No. _____

In the Supreme Court of the United States

GARY HUGHBANKS,
Petitioner,
v.

STUART HUDSON, WARDEN,
Respondent.

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

APPENDIX

Respectfully submitted,

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APPENDIX A

Hughbanks v. Hudson

United States Court of Appeals for the Sixth Circuit

August 13, 2021, Filed

No. 18-3955

Reporter
2021 U.S. App. LEXIS 24359 *

GARY HUGHBANKS, Petitioner-Appellant, v. STUART HUDSON, Warden, Respondent-Appellee.

Prior History: Hughbanks v. Hudson, 2021 U.S. App. LEXIS 18397, 2021 FED App. 138P (6th Cir.) (6th Cir. Ohio, June 21, 2021)

Counsel: [*1] For Gary Hughbanks, Petitioner - Appellant: Dennis Lyle Sipe, Buell & Sipe, Marietta, OH; David P. Williamson, Bieser, Greer & Landis, Dayton, OH.

For Stuart Hudson, Respondent - Appellee: Stephen E. Maher, Charles L. Wille, Office of the Attorney General of Ohio, Columbus, OH.

Judges: Before: MOORE, CLAY, and GIBBONS, Circuit Judges.

Opinion

ORDER

Upon consideration of the petition for rehearing filed by the Petitioner, and the response thereto,

The Court **ORDERS** that the petition for rehearing is **DENIED**. Fed. R. App. P. 40(a)(2).

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APPENDIX B

Hughbanks v. Hudson

United States Court of Appeals for the Sixth Circuit

October 22, 2020, Argued; June 21, 2021, Decided; June 21, 2021, Filed

File Name: 21a0138p.06

No. 18-3955

Reporter
2 F.4th 527 *; 2021 U.S. App. LEXIS 18397 **; 2021 FED App. 0138P (6th Cir.) ***

GARY HUGHBANKS, Petitioner-Appellant, v. STUART HUDSON, Warden, Respondent-Appellee.

Subsequent History: Rehearing denied by Hughbanks v. Hudson, 2021 U.S. App. LEXIS 24359 (6th Cir., Aug. 13, 2021)

Prior History: [**1] Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 1:07-cv-00111—Michael R. Merz, Magistrate Judge.

Hughbanks v. Hudson, 2018 U.S. Dist. LEXIS 228976, 2018 WL 9597457 (S.D. Ohio, Sept. 7, 2018)

Counsel: ARGUED: David Paul Williamson, BIESER, GREER & LANDIS, LLP, Dayton, Ohio, for Appellant.

Margaret S. Moore, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON BRIEF: David Paul Williamson, BIESER, GREER & LANDIS, LLP, Dayton, Ohio, Dennis L. Sipe, Marietta, Ohio, for Appellant.

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

Judges: Before: MOORE, CLAY, and GIBBONS, Circuit Judges. MOORE, J., delivered the opinion of the court in which CLAY and GIBBONS, JJ., joined. GIBBONS, J., delivered a separate concurring opinion.

Opinion by: KAREN NELSON MOORE

Opinion

[*531] [***2] KAREN NELSON MOORE, Circuit Judge. Gary Hughbanks, a death-row prisoner in Ohio, appeals the denial of his petition for a writ of habeas corpus by the United States District Court for the Southern District of Ohio. Hughbanks contends that the State withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and he asserts that the Ohio Court of Appeals unreasonably determined that his trial counsel did not offer ineffective assistance at his mitigation [**2] hearing. For the reasons set forth below, we **AFFIRM** the decision of the district court denying Hughbanks habeas relief.

I. BACKGROUND

A. Factual Background

Because this case does not turn on factual disputes but solely involves issues of law, we present the following account of the facts from the Ohio Supreme Court's decision:

Around 9:00 p.m. on May 13, 1987, William and Juanita Leeman returned to their home in Springfield Township in Hamilton County, Ohio. Once inside, William Leeman confronted a burglar, who proceeded to kill 55-year-old William and 53-year-old Juanita with a knife.

These murders went unsolved for ten years. In August 1997, Larry Hughbanks, the defendant's brother, and Gary Hughbanks Sr., the defendant's father, informed police that Hughbanks had murdered the Leemans.

Hughbanks was tried and convicted of the aggravated murders of the Leemans and sentenced to death. To establish [*532] Hughbanks's guilt, the state introduced a confession, testimony that Hughbanks's [sic] accurately described the layout of the Leeman home and the Leemans' personal property, and two of Hughbanks's knives, which were linked to the murders.

Hughbanks had gone to the Leeman home during the evening [**3] of May 13, 1987, to commit burglary. After looking through the windows to ensure that no one was home, Hughbanks broke in through a back window. Hughbanks went to the master bedroom and took William's wallet and jewelry from the dresser.

When the Leemans came into the house, William confronted Hughbanks in a bedroom. Hughbanks attacked William with a knife, stabbed him repeatedly, and then slit his throat. According to Hughbanks's confession, the attack was over in [***3] "a matter of seconds." After Hughbanks slit William's throat, he chased Juanita into the living room, grabbed her, and slit her throat.

Hughbanks washed in the bathroom and left a bloody hand towel in the sink. He then left the house through the back door, ran through the back yard into adjoining woods, and traveled along a creek to a nearby school. Hughbanks was gone by the time police officers arrived.
After being attacked, Juanita stumbled out the front door of her home. While bleeding profusely, she somehow moved from the patio to the driveway, then down the driveway, before collapsing near the street.

At approximately 9:25 p.m. that evening, Police Officer Pat Kemper was driving his patrol car when he saw someone lying [**4] on the driveway at the Leemans' house "waving [her] arm in a real slow motion * * * to get attention." Kemper noticed that the person was covered in blood. Upon stopping, Kemper asked, "Who did this to you[?]" Juanita was conscious, but when she started to talk, "blood was gurgling out of her throat, and the whole side of her face just fell open * * *." Juanita died of her injuries at the hospital.
Police officers entered the Leemans' house and found William's body in the master bedroom. There were signs of a violent struggle; part of the bedroom wall was bashed in, a lamp was turned over, and blood was smeared on the wall. There was a pool of blood on the carpet between the bed and the wall and a pool of blood under William's head. The telephone cord had been cut, and open dresser drawers appeared to have been searched.
A "large puddle of blood" on the living room carpet indicated where Juanita had been attacked. A trail of blood leading out the front door, onto the front porch, and down the driveway showed Juanita's line of travel after the attack.

Blood smears on an unlocked back screen door suggested that the killer had left that way. On the day after the murders, a police bloodhound [**5] tracked the killer's scent using the hand towel Hughbanks had left in the sink. The bloodhound followed the scent out the back door, down a hill, and into the creek that borders the Leemans' back yard. The bloodhound then traveled along the creek for a quarter of a mile before losing the scent near a neighborhood school.
The police investigation did not uncover any trace evidence, hair fibers, or fingerprints that could identify the killer. Between May 1987 and August 1997, the police checked out "hundreds of leads," but the killer remained unidentified.

[*533] During the summer of 1997, Larry Hughbanks told the police that Gary Hughbanks Jr., his brother, had killed the Leemans. Larry told police that Hughbanks was living in Arizona, but that before leaving, Hughbanks had said, "[I] did it, and * * * threw the knife in some woods." Gary Hughbanks Sr., the defendant's father, soon thereafter went to the police station "to talk * * * about his son murdering the Leemans."

[***4] In August 1997, Larry and Gary Sr. met with John Jay, an investigator with the Hamilton County Prosecutor's Office, and Mark Piepmeier, an assistant county prosecutor. Larry turned over a survival knife with a ball compass

on [**6] the end of the handle. Larry said that Hughbanks "had thrown that knife in a wooded area back in the early part of 1988 out in Amelia, Ohio, when they lived in a trailer." Gary Sr. also implicated Hughbanks in the Leeman murders.

Subsequent police interviews of Jerry Shaw, Hughbanks's uncle, and Howard Shaw, Hughbanks's cousin, resulted in additional information implicating Hughbanks as the Leemans' killer. Lisa Leggett, identified as Hughbanks's "ex-common-law wife," provided police with another survival knife with a ball compass on the handle that had belonged to Hughbanks. In May 1987, Leggett and Hughbanks had lived near the Leeman home. According to Leggett, the knife was "left behind by [Hughbanks] when they split."

In September 1997, Tucson, Arizona police arrested Hughbanks. During a police interview on September 9, 1997, Hughbanks denied any involvement in the Leeman murders. Thereafter, Hughbanks remained in police custody in Arizona pending extradition to Ohio.

Several days later, on September 16, 1997, Tucson police detectives interviewed Hughbanks again. Hughbanks admitted breaking into the Leemans' house and said that two accomplices had been with him during the burglary. [**7] Later, Hughbanks said that a fourth man might have also been at the scene. Hughbanks admitted confronting William in the bedroom after the Leemans arrived home but stated that an accomplice had stabbed William and cut his throat. Hughbanks stated that he did not know where Juanita had been and said that his accomplice had "probably got her first."

As Hughbanks's interview progressed, Hughbanks acknowledged telling his father, brother, and uncle, "I killed somebody." Hughbanks then said, "I went in to commit a burglary. I got scared. I fought with the guy. * * * And I probably ran after the woman and killed her, too." Hughbanks also admitted that he was by himself when he broke into the home and killed the Leemans. Hughbanks said that he had been "completely surprised" by William and had tried to "get away from him in the bedroom." Hughbanks indicated that he "probably" tried to get away by getting out the window, but said, "I think he pulled me back." Hughbanks stated that he had killed the Leemans with a "military knife," which he had found in an "ammo box" in the Leemans' bedroom closet.

When asked about Juanita's location during her husband's murder, Hughbanks replied, "Probably behind [**8] me, watching me, and then after I cut his throat, she took off running out of the house and I went after her." Hughbanks said that he caught her in the living room and added, "I figured I cut her enough that she—she'd bleed to death."

[***5] Hughbanks admitted that he had kept the knife with him when he fled the [*534] scene. Hughbanks stated that after he had left the Leemans' house, he ran towards the woods and creek behind the house. Hughbanks "got the blood off [himself] in the creek" and then followed the creek to Greener School. Later, Hughbanks threw away the costume jewelry that he had taken.

State v. Hughbanks, 99 Ohio St. 3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, 1086-88 (Ohio 2003).

B. Procedural Background

A jury convicted Hughbanks on all counts and recommended the death penalty. The trial court accepted this recommendation and imposed a death sentence for the aggravated murders and a prison term of ten to twenty-five years for the aggravated burglary. Hughbanks's conviction and sentence were affirmed by both the Ohio Court of Appeals, *State v. Hughbanks*, No. C-980595, 1999 Ohio App. LEXIS 5789, 1999 WL 1488933 (Ohio Ct. App. Dec. 3, 1999), and the Ohio Supreme Court, *State v. Hughbanks*, 99 Ohio St. 3d 365, 2003-Ohio-4121, 792 N.E.2d 1081 (Ohio 2003). In July 2000, Hughbanks filed his first petition for post-conviction relief, which the Ohio courts denied. *State v. Hughbanks*, No. C-010372, 2003-Ohio-187, 2003 WL 131937 (Ohio Ct. App. Jan. 17, 2003); *State v. Hughbanks*, 100 Ohio St. 3d 1484, 2003- Ohio 5992, 798 N.E.2d 1093 (Ohio 2003) (table). In June 2003, after the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), Hughbanks petitioned the Ohio courts for post-conviction [**9] relief, asserting intellectual disability under *Atkins*, which the courts denied. *State v. Hughbanks*, No. C-070773 (Ohio Ct. App. Sept. 3, 2008) (unreported) R. 167-1 (Suppl. App'x) (Page ID #11453); *State v. Hughbanks*, No. 2008-2014, 121 Ohio St. 3d 1425, 2009-Ohio-1296 (Ohio Mar. 25, 2009) (unreported) R. 167-1 (Suppl. App'x) (Page ID #11459). In April 2010, Hughbanks filed a successive petition for post-

conviction relief, which the Ohio Court of Appeals dismissed due to lack of jurisdiction. *State v. Hughbanks*, No. C-120351 (Ohio Ct. App. Mar. 6, 2013) (unreported) R. 167-5 (Suppl. App'x) (Page ID #14429).

