, 9) Kaden Sage Beck, DOB [redacted];

c. Records, deposition, and/or subpoena duces tecum of the custodian of the Warren County Job and Family Services records regarding the Myers/Copeland family as a whole and as individuals. The individuals are: 1) Austin Myers, DB 1/4/95; 2) Bryce Myers, DOB [redacted]; 3) Carson Myers, DOB [redacted]; 4) Eva Myers, DOB [redacted]; 5) Kami Myers, DOB: [redacted]; Danielle Copeland, DOB: [redacted]; 7) Gregory Myers, DOB [redacted]; and Kaden Sage Beck, DOB [redacted];

Appendix G

d. Order that the Warren County Grand Jury Proceedings related to the indictment of this case be transcribed by a certified court reporter and provided to Petitioner;

e. Records, deposition, and/or subpoena duces tecum of the custodian of the Miami Valley Hospital records regarding Timothy Mosley, DOB 10/11/94. This request is for all medical and mental health records including, but not limited to, records containing information pertaining to drug usage (prescription, illicit, or otherwise);

f. Records, deposition, and/or subpoena duces tecum of the custodian of the Northmont City Schools records regarding Timothy Mosley, DOB 10/11/94. This request is for all school records from elementary through high school within Northmont City School District including, but not limited to academic records, medical records, mental health records, and disciplinary records;

g. Records, deposition, and/or subpoena duces tecum of the entire Warren County Jail file for Timothy Mosley. This request includes but is not limited to, all disciplinary records, Rules Infraction Board (RIB) files, separations, grievance file, educational file, visitation records, medical records, mental health records, institutional summaries, and/or master file;

h. Records, deposition, and/or subpoena duces tecum of the entire Ohio Department of Rehabilitation and Correction file for Timothy Mosley. This request includes but is not limited to, all disciplinary records, Rules Infraction Board (RIB) files, separations, grievance file, educational file, visitation records, medical records, mental health records, institutional summaries, and/or master file;

i. Records, deposition, and/or subpoena duces tecum of the entire Warren County Prosecutor's file as well as any other file personally kept by any prosecutor assigned to this case, relating to the death of Justin Back and/or the investigation thereof, and/or arrests and convictions of Austin Myers and Timothy Mosley;

j. Records, deposition, and/or subpoena duces tecum of the entire Warren County Sheriff's Office file maintained and relating to the death of Justin Back and/or the investigation thereof, and/or the arrests of Austin Myers and Timothy Mosley. This request includes but is not limited to all police reports; narrative supplements (including those by Deputies Hammons and Apking); and, cell phone pings/ triangulation records;

k. Records, deposition, and/or subpoena duces tecum of the entire Clayton Police Department's file maintained and relating to the death of Justin Back and/or investigation thereof, and/or arrests of Austin Myers and Timothy Mosley;

l. Records, deposition, and/or subpoena duces tecum of the entire Preble County Sheriff's Office file maintained and relating to the death of Justin Back and/or investigation thereof, and/or arrests of Austin Myers and Timothy Mosley;

m. Depositions of trial counsel, J. Gregory Howard and Johnny Christy Kaspar;

n. Deposition of mitigation specialist, Melynda Cook;

o. Deposition of all seated and alternate jurors;

p. Depositions of Warren County Prosecutor David Fornshell; Deposition of Assistant Warren County Prosecutor John Arnold; and Assistant Warren County Prosecutor Travis Vieux;

q. Depositions of all officers, investigators, and agents of the Warren County Sheriff's Office who were involved in the arrests of Austin Myers and Timothy Mosley, and in the investigation concerning the death of Justin Back;

r. Depositions of all officers, investigators, and agents of the Clayton Police Department who were involved in the arrests of Austin Myers and Timothy Mosley, and in the investigation concerning the death of Justin Back;

s. Depositions of all officers, investigators, and agents of the Preble County Sheriff's Office who were involved in the arrests of Austin Myers and Timothy Mosley, and in the investigation concerning the death of Justin Back;

t. Complete chain- of- custody and inventory of all evidence collected from the investigation of the death of Justin Back. This request includes but is not limited to, the notebook/journal allegedly belonging to Timothy Mosley