In February 2007, Hughbanks filed in the district court a petition for a writ of habeas corpus, which the court stayed while Hughbanks exhausted his state-court remedies. In his final amended petition, Hughbanks asserted twenty-two grounds for relief, all of which the district court denied. *Hughbanks v. Hudson*, No. 1:07-cv-111, 2018 U.S. Dist. LEXIS 228976, 2018 WL 9597457 (S.D. Ohio Sept. 7, 2018). The district court also determined that there was no basis to grant a certificate of appealability on any ground. 2018 U.S. Dist. LEXIS 228976, [WL] at *58. We granted Hughbanks's application for a certificate of appealability on two claims: (1) whether the prosecution withheld material evidence from the [***6] defense in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and (2) whether trial counsel were ineffective for failing adequately to investigate and present mitigation evidence.

II. DISCUSSION

A. Standard of Review

We review de novo a district court's denial of a petition for a [**10] writ of habeas corpus. *Joseph v. Coyle*, 469 F.3d 441, 449 (6th Cir. 2006). Hughbanks filed his habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and thus we apply its provisions to his case. *Id.*

We review the decision of "the last state court to issue a reasoned opinion on the issue[s]" raised in a habeas petition. *Id.* at 450 (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)). Under AEDPA, when a state court has adjudicated the merits of a claim, we may grant a writ of habeas corpus if (1) the state court's decision "was contrary to, or involved an unreasonable application of, clearly established [*535] Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or (2) the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). As discussed in more detail in Part II.C, the Ohio Court of Appeals in 2003 was the last state court to issue a reasoned opinion on Hughbanks's ineffective-assistance-of-counsel claim, and it adjudicated the claim on the merits. However, when a state court has not adjudicated the merits of a claim, the requirements of § 2254(d) do not apply. *Williams v. Anderson*, 460 F.3d 789, 796 (6th Cir. 2006). For reasons that we discuss at greater length in Part II.B, the last Ohio court to issue a reasoned opinion discussing Hughbanks's [**11] *Brady* claim did not reach the merits of the claim, and therefore "AEDPA's deferential standard of review does not apply" to Hughbanks's *Brady* claim. *Id.*

B. *Brady* Claim

1. Procedural Default

On appeal, Hughbanks limits his *Brady* claim to the grounds presented in his second state post-conviction application, relying exclusively on the evidence he obtained during federal [***7] discovery. Appellant Br. at 35 & n.4. The last state court to issue a reasoned opinion on Hughbanks's *Brady* claim from his second post-conviction application was the Ohio Court of Appeals in 2013. *State v. Hughbanks*, No. C-120351 (Ohio Ct. App. Mar. 6, 2013) (unreported) R. 167-5 (Suppl. App'x) (Page ID #14429). The Ohio Court of Appeals did not reach the merits of the claim. Instead, the Ohio Court of Appeals held that the trial court lacked jurisdiction to consider Hughbanks's petition because Hughbanks did not satisfy the time requirements of Ohio Revised Code § 2953.21(A)(2) or the requirements set out in Ohio Revised Code § 2953.23 for a successive post-conviction petition. *Id.* at 2-3 (Page ID #14430-31); *see Barton v. Warden*, 786 F.3d 450, 462 (6th Cir. 2015) (per curiam) (holding that a state court's explicit application of a procedural rule to bar the adjudication of a claim on the merits counts as a "last reasoned opinion"). In applying these state-law procedural bars, the Ohio Court [**12] of Appeals did not adjudicate Hughbanks's *Brady* claim on the merits; thus, "the limitations imposed by § 2254(d) do not apply, and we review the claim *de novo*." *Bies v. Sheldon*, 775 F.3d 386, 396 & n.7 (6th Cir. 2014) (recognizing that our court has held that Ohio courts' use of

Ohio Revised Code § 2953.23 to bar a petitioner's claim constitutes procedural default); *White v. Warden*, 940 F.3d 270, 275 (6th Cir. 2019) (holding the same for Ohio Revised Code § 2953.21(A)(2)).

Because the Ohio Court of Appeals applied a state-law procedural bar to reject Hughbanks's *Brady* claim, we consider his claim to be procedurally defaulted. *Bies*, 775 F.3d at 396. Generally, "[u]nexcused procedural default precludes federal habeas review. However, federal courts can excuse procedural default upon a showing of either cause and prejudice or a fundamental miscarriage of justice." *Id.* (internal citations omitted). When considering procedurally defaulted *Brady* claims, the Supreme Court has held that two of the three elements of an alleged *Brady* violation, whether the evidence was suppressed by the State and whether such suppressed evidence was material, constitute the required cause and prejudice to excuse procedural default. *Strickler v. Greene*, 527 U.S. 263, 282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Thus, if Hughbanks can demonstrate a meritorious *Brady* violation, he will have also made the requisite showing of cause and prejudice, allowing us to grant habeas relief. [**13] Accordingly, we proceed [*536] to an analysis of his claim on the merits.

[***8] **2. Merits**

A *Brady* claim has three elements: (1) "the evidence in question [is] favorable," (2) "the state suppressed the relevant evidence, either purposefully or inadvertently," and (3) "the state's actions resulted in prejudice." *Thomas v. Westbrooks*, 849 F.3d 659, 663 (6th Cir. 2017) (alteration in original) (quoting *Bell v. Bell*, 512 F.3d 223, 231 (6th Cir. 2008)). Favorable evidence is evidence that is "exculpatory" or "impeaching." *Bies*, 775 F.3d at 397 (quoting *Strickler*, 527 U.S. at 282). The third prong, prejudice, "is sometimes referred to as the 'materiality' requirement." *Id.* Importantly, a court must consider "the materiality of withheld evidence . . . only by evaluating the evidence collectively," *Castleberry v. Brigano*, 349 F.3d 286, 291 (6th Cir. 2003) (citing *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)), not "item by item," *Spirko v. Mitchell*, 368 F.3d 603, 609 (6th Cir. 2004) (citing *Kyles*, 514 U.S. at 436).

Hughbanks contends that the State suppressed six categories of material evidence: (1) information identifying other suspects; (2) documentation concerning the actions of Burt Leeman, one of the victims' sons, that implicated Burt in the murders; (3) the absence of trace evidence at the scene of the crime that implicated Hughbanks; (4) eyewitness statements that did not match a description of Hughbanks; (5) evidence that impeached the prosecution's theory of the case; and (6) evidence that impeached the prosecution's [**14] witnesses. Appellant Br. at 37.

a. Favorable and Suppressed Evidence

i. Evidence of Other Suspects

Hughbanks first argues that the State suppressed evidence that identified other suspects, including Douglas Hayes, George Wambsganz, Stacy Grisby, Michael Hensley, and several juveniles. R. 213 (Third Am. Pet. at 58-60) (Page ID #15966-68); Appellant Br. at 37, 44-47. Hughbanks provides evidence gathered during federal habeas discovery that local law enforcement had detailing the investigation into these suspects. Appellant Br. at 44-47. The Warden appears to concede that this evidence was suppressed, arguing instead that the evidence was not favorable. Appellee Br. at 22-24. Specifically, the Warden argues that the State was required to disclose only "legitimate suspects." *Id.* at 24. Apart from the evidence concerning Douglas Hayes, we agree that the Warden has the better of the argument.

[***9] "Prosecutors are not necessarily required to disclose every stray lead and anonymous tip, but they must disclose the existence of 'legitimate suspects.'" *Gumm v. Mitchell*, 775 F.3d 345, 364 (6th Cir. 2014) (quoting *D'Ambrosio v. Bagley*, 527 F.3d 489, 499 (6th Cir. 2008)). In determining what constitutes a "legitimate suspect," we generally look to see what evidence substantiates that the suspects may have [**15] been involved in the crime. *Id.* at 366; *see also Jamison v. Collins*, 291 F.3d 380, 391-92 (6th Cir. 2002) (noting that enough relevant factors consistent with the details of the crime matched a second suspect such that information concerning the suspect should have been disclosed). Only the information the police had pertaining to Hayes meets this standard. During the investigation, a jailhouse informant named Thomas Edward Buster told Detective that Hayes admitted that he committed a murder with details that matched the Leemans' murder. R. 167-5 (Buster Polygraph Results at 1-2) (Page ID #14070-71). A polygraph test determined that Buster was [*537] being truthful when he

told police about the confession. *Id.* at 2 (Page ID #14071); *see Gumm*, 775 F.3d at 364 (concluding that a suspect who was reported to have confessed to committing the crime to be a legitimate suspect who should be disclosed). However, for the other four leads, Hughbanks has not demonstrated that the police withheld any evidence showing a sufficient connection to the details of the crime. None of the other suspects confessed to killing the Leemans, were implicated by trace evidence, or were linked to any activities that were consistent with the Leemans' murder. *See* R. 167-5 (Investigative Materials) (Page [**16] ID #14041-46, 14058-59, 14128, 14141). Thus, we will consider only the alleged Hayes confession when assessing the materiality of this category of evidence.

ii. Evidence Concerning Burt Leeman

Hughbanks contends that the State suppressed evidence that identified Burt Leeman, one of the victims' three sons, as a suspect, including that Burt was suspected of credit-card fraud related to one of his father's cards after his murder, that the sons would receive $200,000 each upon the death of their parents, and that Burt's conduct and demeanor was suspicious during the investigation. R. 213 (Third Am. Pet. at 58-59) (Page ID #15966-67); Appellant Br. at 47-52. Hughbanks provides the following evidence to support his claim: a report regarding Burt's involvement, R. 167-5 (Burt Leeman Report) (Page ID #14061-64); an investigative report [***10] provided to the FBI, R. 167-5 (FBI Investigative Report) (Page ID #14128-31); an analysis by the FBI of the crime, R. 167-5 (FBI VICAP Report) (Page ID #14135-39), and credit-card history of William's card, R. 167-5 (Leeman Credit History) (Page #14132-34). It is uncontested that this evidence was not provided to the defense. Evidence implicating a different [**17] suspect is clearly favorable to Hughbanks.

The Warden also argues that much of this evidence was reported in the local newspaper and thus cannot be considered suppressed *Brady* material. Appellee Br. at 32. True enough, "there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question or if the information was available to him from another source." *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000). However, under the circumstances here, the newspaper articles cannot have put Hughbanks's attorneys on notice of law enforcement's serious interest in Burt as a suspect, both for the murders of his parents and the credit-card fraud, or that the FBI had provided a different theory of the case supporting Burt's inclusion as a suspect. One newspaper article stated that "Burt Leeman said police told [the brothers] early in the investigation that they suspected family members were involved in the slayings because of the viciousness of the killings. Police had consulted a psychologist who expounded on the theory of the family's involvement." R. 166-18 (Newspaper Articles at 9) (Page ID #8964). It also noted that the brothers had taken polygraph tests. *Id. [**18]* A second article summarized the same information. *Id.* at 14 (Page ID #8969). The newspaper reports point to the fact that the police considered Burt to be a suspect but did not give any indication that the police believed that Burt was a serious suspect, that the credit-card fraud investigation existed, or that records existed supporting these facts. It is too much to imply from these articles, none of which include official police-department comments, that the defense would have had the essential facts necessary to take advantage of the reports concerning Burt's involvement and the investigation [*538] materials from the credit-card fraud. *See Strickler*, 527 U.S. at 284-85 (holding that a newspaper article detailing that a witness had been interviewed by the police did not suffice to put a defendant's lawyer on notice that records and evidence concerning the witness existed and had been suppressed).

[***11] The Warden also argues that the FBI VICAP report is not exculpatory evidence because it is "the FBI's opinion." Appellee Br. at 29. The Supreme Court has recognized that a prosecutor need not disclose "preliminary, challenged, or speculative information." *United States v. Agurs*, 427 U.S. 97, 109, 96 S. Ct. 2392, 49 L. Ed. 2d 342 & n.16 (1976) (quoting *Giles v. Maryland*, 386 U.S. 66, 98, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) (Fortas, J., concurring in the judgment)); *see also Woods v. Smith*, 660 F. App'x 414, 435 (6th Cir. 2016) (holding [**19] that it was not unreasonable to consider an officer's conclusion as a preliminary suspicion when the officer "provided little information about the basis of his 'conclusion' and did not explain the extent to which it was shared by others in [the department]"). But we fail to see how a routinely prepared FBI crime-analysis report, compiled after reviewing relevant evidence, and requested and relied upon by investigating police officers, falls within that category. *See* R. 167-5 (FBI VICAP Report) (Page ID #14091, 14135). Accordingly, the evidence that Hughbanks put forward concerning Burt Leeman as a suspect will also be considered in our materiality analysis.

iii. Trace Evidence

Hughbanks avers that the State suppressed evidence of the results of palm-print and fingerprint analysis. Appellant Br. at 52-54. Specifically, he argues that the suppressed evidence notes that some of the prints were suitable for comparison purposes. Reply Br. at 28. The State disclosed that prints were taken from the crime scene and "[o]nly a few were suitable for comparison. None were matched to the defendant or anyone else." R. 166-2 (State Resp. to Def.'s Demand for Disc. at 2) (Page ID #3949). Hughbanks [**20] provides no explanation as to why the list of individuals who also had their prints compared provides additional support to the exonerating results of his print comparison. Consequently, we hold that this evidence is not *Brady* material.

iv. Eyewitness Statements

Hughbanks points to evidence of favorable eyewitness statements and two composite drawings, *i.e.*, those that Hughbanks contends do not identify him or aid in identifying him as the perpetrator. Appellant Br. at 54-57. However, one of the sketches that Hughbanks relies on, R. 167-5 (Composite Questionnaire) (Page ID #14075-76), was published in a newspaper article, R. [***12] 166-18 (Newspaper Articles at 5) (Page ID #8960), and thus is not *Brady* material. The witness statements and remaining sketch all describe individuals who do not match Hughbanks's physical description but who were seen in the immediate area surrounding the Leeman residence during the timeframe of the murders. The Warden does not contest that these statements and sketches were suppressed or favorable.

v. Evidence Undermining the State's Theory of the Case

Hughbanks relies on the FBI VICAP Report, the Burt Leeman Report, and the investigative materials as suppressed [**21] evidence that undermined the prosecution's theory of the case, specifically claiming that these items show that (1) the victims knew their assailant, (2) the assailant did not enter the victims' residence to commit [*539] burglary, and (3) the victims did not surprise the assailant by returning home after the assailant had entered their home. Appellant Br. at 57-64. As discussed earlier, *see supra* Section II.B.2.a.ii, the newspaper articles did not put Hughbanks on notice of the breadth and depth of evidence the police had that contradicted the prosecutor's theory that the murderer did not know the Leemans, intended to burglarize their residence, and was surprised by the Leemans upon their return to the residence. For example, although the newspapers reported that the house was left undisturbed, the FBI VICAP report noted that "the victims [sic] jewelry drawers were pulled out" in a manner that suggested purposeful "staging." R. 167-5 (FBI VICAP Report) (Page ID #14137). This type of evidence is much more detailed and cannot be ascertained from a simple report that the house was not ransacked. Thus, we will also consider the materiality of this evidence.

vi. Impeachment of the State's Witnesses [22]**

Finally, Hughbanks points to evidence that impeached two of the prosecution's witnesses—Leonard Leeman, another one of the victims' sons, and Detective Kemper. Appellant Br. at 64-69. Regarding Leonard, Hughbanks points to the investigative materials. Appellant Br. at 65. For Detective Kemper, Hughbanks points to the fingerprint analysis and the FBI VICAP Report. *Id.* at 68-69. However, none of the evidence to which Hughbanks points was suppressed and favorable. As to Leonard, the only possible *Brady* material is the investigative material identifying a wallet as the sole missing property, which would simply [***13] render Leonard's testimony about his mother's jewelry irrelevant, but was completely consistent with Leonard's testimony that only his father's wallet was stolen. *See* R. 163-13 (Leonard Test.) (Page ID #3176-77); R. 167-5 (Investigative Materials at 3) (Page ID #13998). Hughbanks argues that the suppressed evidence would have permitted him to impeach Leonard's testimony as to the layout of his parents' house and property that was stolen. Appellant Br. at 65-66. However, Hughbanks does not point to a single impeaching reference to the layout of the Leeman home in the investigative [**23] materials.

The same is true of Hughbanks's discussion of Detective Kemper's testimony. Hughbanks focuses on Detective Kemper's testimony that Hughbanks's confession was consistent with details of the crime, including the layout of the house. Appellant Br. at 67-69. But there is no reference to the layout of the Leeman home in either the investigative materials or the FBI VICAP Report. Instead, Hughbanks relies on his own confession or trial testimony to highlight any inaccuracies in Detective Kemper's

testimony. *Id.* at 67-69. Hughbanks's confession and the trial testimony are not *Brady* material. Finally, Hughbanks argues that he could impeach Detective Kemper's testimony that no trace evidence was recovered with the palm-print and fingerprint analysis. *Id.* at 67. As stated above, however, this evidence was not suppressed, and Hughbanks could have impeached Detective Kemper with the State's disclosures.

b. Materiality of the Undisclosed Evidence

A finding of a *Brady* violation requires that suppressed, favorable evidence must be material, *i.e.*, that "the omitted evidence creates a reasonable doubt that did not otherwise exist." *Agurs*, 427 U.S. at 112. Or, put differently, "there [must be] a reasonable probability [**24] that, had the evidence been disclosed to the defense, the result of the [*540] proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). The Supreme Court has clarified that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Therefore, if "the favorable evidence could reasonably be taken to put the whole case in such a [***14] different light as to undermine confidence in the verdict," the evidence is material and thus satisfies *Brady*. *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 435).

At the outset, it is important to note what a materiality analysis is not. First, "it is not a sufficiency of evidence test," meaning that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434. The district court erroneously undertook a sufficiency analysis. It listed the salutary points of Hughbanks's confession and then concluded that his "confession, as discussed before, was admitted at trial, and the statements therein *constituted more than enough [**25] evidence for the jury to conclude beyond a reasonable doubt that Petitioner had committed the burglary and murders*, even if he had contested guilt at trial." R. 242 (District Court Op. at 83-84) (Page ID #16612-13) (emphasis added). That is not the test.

Second, materiality refers to the effect of the suppressed evidence "collectively, not item by item." *Kyles*, 514 U.S at 436. The district court's and the Warden's analyses fail to consider the effect of the suppressed, favorable evidence collectively.

With those admonitions in mind, we assess the cumulative materiality of Hayes's confession, Burt's status as a suspect in the murder and in credit-card fraud, favorable eyewitness accounts, the unpublished composite sketch, and the evidence from the investigative materials and the FBI VICAP Report undermining the prosecution's theory of the case. We evaluate these omissions "in the context of the entire record." *Agurs*, 427 U.S. at 112. In doing so, "we 'undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial.'" *Bies*, 775 F.3d at 399 (quoting *Boss v. Pierce*, 263 F.3d 734, 745 (7th Cir. 2001)).

We can immediately remove one of these pieces of evidence from our review: Hayes's confession. [**26] "[E]vidence that could have 'no direct effect on the outcome of trial' cannot be considered *Brady* material." *Barton*, 786 F.3d at 465 (quoting *Wood v. Bartholomew*, 516 U.S. 1, 6, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995)). But "inadmissible material might nonetheless be considered 'material under *Brady* if it would "lead directly" to admissible evidence.'" *Id.* (quoting *Wogenstahl v. Mitchell*, 668 F.3d 307, 325 n.3 (6th Cir. 2012)). Here Hughbanks has made no such showing regarding [***15] Buster's inadmissible polygraph examination and hearsay statements of Hayes's confession. Although Ohio Rule of Evidence 804(B)(3) permits an unavailable declarant's statement to be admitted when it is a statement against interest, the statement must be accompanied by "corroborating circumstances [which] clearly indicate the trustworthiness of the statement." Hughbanks points to no such corroborating circumstances such as a spontaneous [*541] confession occurring shortly after a crime or any other additional evidence implicating Hayes in the murder. *See Gumm*, 775 F.3d at 369. Accordingly, Hayes's confession cannot be considered material under *Brady*. *See Wood*, 516 U.S. at 6 (holding that an appellate court must point to specific admissible evidence that could be utilized, otherwise the conclusion that the disclosed inadmissible evidence might have led to some additional evidence "is based on mere speculation" and is not enough to sustain *Brady [**27]* materiality).

Hughbanks offers a conclusory assertion that trial counsel, armed with the remaining suppressed favorable evidence, could have "constructed a 'plausible alternative narrative of the crime and raised reasonable doubt in the minds of the jurors.'" Appellant Br. at 94 (quoting *Bies*, 775 F.3d at 400). Notably in *Bies*, this court was able to construct a compelling alternative narrative based on the suppressed evidence raised by the defendant. *Bies*, 775 F.3d at 399-401 ("Considering the quality and

quantity of the evidence that the State failed to disclose in this case, the potential for that evidence to have affected the outcome of Bies' trial is inescapable."). Hughbanks fails to make a similar showing.

The strength of the undisclosed evidence in Hughbanks's case is far weaker, and its nature is much less compelling. Although the investigative reports and the FBI VICAP report marked Burt as a suspect for taking his father's credit cards, the reports at best support considering the potential credit-card fraud as being tangentially related to the murder. Crucially, there was no evidence of Burt, or anyone connected to Burt, physically having the credit cards. Nor was there ever any eyewitness statement, confession, or trace [**28] evidence implicating Burt, or any other family member, in the murders. The FBI VICAP and investigative reports' assessments of the evidence in part undermine the prosecution's theory of the case, but at the same time the FBI VICAP report supports the prosecution's theory that Hughbanks committed the murders. The report concluded that the offender was most likely a young White male living [***16] in the area, who encountered a "significant stressor prior to the assault," was "known to have an explosive temper," was lacking "interpersonal skills," likely has displayed anger against his spouse, and "may be known to possess the knife used in the assault." R. 167-5 (FBI VICAP Report) (Page ID #14138). The Warden aptly points out that all these descriptors apply to Hughbanks. Appellee Br. 28-29. Additionally, neither the eyewitness statements, the composite sketch, nor the FBI VICAP report ever led to a positive identification of any alternative suspect or steered the police to a valuable lead that they failed to pursue. In sum, the amount of undisclosed evidence was slight as opposed to voluminous, did not significantly weaken the case against Hughbanks, and did not reveal that the police conducted [**29] a "shoddy" investigation that could "lessen the credibility of the State's case against [Hughbanks]." *Bies*, 775 F.3d at 401 (quoting *Kyles*, 514 U.S. at 442 n.13).