The Petitioner supplemented his motion for leave to complete discovery to include the following requests

Supplemental petition requests:

1. Document Requests: Subpoena for documents identified in paragraphs (e), (f), (g), (h), (i), (j), (k), and (l) for records concerning Tim Mosley, including medical records, mental health records, academic records, disciplinary records, jail records, prison records, visitation records, prosecution records, and all other records identified in those subparagraphs. This includes a request for permission to issue record subpoenas and/or document requests to: (a)Miami Valley Hospital; (b) Northmont City Schools and/or School District; (c) Warren County Jail; (d) Ohio Department of Rehabilitation and Correction; (e) Warren County Prosecutor's office; (f) Warren County Sheriff's Office; (g) Clayton Police Department; and (h) Preble County Sheriff's Office.

2. Document Requests: Records Subpoena to the Warren County Jail, or any other facility at which Petitioner was incarcerated awaiting trial, for any records of visitation by any of Petitioner's trial counsel or any members of his defense "team."

3. Depositions: The depositions of trial counsel J. Gregory Howard and Johnny Christy Kaspar concerning their representation of Petitioner at his trial and their investigation and preparation for same.

4. Depositions: The deposition of court-appointed investigator, Brenda Beyersdoerfer, and of Melynda Cook, who in part functioned as investigator, among other tasks for this capital case.

Revised Code § 2953.21 governs post-conviction petitions. It was amended effective April 6, 2017. The amendment allows for discovery in post-conviction proceedings when the petitioner has been sentenced to death and good cause can be shown. The State has argued that the previous version of the statute is the statute to be applied in this case. Previously R.C. § 2953.21 did not provide for discovery in post-conviction petition proceedings. *State v. Ketterer*, 12th Dist. No. CA2016-08-166, 2017-Ohio-4117, 92 N.E.3d 21, ¶ 45,

It has been previously held that the "triggering event" to determine which version of a statute governs in post-conviction petitions is the date the petition was filed. See *State v. Williamson*, 8th Dist. Cuyahoga No. 104294, 2016-Ohio-7053, ¶ 18, citing *State v. Worthington*, 12th Dist. Brown No. CA2014-12-022, 2015-Ohio-3173 at Footnote 4, ("R.C. § 2953.21 was amended by 2014 Sub.H.B. No. 663, which extended the timeframe for defendants to file their motions for post-conviction relief from 180 days to 365 days. The statute did not take effect until March 23, 2015, well after appellant filed his motion for post-conviction relief. Appellant's motion, therefore, is governed by former R.C. § 2953.21").

The petition in this matter was filed November 10, 2016, prior to the amended version of R.C. § 2953.21. The first motion for leave to conduct discovery was filed at the same time. The supplemental motion for leave to conduct discovery was filed after the amended version of the statute went into effect.

Statutes are presumed to be prospective unless expressly stated to be retroactive. See R.C. § 148. The Ohio Supreme Court has set forth a test to determine whether a statute is retroactive. First, the statute must expressly state it is retroactive and then if it does so expressly state, the reviewing court must determine whether it is substantive or remedial. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶¶ 8-10 (2007).

The statute as amended does not explicitly state that it is to be applied retroactively. Therefore, the Court does not need to determine if it is substantive or remedial. As the statute does not expressly state that it is retroactive, the Court finds the petitioner's post-conviction petition and any discovery related thereto are governed by the previous statute which did not expressly provide for discovery.

However, in the State v. *Ketterer*, 12th Dist. No. CA2016-08-166, 2017-Ohio-4117, 92 N.E.3d 21, ¶ 47, the Court of Appeals remanded the post-conviction petition in a death penalty case to allow the trial court to determine if the newly amended statute applied and if so, whether the petitioner had shown good cause. Therefore, the Court will consider whether the petitioner has shown good cause to complete discovery in this matter.