The State's case at trial came down to Hughbanks's confession to the police and testimony from Detective Kemper and John Jay, an investigator for the State, that Hughbanks confessed to his father and brother, as well as to other people. Our court has consistently held that "a confession 'is strong evidence of [] guilt.'" *Gumm*, 775 F.3d at 371 (alteration in original) (quoting *Harbison v. Bell*, 408 F.3d 823, 824 (6th Cir. 2005)). Nonetheless, we have also found that "there are numerous reasons why a jury [might] discount[] Petitioner's [*542] statements to the police" when conducting a *Brady* materiality analysis. *Id.*

Hughbanks's confession presents at least two of those reasons. First, a careful review of the recording of Hughbanks's transcript shows the detectives consistently correcting Hughbanks when he offered details of the crime. *See Bies*, 775 F.3d at 402-03 (finding that a confession was "far from overwhelming evidence" of a defendant's guilt in part because detectives asked leading questions and supplied him with the facts); *see, e.g.*, R. 193-1 (Hughbanks Confession at 89-91, 160) (Page ID #15545-47, 15617) (stating that he did not inflict any of the wounds on the [**30] Leemans, then stating that he did so with a screwdriver while an accomplice wounded the victims with a pocketknife, but ultimately stating that he murdered the Leemans by himself). Hughbanks's statements during the confession also demonstrate a diminished mental capacity. *See Gumm*, 775 F.3d at 371. Throughout his confession, Hughbanks references hallucinations, R. 193-1 (Hughbanks Confession at 123-24) (Page ID #15579-80); that he has psychiatric [***17] problems, *id.* at 125-26 (Page ID #15581-82); and that he was not sure he had committed the murders or whether he had made up the events in his mind, *id.* at 125-26, 129 (Page ID #15581-82, 15585). The circumstances surrounding Hughbanks's statements to police raise a question of whether Hughbanks had the capacity to understand what was happening to him and challenge the legitimacy of his statements. *See Bies*, 775 F.3d at 403.

We find concerning the shortcomings tainting Hughbanks's confession. But the suppressed, favorable evidence does not present a significant challenge to the prosecution's theory of the case or lead to a reasonable probability that a jury would have found Hughbanks's multiple confessions unreliable. In *Bies* and *Gumm*, we held that a defendant's confession did not [**31] bar us from concluding that the disclosed evidence put the whole case in such a different light that the verdict was no longer worthy of confidence when there were "numerous reasons why a jury would have discounted [the defendant's] alleged statements to the police." *Bies*, 775 F.3d at 402; *Gumm*, 775 F.3d at 371. In doing so, we emphasized that the suppressed evidence allowed the defendant to construct a compelling alternative theory of the crime, complete with eyewitness testimony implicating another suspect and a confession by that same suspect. *Bies*, 775 F.3d at 402-403; *Gumm*, 775 F.3d at 371, 373. Here the suppressed evidence falls short of mounting a plausible counter-narrative and offers only tenuous connections at best to other suspects. Defense counsel might have been able to craft a story suggesting that another person committed the crime, but they would not have been able to produce a name or description of an alternate suspect that any of the undisclosed evidence could corroborate. Moreover, as discussed above, key parts of the suppressed evidence support the State's theory rather than undermine it. Given the relatively weak exculpatory nature of the undisclosed evidence, despite our concerns regarding Hughbanks's confession, we cannot conclude that the State's failure [**32] to disclose the evidence "could reasonably be taken to put the whole case in

such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435; *see Bies*, 775 F.3d at 399 (assessing materiality in light of the disclosed evidence and the evidence presented by the State). Thus, we affirm the district court's conclusion that the State's failure to disclose favorable evidence did not prejudice Hughbanks. Consequently, we hold that Hughbanks has not overcome procedural default for his *Brady* claim, rendering [*543] us unable to grant habeas relief on the basis of this claim.

[***18] C. Ineffective-Assistance-of-Counsel Claim[1]

1. *Strickland* and AEDPA Deference

Hughbanks contends that trial counsel provided constitutionally deficient assistance by failing adequately to investigate, prepare, and present mitigation evidence during the penalty phase of trial. Under *Strickland v. Washington*, Hughbanks received ineffective assistance of counsel if his counsel's performance was constitutionally deficient and Hughbanks was prejudiced as a result. 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). But AEDPA adds another layer to our review if a state court adjudicated a *Strickland* claim on the merits. Under § 2254(d)(1), we may grant relief only if the state court's merits decision "was contrary [**33] to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." The Supreme Court has warned that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Thus, "[t]he combined effect of *Strickland* and § 2254(d) is doubly deferential review. Put differently, '[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.'" *Foust v. Houk*, 655 F.3d 524, 533-34 (6th Cir. 2011) (internal quotations and citations omitted) (quoting *Harrington*, 562 U.S. at 105).

In this case, Hughbanks's first state post-conviction petition alleged several instances of trial counsel ineffectiveness that mirror his claims in his amended federal habeas petition. R. 166-16 (First Post-Conviction Pet. at 33-35, 49-63, 68-69) (Page ID #8224-25, 8240-54, 8259-60); R. 213 (Third Amended Pet. at 92-96) (Page ID #16000-04). The state courts considered Hughbanks's claim of ineffective assistance on its merits. The Ohio Court of Appeals's decision in 2003 was the last reasoned decision of the Ohio courts assessing these claims. That court found that Hughbanks's "counsel presented the case in mitigation competently in view of the facts available to them" [**34] and that "[n]othing in the record . . . or in the evidentiary material [***19] offered in support of these claims presents a reasonable probability that, but for the alleged omissions of counsel, the result of the penalty phase of Hughbanks's trial would have been different." *Hughbanks*, 2003-Ohio-187, 2003 WL 131937, at *12-13. We therefore afford appropriate deference to the Ohio Court of Appeals's decision on both prongs of the *Strickland* test.

2. Merits

Counsel's performance is deficient if it "fell below an objective standard of reasonableness," which means "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687-88. We ascertain reasonableness [*544] by looking to the "prevailing professional norms." *Id.* at 688. "Thus, to provide professionally competent assistance in Ohio capital cases, defense counsel must conduct a reasonably thorough investigation into all possible mitigation evidence that would present a sympathetic picture of the defendant's family, social, and psychological background." *Jells v. Mitchell*, 538 F.3d 478, 495-96 (6th Cir. 2008); *see also Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (noting that, according to ABA standards for capital defense work, "among the topics counsel should consider presenting are medical history, educational history, employment and training

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[1] Hughbanks also asserts that the Ohio Court of Appeals made unreasonable factual determinations under § 2254(d)(2) when it assessed his ineffective-assistance-of-counsel claim. Appellant Br. at 147-48. But the "determinations" Hughbanks takes issue with are not factual determinations as the Supreme Court has defined them but instead are complaints about the court's legal analysis. *See Thompson v. Keohane*, 516 U.S. 99, 109-10, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995) (holding that factual determinations consist of "basic, primary, or historical facts" (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n.6, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963))). Thus, his § 2254(d)(2) argument is without merit.

history, [**35] *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences").[2] And we define counsel's duty to investigate as "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Outside of the deference we owe to the Ohio Court of Appeals's decision, the Supreme Court also has instructed that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Thus, we must "evaluate the conduct from counsel's perspective at the time" and operate under "a strong presumption that counsel's conduct . . . under the circumstances . . . 'might be considered sound trial strategy.'" *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). Hughbanks alleges that counsel was deficient by failing (1) to [***20] interview mitigation witnesses; (2) to investigate and present evidence of his mental illness; (3) to retain a competent mental-health expert; and (4) to present relevant evidence regarding Hughbanks's childhood. We address each act or omission in turn. *Id.* at 690.

Hughbanks points to two potential mitigation witnesses whom counsel failed to interview: his father and brother. But Hughbanks ignores the [**36] obvious strategic reason for why his counsel did not interview them. Hughbanks's father and brother were the two informants who drew the police's attention to Hughbanks as a suspect in the Leemans' murder. Both informed the police that Hughbanks committed the crime. *Hughbanks*, 792 N.E.2d at 1086. Furthermore, counsel's failure to interview them did not result in the absence of any family member offering mitigating evidence on Hughbanks's behalf. Hughbanks's mother, Evangeline Hughbanks; uncle, Larry Kramer; and sister, Larketa Hughbanks, testified about Hughbanks's struggles with mental health, the abuse Hughbanks suffered from his father, his father's substance abuse and mental illness, and the abusive relationship between his mother and father, as well as other aspects of Hughbanks's troubled childhood. *See, e.g.*, R. 163-16 (Kramer Test., Mitigation Hr'g Tr.) (Page ID #3592, 3594-97, 3600, 3608); R. 163-16 (Larketa Test., Mitigation Hr'g Tr.) (Page ID #3613-19, 3627-31); R. 163-16 (Evangeline Test., Mitigation Hr'g Tr.) (Page ID #3640-42, 3645-48, 3650-56). Under these circumstances, counsel's decision not to investigate Hughbanks's remaining two immediate family members falls within the scope of reasonable [**37] trial strategy.

Hughbanks also contends that his counsel was deficient by failing to present [*545] evidence that he suffered from bi-polar disorder, substance abuse, and other mental illnesses at the time of the offense. In fact, counsel had two mental-health experts, Dr. Saqi Raju and Dr. Bernard De Silva, testify at the mitigation phase to their treatment and diagnoses of Hughbanks, which included diagnoses of bi-polar disorder, depression, and substance abuse. R. 163-15 (Raju Test., Mitigation Hr'g Tr.) (Page ID #3436, 3439-43, 3453, 3456); R. 163-15 (De Silva Test., Mitigation Hr'g Tr.) (Page ID #3501-02, 3504). Dr. De Silva, who treated Hughbanks since the age of fifteen, explicitly contested the finding of the prosecution's expert, Dr. Nancy Schmidtgoessling, that Hughbanks did not suffer from any mental illness at the time of the offense. R. 163-15 (De Silva Test., Mitigation Hr'g Tr.) (Page ID #3501-02, 3556-58). Dr. [***21] De Silva testified that Hughbanks often had psychotic episodes throughout the timeframe surrounding the murders and that Hughbanks suffered from significant mental illness that would have affected his ability to make judgments, including during social interactions. *Id. [**38]* (Page ID #3575-76). To support his claim of ineffectiveness, Hughbanks submitted the affidavit of Dr. Robert Smith, a clinical psychologist, who diagnosed Hughbanks as suffering from PTSD as well as bi-polar disorder and substance abuse at the time of the offense. R. 166-20 (Smith Aff. at 3-4) (Page ID #9285-86). However, this disagreement in diagnoses is not sufficient to render counsel's performance deficient. Dr. Smith relied on evidence known to Dr. De Silva to come to his conclusion that Hughbanks suffered from PTSD. *Id.* at 7-8 (Page ID #9289-90). "[M]ere disagreement between experts" does not serve as an appropriate basis upon which to grant habeas relief. *Skaggs v. Parker*, 235 F.3d 261, 272 (6th Cir. 2000); *McGuire v. Warden*, 738 F.3d 741, 758 (6th Cir. 2013). Because Hughbanks presents "no evidence that [Dr. De Silva] was incompetent, or that [Hughbanks's] lawyers had any reason to question [Dr. De Silva's] professional qualifications," it was objectively reasonable for Hughbanks's counsel to rely on Dr. De Silva's diagnosis of Hughbanks's mental illnesses. *Campbell v. Coyle*, 260 F.3d 531, 555 (6th Cir. 2001).

For similar reasons, we find unpersuasive Hughbanks's argument that his counsel should have used a clinical psychologist to present Hughbanks's mental health and social background. Dr. Raju treated Hughbanks twice in 1986, [**39] less than a year before the murders. R. 163-15 (Raju Test., Mitigation Hr'g Tr.) (Page ID #3452). Dr. De Silva treated Hughbanks over the course of years and evaluated Hughbanks's medical records up the time of the murders in 1987. R. 163-15 (De Silva Test.,

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[2] Although *Wiggins* postdates the Ohio Court of Appeals's decision in this case, we have held that *Wiggins* "did not rest on 'new law' but instead 'applied the same "clearly established" precedent of *Strickland*.'" *Johnson v. Bagley*, 544 F.3d 592, 599 (6th Cir. 2008) (quoting *Wiggins*, 539 U.S. at 522).

Mitigation Hr'g Tr.) (Page ID #3490, 3519, 3575-76). Both presented crucial mitigation evidence concerning Hughbanks's mental illness, substance abuse, and troubled family background, including the physical and emotional abuse inflicted on Hughbanks by his parents. The testimony of Hughbanks's family members supplemented the doctors' presentations. The addition of a clinical psychologist might have been helpful to Hughbanks's mitigation team. But considering all the evidence that was presented, counsel's decision to rely on competent mental-health experts who were familiar with Hughbanks and treated him close to the time of the murders does not fall outside the ambit of reasonable trial strategy. *See Lewis v. Alexander*, 11 F.3d 1349, 1353 (6th Cir. 1993) (holding that it is reasonable for an attorney to [***22] rely on a competent and reputable professional to evaluate medical records and to formulate judgments necessary to trial preparation).

[*546] Hughbanks's final challenge—counsel's failure [**40] to present relevant evidence concerning Hughbanks's childhood—has the most merit. Hughbanks asserts that two significant omissions reveal counsel's objectively unreasonable performance. First, Hughbanks notes that counsel did not put forward evidence demonstrating his mother's parental failures, such as her own mental health struggles and substance abuse. But the record belies this contention as Hughbanks's uncle testified that Hughbanks's mother suffered from depression, R. 163-16 (Kramer Test., Mitigation Hr'g Tr.) (Page ID #3600), and Hughbanks's mother and Dr. De Silva discussed how his parents' abusive relationship affected Hughbanks, R. 163-15 (De Silva Test., Mitigation Hr'g Tr.) (Page ID #3499, 3516, 3523); R. 163-16 (Evangeline Test., Mitigation Hr'g Tr.) (Page ID #3640-42, 3651). Both Hughbanks's mother and Dr. De Silva also highlighted an incident where his mother struck Hughbanks in the face. R. 163-15 (De Silva Test., Mitigation Hr'g Tr.) (Page ID #3523); R. 163-16 (Evangeline Test., Mitigation Hr'g Tr.) (Page ID #3666). Hughbanks's mother admitted that she could be "too hard" when disciplining her children. R. 163-16 (Evangeline Test., Mitigation Hr'g Tr.) (Page ID #3662-63). [**41] Given all the evidence counsel discovered and presented from Hughbanks's relatives and treating psychiatrist, counsel's decision not to investigate and present additional evidence concerning Hughbanks's mother fell "within the range of professionally reasonable judgments." *Strickland*, 466 U.S. at 699.

Second, Hughbanks faults his counsel for failing to present evidence that Hughbanks suffered from two very serious episodes of sexual abuse. A cousin of Hughbanks molested him repeatedly for an entire summer, when Hughbanks was seven years old. R. 166-20 (Smith Aff. at 8) (Page ID #9290). An unknown assailant abducted Hughbanks and raped him, when he was fifteen. *Id.* According to Dr. Smith, Hughbanks disclosed the sexual abuse by his cousin to Hughbanks's mother and reported the rape to Dr. De Silva. *Id.* Dr. Smith discussed these incidents, in tandem with the abuse perpetuated against Hughbanks by his father, as the underlying traumatic events that supported his diagnosis that Hughbanks suffered from PTSD at the time of the offense. *Id.* at 7-8 (Page ID #9289-90). Dr. Smith noted that [***23] Dr. Schmidtgoessling's report evaluating Hughbanks's mental health, as well as Hughbanks's medical records, documented these traumatic [**42] events. *Id.* at 8 (Page ID #9290).

Counsel's failure to present this evidence is concerning. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987) (O'Connor, J., concurring)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). But this is not a case where counsel neglected to investigate adequately a defendant's family, social, and mental-health history and consequently failed to present considerable evidence concerning a defendant's background and character. *Cf. Williams v. Taylor*, 529 U.S. 362, 395-96, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (holding that counsel's performance was deficient when their investigation failed to uncover "extensive records" filled with mitigation evidence concerning the defendant's [*547] family history, education, mental health, and rehabilitation); *Wiggins*, 539 U.S. at 523-25 (holding that counsel's performance was deficient when they failed to expand their investigation into the defendant's life history "after having acquired only rudimentary knowledge of his history from a narrow set of sources," especially when those [**43] sources indicated the existence of helpful mitigation evidence). Hughbanks's counsel investigated his family, social, and psychological background, including whether he suffered from any mitigating mental illnesses at the time of the offense. The record reflects that counsel obtained and reviewed Dr. Schmidtgoessling's report, which mentioned the sexual abuse, as well as the records on which she relied. *See* R. 166-19 (Dr. Schmidtgoessling Report at 2-5) (Page ID #8999-9002); R. 163-16 (Schmidtgoessling Test., Mitigation Hr'g Tr.) (Page ID #3700-01, 3712-13) (showing that defense counsel reviewed the report and referenced it during his cross-examination of Dr. Schmidtgoessling); *see also* R. 166-19 (Letter from Dr. Schmidtgoessling) (Page ID #9099) (confirming that Dr. Schmidtgoessling sent defense counsel her report and all of the clinical information she collected on Hughbanks). Furthermore, counsel interviewed several family members and relied on evaluations of Hughbanks's mental health performed by professionals who had treated Hughbanks throughout his

teenage and adult years and close to the time of the murders. As a result, the jury and Hughbanks's sentencing judge heard detailed [**44] [***24] descriptions about Hughbanks's struggles with substance abuse and mental health, his repeated diagnoses of bipolar disorder, schizophrenia, and depression, and his troubled childhood, including the emotional and physical abuse he suffered from his parents, as well as the role his background played in his mental state at the time of the offense. Counsel presented a sympathetic picture of Hughbanks that was far from incomplete.

Nevertheless, counsel's omission of the trauma that Hughbanks suffered from two separate incidents of sexual abuse does not immediately strike us as a reasonably strategic decision. But the stringent requirements of AEDPA constrain our review. We must decide whether it was objectively unreasonable for the Ohio Court of Appeals to conclude that "proof of the existence of mitigation evidence that was not presented at trial, but that might have supported an alternative theory of mitigation, does not constitute proof of counsel's ineffectiveness, when . . . the record demonstrates that counsel presented the case in mitigation competently in view of the facts available to them." *Hughbanks*, 2003-Ohio-187, 2003 WL 131937, at *12. This is a high bar for Hughbanks to clear. He must "show that the state court's ruling [**45] . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. We "must determine what arguments or theories supported or . . . could have supported[] the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* at 102.

We cannot conclude that the Ohio Court of Appeals was objectively unreasonable. Neither Dr. De Silva nor Dr. Schmidtgoessling opined that those traumatic events had any impact on their diagnoses of whether Hughbanks suffered from mental illness at the time of the offense. In fact, Dr. Schmidtgoessling specifically determined that Hughbanks did not present "any symptoms of Post Traumatic [*548] Stress Disorder secondary to these traumas." R. 166-19 (Dr. Schmidtgoessling Report at 3) (Page ID #8999). Faced with Dr. Schmidtgoessling's uncontradicted finding, counsel might have believed that presenting evidence of the sexual assaults would not be a viable mitigation theory as compared to the mental-health issues about which Dr. [**46] De Silva was prepared to testify. We may not find this argument to be persuasive or [***25] correct, but it is not so lacking in justification that no fairminded jurist could find it to be consistent with *Strickland*'s objective standard for reasonable performance. *See Strickland*, 466 U.S. at 690-91. Furthermore, it was not unreasonable for the Ohio Court of Appeals to conclude that "the other evidence presented by trial counsel raised their performance above the minimum level of competence required by *Strickland*." *Campbell*, 260 F.3d at 556.

In sum, we conclude that, under the deferential review required by AEDPA, Hughbanks has not shown that the Ohio Court of Appeals was objectively unreasonable in determining that Hughbanks's counsel did not perform so deficiently as to violate the first *Strickland* prong. Accordingly, we need not address whether the Ohio court's conclusion in regard to the prejudice prong was also objectively reasonable. Therefore, we affirm the district court's denial of habeas corpus based on Hughbanks's claim of ineffective assistance of counsel.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's denial of a writ of habeas corpus.

Concur by: JULIA SMITH GIBBONS

Concur

[***26] CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring. [**47] I concur in the majority's resolution of the ineffective assistance of counsel claim and agree with the ultimate resolution of the *Brady* claim. But I quibble with the majority's categorization of several pieces of evidence as suppressed or favorable to Hughbanks and thus subject to materiality analysis. For example, I would dispose of the claims about witness reports about individuals seen near the Leeman home near the time of the murder and the FBI VICAP report and investigative materials at an earlier point in the *Brady* analysis. The point I make is a small one,

however, because the majority opinion ultimately concludes that none of the information at issue was material within the meaning of *Brady*, a conclusion with which I agree. I write separately only to note that I do not agree with or join all of the majority's analysis of the *Brady* claim.

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APPENDIX C

Hughbanks v. Hudson

United States Court of Appeals for the Sixth Circuit

August 15, 2019, Filed

No. 18-3955

Reporter
2019 U.S. App. LEXIS 24474 *

GARY HUGHBANKS, Petitioner-Appellant, v. STUART HUDSON, Respondent-Appellee.

Prior History: Hughbanks v. Hudson, 2018 U.S. Dist. LEXIS 228976 (S.D. Ohio, Sept. 7, 2018)

Counsel: [*1] For Gary Hughbanks, Petitioner - Appellant: Dennis Lyle Sipe, Buell & Sipe, Marietta, OH; David P. Williamson, Bieser, Greer & Landis, Dayton, OH.

For Stuart Hudson, Respondent - Appellee: Stephen E. Maher, Charles L. Wille, Office of the Attorney General of Ohio, Columbus, OH.

Judges: Before: MOORE, CLAY, and GIBBONS, Circuit Judges.

Opinion

ORDER

Gary Hughbanks, an Ohio death row inmate represented by counsel, appeals from a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The district court did not issue a certificate of appealability ("COA") for any claims. Hughbanks has filed a COA application with this court. Stuart Hudson, a warden for the State of Ohio proceeding through counsel, has filed a response in opposition. Hughbanks has filed a reply.