Revised Code § 2953.21 provides that at any time in conjunction with the filing of a petition for post-conviction relief, the Court, for good cause shown, may authorize the parties to conduct discovery, and may limit the extent of the discovery as necessary.

The term 'good cause' is not defined by the statute. For the purpose of this motion, the Court will adopt the generally-accepted definition applied to federal habeas proceedings:

> Where specific allegations show reason to believe the requesting party may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, it is the duty of the Court to provide the necessary facilities and procedures for an adequate inquiry.

Bracy v. Gramley 394 U.S., at 300, 89 S.Ct.1793 at 1091. It is incumbent upon the Court to permit discovery where the requests are specific, limited and reasonably calculated to lead to evidence in support of the claim. *Hill v. Mitchell*, 2007 U.S. Dist. LEXIS 7195, at *31 (S.D. Ohio Sep. 27, 2007). The *Bracy* standard provides for the Court to first identify the essential elements on which the discovery is sought and then determine whether the discovery is warranted. *Id at 904; citing United States v. Armstrong*, 517 U.S. 456, 468, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

Like *Bracy, t*he newly-amended Ohio statute places burden of demonstrating the materiality of the information requested on the moving party. Even in a death penalty case, 'bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or require an evidentiary hearing.' *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003), *cert. denied*, 543 U.S. 842, 125 S. Ct. 281, 160 L. Ed. 2d 68 (2004), *quoting Stanford*, 266 F.3d at 460. Neither federal nor state law sanction fishing expeditions based on a petitioner's conclusory allegations. *Williams v. Bagley*, 380 F.3d 932, 974, (6th Cir. 2004), *cert. denied*, 544 U.S. 1003, 125 S. Ct. 1939, 161 L. Ed. 2d 779 (2005), *citing Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997); *see also Stanford*, 266 F.3d at 460. Conclusory allegations are not enough to warrant discovery.

For example, in *Bracy*, the petitioner's trial attorney was a former associate of the corrupt trial judge who appointed him. There were specific allegations contained in the petition concerning bribery involving the judge in other cases and there was reason to believe, through discovery, it could be determined that petitioner's trial attorney had knowledge of this corruption and that it tainted petitioner's trial.

Petitioner's discovery requests can be logically broken down into nine general categories of inquiry:

1) Records in the custody of Children's Services, ODJFS, Juvenile Court or others regarding the Myers/Copeland family, including Bryce Myers.

2) Petitioner's records from the Warren County Jail, including visitation records.

3) Grand Jury Proceedings

4) Records of Timothy Mosley such as hospitalization, mental health, school, incarceration and other institutional-type documentation.

5) Records of the prosecutor's office and law enforcement, including chain of custody and inventory documents.

6) Depositions of the defense team;

7) Depositions of law enforcement officers

8) Depositions of the jurors;

9) Depositions of the attorneys of the prosecution team

With regard to the discovery requests, the Court makes the following findings:

1) Bryce Myers, Timothy Mosley, Greg Myers and Danielle Copeland testified at trial.

2) Bryce Myers, Timothy Mosley, Greg Myers, Danielle Copeland, Melynda Cook and Gregory Howard signed affidavits which were submitted to the Court in connection with the petition for post-conviction relief.

3) The affidavit of Bryce Myers, petitioner's younger brother, states that he was in school during petitioner's trial, but he attended and testified in the sentencing phase. Bryce stated his contact with Greg Howard and Melynda Cook was two visits, which lasted about an hour each. The affidavit details he and petitioner's childhood, specifically:

> "I think what happened to me and Austin was a perfect bad storm. Our childhood, our mother's affair, our parents' divorce, the neglect, lack of attention, and lack of discipline all contributed to each of our situations."

4) The affidavit of Greg Myers, petitioner's father, details his relationship with petitioner's mother, petitioner's childhood, his opinions regarding the prosecution of petitioner, the performance of the defense team and his interactions with the attorneys and mitigation specialist.

5) The affidavit of Danielle Copeland, petitioner's mother, describes her relationship with petitioner's father, petitioner's childhood and mental health, and her interactions with the attorneys and mitigation specialist.

6) Petitioner has not indicated with specificity what the records kept in connection with the Myers/Copeland family would show to support any of the claims raised in the petition.

7) Petitioner has not indicated with specificity what the Petitioner's jail and/or visitation records would show to support the claims raised in the petition.

8) Prior to trial, Petitioner was addressed regularly by the Court concerning visits with his attorneys and members of the defense team. Petitioner repeatedly stated, on the record, that his attorneys and members of the defense team were coming to see him at the jail.

9) Petitioner has not indicated what information, if any, would be contained in the transcripts of the grand jury proceedings in support of the claims raised in the petition.

10) Petitioner has not indicated with specificity how the records of Timothy Mosley such as hospitalization, mental health, school, incarceration and other institutional-type documentation would support the claims raised in the petition.

11) Some, if not all of the hospitalization, mental health and school records would likely contain privileged information of Timothy Mosley.

12) The affidavit of Timothy Mosley states that he was regularly using drugs and was going through cocaine withdrawal at the time of the crime. He was also depressed and suicidal. He was not interviewed by any member of the defense team.

13) Petitioner has not indicated with specificity how the records of the prosecutor's office and law enforcement, including chain of custody and inventory documents, would support the claims raised in the petition.

14) Petitioner has not specifically identified which law enforcement officers he wishes to depose nor what testimony or information they have in their possession that would support the claims raised in the petition.

15) Petitioner has not specifically identified how deposing the jurors would support the claims raised in the petition.

16) Petitioner has not identified any misconduct, improper influences and/or inappropriate contact involving the jurors.

17) In his Forensic Psychological Evaluation in Mitigation of Sentence, Dr. Daniel Davis opines:

> "[T]he court and jury were deprived of both pertinent psychological information specific to [petitioner] and general

> psychological research specific to both youthful offenders and capital offenders. As a result, neither the court nor jury had the benefit of full and adequate psychological information."

18) The affidavit of Melynda Cook details her experience and describes the circumstances of her appointment as the mitigation expert. She describes her interaction with petitioner's family and her work on the case, particularly her expectations regarding the testimony of petitioner's parents.

19) The affidavit of Greg Howard sets forth counsel's belief that the life sentence received by Timothy Mosley and the fact that petitioner was not the actual killer were strong, if not the strongest, mitigation against the imposition of the death penalty.

20) Greg Howard presented evidence and argument, both in the trial phase and mitigation phase, that petitioner was not the actual killer and that Timothy Mosley received a life sentence for his cooperation with the state.

21) Petitioner has not indicated with specificity how depositions of the prosecuting attorneys or their agents would support the claims raised in the petition.

With regard to the depositions of witnesses, amended R.C. § 2953.21(d) provides two different standards in connection with taking depositions and issuing subpoenas and subpoenas duces tecum:

> (i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.
>
> (ii) For any witness with respect to whom division (A)(1)(d)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

Because Bryce Myers, Timothy Mosley, Greg Myers and Danielle Copeland all testified at trial, depositions or the issuing of subpoenas or subpoenas duces tecum in connection with their testimony is held to a high standard. Petitioner must show, by clear and convincing evidence this discovery will substantiate their claim. They have failed to meet this burden. The Court finds, even under the lesser burden of R.C. §

2953.21(d)(ii), they have still not met their burden. Implicit in the request concerning categories #1 through #5 is a claim that there might be something exculpatory in these records that has not been previously revealed that would support his claim. This notion is completely speculative and does not provide good cause for conducting discovery. Likewise, the motion seems to hint that, were the petitioner permitted to depose the prosecutor, police and/or the jurors – or go through the files of the prosecutor, law enforcement officers, jail, hospitals, children's services and other courts – they might find evidence that will either impeach these witnesses or bolster the claims made in the petition. Again, this is completely speculative.