In September 1997, a Hamilton County, Ohio grand jury indicted Hughbanks on two counts of aggravated murder (each with three capital specifications) and one count of aggravated burglary. Following a jury trial, Hughbanks was convicted of all charges and sentenced to death for each murder conviction and to a term of imprisonment of ten to twenty-five years for the aggravated burglary conviction. Hughbanks's convictions [*2] and sentences were affirmed on direct appeal. *State v. Hughbanks*, No. C-980595, 1999 Ohio App. LEXIS 5789, 1999 WL 1488933 (Ohio Ct. App. Dec. 3, 1999), *aff'd*, 99 Ohio St. 3d 365, 2003-Ohio-4121, 792 N.E.2d 1081 (Ohio).

In March 2000, Hughbanks filed an application to reopen his direct appeal. The Ohio Court of Appeals denied relief, and the Ohio Supreme Court affirmed the decision. *State v. Hughbanks*, 101 Ohio St. 3d 52, 2004-Ohio-6, 800 N.E.2d 1152 (Ohio).

In July 2000, Hughbanks filed a petition for post-conviction relief. The trial court denied relief, and the Ohio Court of Appeals affirmed the decision. *State v. Hughbanks*, No. C-010372, 2003-Ohio-187, 2003 WL 131937 (Ohio Ct. App.). The Ohio Supreme Court declined further review. *State v. Hughbanks*, 100 Ohio St. 3d 1484, 2003-Ohio-5992, 798 N.E.2d 1093 (Ohio) (table).

In June 2003, Hughbanks filed a second post-conviction petition. The trial court denied relief without permitting discovery or conducting an evidentiary hearing. The Ohio Court of Appeals reversed and remanded the decision to permit discovery and an evidentiary hearing. *State v. Hughbanks*, 159 Ohio App. 3d 257, 2004-Ohio-6429, 823 N.E.2d 544 (Ohio Ct. App.). The Ohio Supreme Court declined further review. *State v. Hughbanks*, 105 Ohio St. 3d 1500, 2005-Ohio-1666, 825 N.E.2d 623 (Ohio) (table). On remand, the trial court again denied relief after permitting discovery and conducting a hearing. An appeal occurred but addressed only whether the trial court properly denied Hughbanks's efforts to amend his petition.

In April 2010, Hughbanks filed a successive post-conviction petition. The trial court determined that it lacked jurisdiction and dismissed the petition. The Ohio Court of Appeals affirmed the decision.

In May 2006, [*3] Hughbanks filed a notice of intent to file a petition for a writ of habeas corpus. The case was referred to a magistrate judge. In February 2007, Hughbanks filed his habeas petition. The warden filed a return of writ. Hughbanks filed a reply. In January 2010, the district court held the case in abeyance. In May 2012, Hughbanks filed an amended petition. In June 2016, Hughbanks filed a second amended petition. The warden filed a return of writ. In April 2017, Hughbanks filed a third amended petition. Hughbanks subsequently filed a traverse. The court denied the petition and declined to issue a COA for any claims.

Hughbanks now seeks a COA as to the first, third, seventh, thirteenth, and fourteenth grounds for relief. The warden has filed a response in opposition. Hughbanks has filed a reply.

"[A] COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting 28 U.S.C. § 2253(c)(2)). A substantial showing is made where the applicant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement [*4] to proceed further.'" *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 & n.4 (1983)). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). If the district court has denied a claim on a procedural basis only, then a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Upon review, Hughbanks's COA application is **GRANTED** in part. The Clerk's Office shall issue a briefing schedule for portions of the seventh and the thirteenth grounds for relief: (1) whether the prosecution withheld material evidence from the defense in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); and (2) whether trial counsel were ineffective for failing to investigate and present mitigation evidence adequately.

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APPENDIX D

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

Gary L. Hughbanks, Jr.
Plaintiff
v.
Warden, Stuart Hudson
Defendant

Civil Action No. 1:07-cv-111

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☑ other: Judgment in favor of warden and against petitioner

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Michael R Merz on a motion for

Date: 9/7/18

CLERK OF COURT

Kaylin Atkinson
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO

APPENDIX E

Hughbanks v. Hudson

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

September 7, 2018, Decided; September 7, 2018, Filed

Case No. 1:07-cv-111

Reporter
2018 U.S. Dist. LEXIS 228976 *; 2018 WL 9597457

GARY HUGHBANKS, Petitioner, - vs - STUART HUDSON, Warden, Respondent.

Subsequent History: Motion denied by, Without prejudice Hughbanks v. Hudson, 2018 U.S. Dist. LEXIS 173264, 2018 WL 4870717 (S.D. Ohio, Oct. 9, 2018)

Certificate of appealability granted, in part Hughbanks v. Hudson, 2019 U.S. App. LEXIS 24474 (6th Cir., Aug. 15, 2019)

Affirmed by Hughbanks v. Hudson, 2021 U.S. App. LEXIS 18397 (6th Cir., June 21, 2021)

Prior History: Hughbanks v. Hudson, 2008 U.S. Dist. LEXIS 132507, 2008 WL 11508990 (S.D. Ohio, Apr. 23, 2008)

Counsel: [*1] For Gary L. Hughbanks, Jr., Petitioner: Dennis Lyle Sipe, LEAD ATTORNEY, Marietta, OH USA; David Paul Williamson, Bieser, Greer & Landis, Dayton, OH USA.

For Warden Stuart Hudson, Respondent: Charles L Wille, Stephen E. Maher, Thomas E Madden, LEAD ATTORNEYS, Office of the Ohio Attorney General, Columbus, OH USA.

Judges: Michael R. Merz, United States Magistrate Judge.

Opinion by: Michael R. Merz

Opinion

DECISION AND ORDER DISMISSING PETITIONER'S THIRD AMENDED PETITION FOR WRIT OF *HABEAS CORPUS*

This capital habeas corpus case is before the Court for decision on the merits on the Petitioner's Motion for Leave to File an Amended Petition (ECF No. 203). The parties unanimously consented to plenary magistrate judge jurisdiction in this case under 28 U.S.C. § 636(c) and District Judge Barrett has referred it on that basis (ECF No. 13).

On June 2, 1998, Petitioner Gary L. Hughbanks, Jr., was convicted in the Hamilton County, Ohio, Court of Common Pleas of one count of aggravated burglary and two counts of capital murder. The jury found that, in 1987, Petitioner murdered William and Juanita Leeman ("Mr. and Mrs. Leeman," respectively) for the "purpose of escaping detection, apprehension, or trial for the commission of an aggravated burglary[,]" [*2] which he had committed at the Leemans' residence (Third Amended Petition, ECF No. 213, Page ID 15911, citing Trial Trans., ECF No. 163-14, Page ID 3402-03). On June 12, 1998, the jury recommended that Petitioner be sentenced to death for the murders of Mr. and Mrs. Leeman, and Common Pleas Court Judge Melba Marsh followed that recommendation on July 6, 1998 (Trial Trans., ECF No. 163-18, Page ID 3844-45; Trial Trans., ECF No. 163-19, Page ID 3857-59). After a series of appeals and petitions for relief in Ohio state courts, and on February 12, 2007, Petitioner filed his initial Petition for Writ of *Habeas Corpus* by a Person in State Custody (Initial Petition, ECF No. 16). On April 21, 2017, Petitioner filed his Third Amended Petition (ECF No. 213). For the reasons set forth below, the Third Amended Petition is DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Leemans' Murders, Investigation, and Petitioner's Arrest

On the evening, May 13, 1987, Mr. and Mrs. Leeman's residence was broken into, and after seeing the Leemans, the burglar attacked them with deadly force (State Court Record App'x ("App'x"), ECF No. 166-2, Page ID 3925-27). At about 9:30 p.m. that evening, Pat Kemper ("Kemper"), [*3] an officer of the Springfield Township, Hamilton County, Ohio, Police Department, drove by the Leemans' residence and saw Mrs. Leeman "laying on the front of the driveway waving her arms." (Traverse, ECF No. 234, Page ID 16239, citing Trial Trans., ECF No. 163-13, Page ID 3194). Kemper approached Mrs. Leeman, who attempted unsuccessfully to communicate with him, but her throat had been slashed and "[s]he had so many cuts and stab wounds that the coroner was subsequently unable to count them." *Id.*, citing Trial Trans., ECF No. 163-13, Page ID 3195-96. Kemper and fellow Springfield Township police officer John McDaniel ("McDaniel") entered the dwelling, (App'x, ECF No. 167-2, Page ID 11925, 11947) where McDaniel found Mr. Leeman dead from having "suffered eight cuts and seventeen stab wounds." (Traverse, ECF No. 234, Page ID 16329, citing Trial Trans., ECF No. 163-13, Page ID 3198; Trial Trans., ECF No. 163-14, Page ID 3310, 3320-21). Mr. Leeman's wallet was stolen (App'x, ECF No. 167-5, Page ID 14002).

The Cincinnati and Springfield Township Police Departments launched an intensive investigation, involving the Federal Bureau of Investigation ("FBI") (Traverse, ECF No. 234, Page ID 16240). [*4] Fingerprints and palm prints were recovered from the crime scene, but did not match those of any suspect (App'x, ECF No. 167-2, Page ID 11651-52, 11678; App'x, ECF No. 167-4, Page ID 13412; App'x, ECF No. 167-5, Page ID 14024-27, 14137). While he was never arrested for or charged with the Leemans' murders, their son, William "Burt" Leeman, was initially identified as a suspect, due to a possible motive (he was to inherit two hundred thousand dollars upon the Leemans' deaths); his strangely calm demeanor at the crime scene; and attempts by an individual, whom police suspected was Burt's wife, to place charges on the Leemans' credit cards after the murders (Traverse, ECF No. 234, Page ID 16241, citing App'x, ECF No. 167-5, Page ID 14005-06, 14061, 14063, 14137).

While Petitioner resided in Hamilton County, Ohio, at the time of the murders, he subsequently moved to Pima County (Tucson), Arizona. He was residing there in 1997 when, in Hamilton County, an arrest warrant was issued for his brother, Larry Hughbanks ("Larry"), for violating the terms of his probation. Larry averred that he agreed to provide information about the Leemans' murders in exchange for the withdrawal of the arrest [*5] warrant and vacation of his remaining probation. (App'x, ECF No. 166-17, Page ID 8490). Larry told John Jay ("Jay"), an investigator with the Hamilton County, Prosecutor's Office, that Petitioner had told Larry that he had murdered the Leemans (Trial Trans., ECF No. 163-13, Page ID 3236-38.) Petitioner's father, Gary L. Hughbanks, Sr. ("Gary Sr.") also told Jay that Petitioner had confessed the murders to him. *Id.*, Page ID 3238-39. Based on these conversations, the Prosecutor's Office "[s]igned charges against [Petitioner] for the murder of the Leemans." *Id.*, Page ID 3239.

On September 9, 1997, persons with the Prosecutor's Office and Springfield Township Police Department, in conjunction with the Tucson, Arizona, Police Department, arrested Hughbanks in Tucson, ostensibly for violating his parole by driving without a license (Trial Trans., ECF No 163-13, Page ID 3240; App'x, ECF No. 167-3, Page ID 13031). Yet, immediately upon being booked into the Pima County Jail, Prosecutor's Office Investigator William Fletcher ("Fletcher"), along with Tucson Police Department Detectives James Filippelli ("Filippelli") and Michael Millstone ("Millstone"), began questioning him about the Leemans' [*6] murders. After signing a written waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), Petitioner denied any involvement in the murders to Filippelli and Millstone, and agreed to take a polygraph test. However, the results of the polygraph were inconclusive, as Petitioner was under the influence of crystal methamphetamine (App'x, ECF No. 166-3, Page ID 4222-23). On September 10, 1997, Kemper and Fletcher interviewed Hughbanks about the murders, without obtaining Petitioner's renewed consent to be interviewed (App'x, ECF No. 167-3, Page ID 12489-90). After answering questions posed by Kemper and Fletcher, Petitioner informed them that he wished to cease questioning. Kemper and Fletcher complied with the request, and Petitioner remained incarcerated pending extradition to Ohio (Trial Trans., ECF No. 163-13, Page ID 3262; App'x, ECF No. 167-3, Page ID 12490).