The request to depose the defense team, including the defense attorneys, presents a different inquiry. This is not a case where the defense did not seek the assistance of an investigator, mitigation expert and mental health expert. Clearly, a decision by trial counsel not to even have these valuable tools available to him while defending a capital murder case can never be a tactical, strategic decision. However, the decision of whether or not to use these tools or how to use them, as a matter of strategy or in the context of marshaling resources, is the cornerstone in building a proper legal defense.

Under *Bracy,* in order to determine whether petitioner is entitled to conduct discovery on his ineffective assistance of counsel claims, the Court must identify the essential elements of such claims. *Bracy,* 520 U.S. at 904. The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that 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 unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). With respect to the first prong of the *Strickland* test, the Court notes that because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689.

To establish the second prong of the *Strickland* test, *i.e.,* prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Because petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

At this stage of the proceedings, petitioner need not prove these elements; rather, he must show that if the facts are developed through the discovery he seeks, he could prove a *Strickland* violation and would be entitled to relief. *See Harris, supra,* 394 U.S. at 299.

Inherent in counsel's responsibilities is the duty to investigate. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland, supra,* 466 U.S. at 691; *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir. 1992); *see also O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir. 1994)(failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted); *Workman v. Tate,* 957 F.2d 1339, 1345-46 (6th Cir. 1992)(reasonable investigation was lacking, so counsel's performance was deficient). The importance of competent representation during the penalty phase of a capital trial cannot be understated, especially with respect to the duty to investigate, since, as a practical matter, all that stands between a defendant who has been convicted of a capital specification and death is whatever mitigation evidence he or she can muster. *Mapes v. Coyle,* 171 F.3d 408, 426 (6th Cir. 1999).

In determining whether a particular act or omission on the part of counsel was outside the wide range of professional norms, this Court must accord a high measure of deference to counsel's decisions. *Strickland,* 466 U.S. at 681; *see also White v. McAninch,* 235 F.3d 988, 994-95 (6th Cir. 2000). Of course, a "strategic" or "tactical" decision is not automatically insulated from review, if it does not appear that the decision was supported by sufficient investigation.

Petitioner has made allegations that his attorneys and mitigation specialist were ineffective and did not properly investigate and prepare a defense. In support of this claim, he has provided affidavits and documentary evidence concerning their performance. However, petitioner has made no specific representation about what he expects to learn in a deposition of Greg Howard, Johnny Kaspar and/or Melynda Cook. Both Greg Howard and Melynda Cook provided affidavits explaining what they knew, what they did and why they did it. The fact that an attorney may look back in a deposition or otherwise, with 20/20 hindsight, and question or revisit his trial strategy **after** the jury has rendered its verdict provides no real insight to the Court. Further, the fact that Greg Howard may have limited his mitigation strategy to what he believed to be the strongest and most compelling arguments does not support conducting discovery on this issue. To hold otherwise would invite trial attorneys to pursue more outrageous and/or risky trial strategies, knowing full well that appellate courts will throw out a jury verdict and give petitioner another opportunity to pursue a different strategy with different attorneys.

In short, the petitioner has not established good cause to conduct discovery with respect to the defense team, including the attorneys.

Based on the foregoing, even if the Court found that the current statute was applicable to this case, the petitioner would still not be entitled to discovery. The supplemental motion to conduct discovery is denied.

This matter will be set for a telephonic status conference to establish the remainder of the briefing schedule on July 25, 2018 at 2:30 p.m.

IT IS ORDERED.

Donald E. Oda II, Judge
Warren County Common Pleas Court

C: John Parker, Esq.
Timothy Sweeney, Esq.
Warren Co. Prosecutor's Office