On September 16, 1997, at the request of Kemper and Fletcher, Filippelli and Millstone again interviewed Petitioner at the Pima County Jail. Petitioner, no longer under the influence of alcohol or drugs, executed a form consenting to another polygraph examination, which he failed (App'x, ECF No. 166-3, Page ID 4230; App'x, ECF No. 167-3, Page ID 12743).

Despite [*7] not agreeing to resume the interrogation, Petitioner was questioned by Filippelli and Millstone for several hours, during which time he confessed that, acting alone, he burglarized the Leemans' house and killed the Leemans in an attempt to cover up his burglary (App'x, ECF No. 167-3, Page ID 12857-13017). Petitioner indicated that his confession to the burglary and murders was a product of his free will, and that he did not receive any promise or consideration in exchange for confessing. *Id.*, Page ID 13016-17. Petitioner agreed to waive extradition proceedings. *Id.*, Page ID 13035.

B. Indictment and Motion to Suppress

On September 17, 1997, Petitioner was indicted by a Hamilton County, Ohio, grand jury (App'x, ECF No. 166-2, Page ID 3925-28). The face of the indictment stated "CAPITAL-DEATH PENALTY" for Counts One and Two, the murders of Mr. and Mrs. Leeman. *Id.*, Page ID 3925. The grand jury foreperson was a Debbie Mahaffey ("Mahaffey"). *Id.*, Page ID 3928.

Petitioner's trial counsel filed a motion to suppress Petitioner's confession, arguing that, due to post-traumatic stress disorder ("PTSD"), bipolar disorder (for which he was not taking medication), and substance abuse, Petitioner was [*8] not of sound mind at the time he was interrogated. Thus, they claimed, any waiver of his *Miranda* rights was invalid, and his confession was not knowing, intelligent, and voluntary (Trial Trans., ECF No. 163-7, Page ID 2402 (citing *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987); *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). At the motion hearing, Fletcher testified that, on September 9, he discussed each right contained in the Waiver of Rights form prior to Petitioner's signing the form and the interrogation commencing, and that Petitioner told him that he had not ingested drugs or alcohol that day. *Id.*, Page ID 2407-09. On cross-examination, Fletcher stated that during the interrogation, Petitioner did not appear to be under the influence of drugs, and that he did not learn until after the initial interview that: (a) Petitioner was under the influence of crystal methamphetamine during the interview; and (b) the initial polygraph examination was inconclusive because of Petitioner's drug use. He further stated that, while Petitioner told him that he had been treated by a psychiatrist and had received Social Security disability benefits for mental health issues, he was unaware that Petitioner had taken medication for any psychiatric disorder. *Id.*, Page ID 2412-14.

Petitioner's [*9] trial counsel did not call any witnesses or introduce any evidence. (Third Amended Petition, ECF No. 213, Page ID 15944-45, citing Trial Trans., ECF No. 163-7, Page ID 2420). Rather, in his closing argument, Stephen Wenke, one of Petitioner's trial attorneys, emphasized that the transcript of the interrogation would show that law enforcement officers were aware of Petitioner's history of psychiatric treatment and medication, and argued that efforts should have been made to get Petitioner medication or "some [other] kind of psychiatric treatment before he made these [incriminating] statements." (Trial Trans., ECF No. 163-7, Page ID 2422). Counsel further argued that, given Petitioner's history of psychiatric disorder, the length and repetitive nature of the interrogation, and the details that were suggested by the officers, Petitioner's confession was not voluntary, knowing, and intelligent. *Id.*, Page ID 2423-25, citing *Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473; and *State v. Edwards*, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976), *certiorari granted, judgment vacated, and case remand on other grounds by Edwards v. Ohio*, 438 U.S. 911, 98 S.Ct. 3147 (Mem), 57 L.Ed.2d 1155 (1978).

Mark Piepmeier, prosecutor for the State, argued that the Fletcher's testimony was undisputed evidence that Petitioner was aware of his *Miranda* rights prior to waiving them. Also, he noted [*10] that Petitioner did not confess until the September 16, 1997, interrogation, during which Petitioner told Millstone that he had "been absolutely clean for the week I have been in jail. I am not still high." (Trial Trans., ECF No. 163-7, Page ID 2427). Piepmeier emphasized that Ohio's First District Court of Appeals ruled that a similar line of questioning ("when the homicide investigators . . . told the defendant ['']you failed a polygraph, why don't you tell us really what happened.['']") was not coercive. *Id.*, Page ID 2428, citing *State v. Cook*, 1st Dist. Hamilton No. C-960252, 1997 Ohio App. LEXIS 5720, 1997 WL 783498 (Dec. 19, 1997) (*per curiam*). On February 20, 1998, Judge Marsh overruled the motion to suppress. *Id.*, Page ID 2431.

C. Discovery

On October 3, 1997, Petitioner pursuant to Ohio Crim. R. 7(E), requested "that the prosecuting attorney furnish the Defendant a Bill of Particulars[,] setting up [sic] specifically the nature of the offense charged[,] including location and time and the conduct of the Defendant alleged to constitute the offense." (App'x, ECF No. 167-3, Page ID 12773). The same day, Petitioner also moved, pursuant to Ohio Crim. R. 16, for the State to produce:

(A) All written or recorded statements made by Petitioner, including those made to a prosecuting attorney or law enforcement officer;

(B) Petitioner's [*11] prior criminal record;
(C) Documents and tangible objects in the State's possession that the State intended to use at trial as evidence, or were obtained from or belonged to Petitioner;
(D) Reports, examinations, or tests, and results therefrom, created in connection with the case, which were in the State's possession;
(E) Names and addresses of all witnesses the State intended to call at trial, along with the felony criminal records, if any, of those witnesses; and
(F) Any evidence that was favorable to the Petitioner and that would be material in either the guilt or penalty phases.

Id., Page ID 12775-76. On October 30, 1997, the State represented to the Court that it had provided to Petitioner:
(A) A summary of Petitioner's oral statement to Fletcher and Kemper; Kemper's notes regarding that statement; and a tape of his interview with Millstone and Filippelli;
(B) Petitioner's prior criminal record;
(C) Defendants' health record, rights forms and waivers thereof signed by Petitioner, and photos and tangible objects retrieved from the crime scene;
(D) Autopsy reports for the Leemans, polygraph results of the Petitioner, and statements that:

a. only a few palm and fingerprint lifts obtained [*12] at the residence could be tested, and none of those tested prints matched those of Petitioner; and
b. a police canine followed the scent of a towel with blood from the Leemans' house, to a creek behind the house, through the woods, and finishing at Greener Elementary School;

(E) A list of witnesses, including: Larry, Gary Sr., and Burt, Leonard, and Gordon Leeman; and
(F) The following additional evidence:
a. There was no fingerprint or forensic evidence linking Petitioner to the crime;
b. No eyewimess placed Petitioner at the crime scene on the night in question;
c. Petitioner was arrested for burglary in 1987 and questioned about the murders, but denied any involvement;
d. Merchants contacted MasterCard about attempts by Burt Leeman and his wife to use the Leemans' credit card after their deaths; and
e. "Numerous 'suspects' were either questioned or had their fingerprints checked over the ten year period from 1987 to 1997. None of the 'suspects' were ever linked to the homicide by . . . admissions, fingerprints, forensic evidence, or eye witnesses [sic]."

Id., Page ID 12808-11. That same day, the State also furnished to Petitioner a Bill of Particulars, which incorporated by reference the [*13] grand jury indictment. *Id.*, Page ID 12812. The Bill described the manner of the Leemans' murders—"both were stabbed repeatedly and had their throats cut, causing their death[s]." *Id.* The Bill stated that Petitioner entered "their home by cutting a screen and going through a window. The bedroom had been ransacked and missing were unknown jewelry items and a billfold of William Leeman." *Id.*

On December 17, 1997, Petitioner moved that the State disclose all discoverable evidence it intended to use at trial, along with prior statements of any witnesses it intended to call (App'x, ECF No. 167-3, Page ID 12778, 12780). The same day, Petitioner served upon the State a renewed Demand for Disclosure of Favorable Evidence, stating that "motions will be filed with the Court certifying non-compliance if the material is not produced within ten (10) days[,]" *id.*, Page ID 12791, and filed a motion to compel the production of any exculpatory evidence in the State's possession. *Id.*, Page ID 12793, citing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). On December 29, 1997, the State averred that it had fully complied with all of Petitioner's Rule 16 discovery demands and had disclosed all the evidence it intended to use at trial. *Id.*, Page ID 12814. The [*14] State also represented to the trial court that it would "fully and liberally comply" with Petitioner's requests for disclosure of: witness identities, including rebuttal witnesses; exculpatory evidence; information relating to aggravating and mitigating factors; and all information obtained by law enforcement officials during their investigation. *Id.*, Page ID 12815-24. On January 6, 1998, the State represented, as to Petitioner's request for impeachment evidence, that the Prosecutor's Office had agreed to remove the absconder warrant outstanding against Larry and to restore him to good standing as to his probation in exchange for Larry's provision of information as to the Leemans' murders. *Id.*, Page ID 12825. The State further represented

that "[i]t was made clear to [Larry] at that time that nothing further would be done on his behalf, [and] that he was still on probation[.]" *Id.*

D. Voir Dire and Jury Selection

During voir dire, Petitioner's counsel conceded his guilt and called him a liar while portraying the Leemans sympathetically. (Third Amended Petition, ECF No. 213, Page ID 15991-92, citations omitted). "Two of the jurors who sat on the case indicated that they were troubled by [*15] these concessions of trial counsel." *Id.*, Page ID 15992, citing App'x, ECF No. 166-17, Page ID 8418, 8423-24. In addition to these supposed errors of commission, Petitioner claims that his counsel failed to explain adequately options for life sentencing, and failed to object to Judge Marsh's statement that no one can predict when someone will be granted parole. *Id.* (citations omitted). "One of the jurors expressed concern that Hughbanks would be released." *Id.*, citing App'x, ECF No. 166-17, Page ID 8425.

Additionally, voir dire revealed serious doubts as to whether at least two members of the venire, Rosalie Van Nuis and Samuel Allen, could be objective toward Petitioner. Van Nuis stated that, all things being equal, she would lean toward imposing the death penalty on someone who committed the crimes at issue, even with the option of life in prison (Third Amended Petition, ECF No. 213, Page ID 15960, citing Trial Trans., ECF No. 163-9, Page ID 2700). Further, after indicating ambivalence regarding psychiatry in her juror questionnaire and being told by the prosecution that there would be testimony from Petitioner's treating psychiatrists regarding his history of mental illness, Van [*16] Nuis expressed skepticism as to whether psychiatrists help people with "real problems or really chronic problems. I think they help people who have superficial problems." (Trial Trans., ECF No. 163-9, Page ID 2691). When asked by Dale Schmidt, Petitioner's trial attorney, "[d]o you think the horribleness of this crime alone is something that you would vote for the death penalty no matter what?" Van Nuis responded, "[p]robably." *Id.*, Page ID 2698. Schmidt moved to strike Van Nuis for cause; when Judge Marsh denied that motion, counsel struck her peremptorily. *Id.*, Page ID 2700, 2705; Trial Trans., ECF No. 163-12, Page ID 3107-08.

In his juror questionnaire, Allen indicated that one of his close friends from childhood, a Darrell Lane, had been murdered (Trial Trans., ECF No. 163-10, Page ID 2802-03). In addition to Petitioner, Schmidt was representing a Joseph Paul Franklin, who was facing trial in 1998 for Lane's murder, and Piepmeier was the lead prosecutor in that case, as well. *Id.*, Page ID 2809-10. Despite Allen's repeated assurances that, even in light of the above, he could be a fair and impartial juror, Schmidt stated that Allen should not serve on the jury. *Id.*, Page ID 2810-12. [*17] Schmidt moved to strike Allen for cause, which Judge Marsh denied. *Id.*, Page ID 2816, 2818. Schmidt then struck Allen peremptorily (Trial Trans., ECF No. 163-12, Page ID 3106). Petitioner exercised only five of his allotted six peremptory challenges. *Id.*, Page ID 3113-15.

E. Guilt Phase

In the State's opening statement, Richard Gibson ("Gibson"), one of the State's prosecutors, described the burglary as being committed by someone who had never met the Leemans, and who had decided to rob their house because it was "in a nice suburban neighborhood," where there was "a reasonable likelihood of obtaining something worth stealing, something worth breaking into a home for." (Trial Trans., ECF No. 163-13, Page ID 3147-48). He claimed that, on the night in question, Petitioner was armed and already in Leemans' home as they returned to the residence. "[N]ot long after entering the home, Mr. Leeman encounters this killer, this armed intruder[.] . . . And the killer attacks Mr. Leeman savagely with a knife[.]" *Id.*, Page ID 3149. He argued that Mr. Leeman suffered several stab wounds in his chest and shoulder, after which Petitioner slit his throat from end to end, and that Petitioner subsequently [*18] chased Mrs. Leeman into the living room and killed her by slitting her throat. *Id.*, Page ID 3149-51. Mrs. Leeman stumbled outside to her driveway, but by the time Kemper saw her and called for an ambulance, it was too late; she died in the hospital "without having ever being able to express what happened to her and her husband." *Id.*, Page ID 3152-53.

Gibson continued that the case was unsolved for over ten years until Larry and Gary Sr. began contacting the Springfield Township Police Department with information implicating Petitioner in the crimes. Lisa Leggett, Petitioner's former common law spouse, also provided the police with information incriminating Petitioner, including a survival knife that was, the State claimed, similar to the one used in the Leemans' murders (Trial Trans., ECF No. 163-13, Page ID 3155-57). Gibson concluded by discussing Petitioner's confession, specifically: (a) the detail in which he described the Leemans' residence, including the

bedroom closet where he hid after the Leemans came home; (b) his struggle with Mr. Leeman; and (c) the knife he used to kill the Leemans. *Id.*, Page ID 3159-63.

During his opening statement, Wenke, Petitioner's counsel, again conceded [*19] guilt, stating that "on May 13th of 1987 . . . [Petitioner] went into that house and he committed these crimes[.]" (Trial Trans., ECF No. 163-13, Page ID 3165). Wenke continued that, for the decade after the murders, Petitioner lied to himself and others about what he did, *id.*, Page ID 3165-66, until, "his life was a lie." *Id.*, Page ID 3168. Wenke used the terms "lie," "liar" or some variation thereof fourteen times during his brief opening statement. *Id.*, Page ID 3165-69. He concluded by saying that the guilt phase would be "about taking responsibility for what [Petitioner] did. And . . . all we expect you to do is to give him that responsibility . . . for what he did." *Id.*, Page ID 3169.

Leonard Leeman ("Leonard"), the State's first witness, "testified at length as to the consistency between the details in Hughbanks' custodial statement and the physical evidence." (Third Amended Petition, ECF No. 213, Page ID 15945, citing Trial Trans., ECF No. 163-13, Page ID 3178-85). Leonard also opined, without objection from Petitioner's counsel, that because of that consistency, "there was no doubt" that Petitioner had been in the Leemans' house (Trial Trans., ECF No. 163-13, Page ID 3179). [*20] Despite there being several inconsistencies between Petitioner's statements during the interrogation and the physical evidence about which Leonard testified, Petitioner's counsel did not cross-examine Leonard as to those discrepancies. *Id.*, Page ID 3188-89; Third Amended Petition, ECF No. 213, Page ID 15945-46, citing App'x, ECF No. 167-3, Page ID 12877, 12932, 12936, 12940-41, 12946, 12955, 12975, 12997, 13001, 13010-11.

Kemper testified about encountering Mrs. Leeman in the driveway and her unsuccessful attempts to communicate with him (Trial Trans., ECF No. 163-13, Page ID 3193-95). He also described how, after paramedics arrived to tend to Mrs. Leeman, he entered the Leemans' residence and found Mr. Leeman dead. *Id.*, Page ID 3198. Kemper testified as to his initial phone call with Larry in the summer of 1997, in which Larry told Kemper that Petitioner had told Larry that he had killed the Leemans and thrown the knife in the woods near the Leemans' residence. *Id.*, Page ID 3236-37. Kemper turned the information over to the Prosecutor's Office, and representatives of that office interviewed both Larry and Gary Sr.; Kemper did not attend either interview. *Id.*, Page ID 3237-38. Finally, [*21] Kemper testified that Petitioner's descriptions of the crimes and of the Leemans' house during his September 16, 1997, interview with Millstone and Filippelli was consistent with the physical evidence and his inspection of the Leemans' house. *Id.*, Page ID 3240-43. At no point did Petitioner's attorneys object or move to strike Kemper's above testimony on the grounds of hearsay or lack of personal knowledge. Nor did they cross-examine Kemper. *Id.*, Page ID 3243.

John Jay, an investigator with the Prosecutor's Office at the time of Petitioner's arrest, testified regarding his interviews with Larry and Gary Sr., in which Larry turned over a survival knife to Jay and Piepmeier, and both Larry and Gary Sr. told Jay that Petitioner had confessed the murders to them. (Trial Trans., ECF No. 163-13, Page ID 3251-54). Jay also interviewed Leggett, along with Jerry Shaw and Howard Shaw, Petitioner's uncle and cousin, respectively, both of whom stated that Petitioner had killed the Leemans. Leggett provided Jay with one of Petitioner's knives that was similar to the one that Larry described to Jay. *Id.*, Page ID 3254-55. Petitioner's counsel did not object to any portion of Jay's testimony, so as [*22] to eliminate the need for Leggett to testify; nor did he cross-examine Jay. *Id.*, Page ID 3255-57.

Millstone testified that Petitioner had already been charged with the murders of the Leemans prior to his first interview of Petitioner on September 9, 1997, and that despite Petitioner's initial denial of involvement, he was held in the Pima County Jail pending extradition to Ohio (Trial Trans., ECF No. 163-13, Page ID 3260-62). The cross-examination of Millstone focused on: (a) the lack of coercion by the officers during the September 16, 1997, interrogation; (b) the remorse Petitioner expressed after confessing. *Id.*, Page ID 3265, 3268. Similarly, the cross-examination of Filippelli by Petitioner's counsel centered on Petitioner's post-confession phone call to his parents, in which he expressed that the confession had lifted a weight from his shoulders. Further, Filippelli testified that it is common, and not necessarily an indicator of dishonesty or bad character, for homicide suspects to initially deny culpability before admitting guilt later in an interview. *Id.*, Page ID 3280-81, 3283-84. Moreover, Petitioner's counsel, in cross-examining the coroner, the State's final witness, elicited [*23] only that the knives examined by the coroner may not have been the murder weapon, and that he found alcohol in Mr. Leeman's system during the autopsy (Trial Trans., ECF No. 163-14, Page ID 3333-35).

Despite there being evidence contradicting the State's theory of the case—that the perpetrator: (1) did not know the victims; (2) cased the Leeman's home prior to entry; (3) entered their home with the intent to commit theft; (4) was surprised by the

Leemans' return; and (5) killed the Leemans to cover up the burglary—Petitioner did not put on a case-in-chief (Third Amended Petition, ECF 213, Page ID 15996-97, citing Trial Trans., ECF No. 163-13, Page ID 3148-50). Additionally, Petitioner's counsel, in closing arguments, reiterated that the jury would have no problem finding Petitioner guilty (Trial Trans. ECF No. 163-14, Page ID 3361-62). After closing arguments, Judge Marsh asked that anyone who planned to leave the courtroom do so prior to the start of jury instructions, and instructed her bailiff to bar the door during instructions. However, she did not ask anyone to leave the courtroom. *Id.*, Page ID 3363-64. After less than ninety minutes of deliberation, the jury returned verdicts [*24] of guilty on all three counts. *Id.*, Page ID 3402-03.

F. Penalty Phase

At the beginning of the penalty phase, Judge Marsh informed the jurors what aggravating circumstances and mitigating factors were, and verbally instructed them that their task was to determine whether the State had proved, beyond a reasonable doubt, that the aggravating circumstances presented by the State outweighed the mitigating factors presented by Petitioner. (Trial Trans., ECF No. 163-15, Page ID 3415-16). She further instructed that:

> If you find the aggravating circumstances by proof beyond a reasonable doubt outweigh the mitigating factors, then you must make a finding that the death sentence be imposed upon Gary Hughbanks.
>
> However, if you find that the State of Ohio has failed to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, then you will enter a verdict imposing one of the life sentences, either life imprisonment without parole eligibility until twenty-five full years of imprisonment; life imprisonment without parole eligibility for thirty full years; or life imprisonment without the possibility of parole, whichever you deem appropriate.

Id., Page ID 3416-17. [*25]

Petitioner's attorney Schmidt, during his opening statement, conceded that Petitioner "did not present any evidence at the trial phase because there was nothing to present." (Third Amended Petition, ECF 213, Page ID 16001, citing Trial Trans., ECF No. 163-15, Page ID 3426-29). Schmidt stated that Petitioner "never had a chance from the get-go, so to speak" and "was a product of a dysfunctional family, genetically impaired, and that he has problems that have followed him and nightmares that have followed him all of his life." (Trial Trans., ECF No. 163-15, Page ID 3427-28). He promised that Petitioner would address the jury and accept responsibility, and that Petitioner's psychiatrists would testify about his lifelong mental illnesses. *Id.*, Page ID 3425-26, 3428. Schmidt concluded by stating that Petitioner was not seeking a sentence of less than life without parole. *Id*, Page ID 3428. The State's case-in-chief consisted solely of moving to re-admit all testimony and exhibits from the guilt phase. *Id.*, Page ID 3429. Petitioner's counsel renewed his objection to the admission of the photographs of the victims; Judge Marsh overruled counsel's objection, ruling that the photographs were [*26] proper aggravating evidence. *Id.*, Page ID 3429-30.

Sagi S. Raju, M.D., who was Petitioner's treating psychiatrist in 1986, while Hughbanks was hospitalized at Christ Hospital in Cincinnati, testified on Petitioner's behalf (Trial Trans., ECF No. 163-15, Page ID 3435). Dr. Raju testified that Petitioner was admitted on or about June 1, 1986, due to agitation and psychotic behavior, including hallucinations and suicidal and homicidal ideations, caused by drug and alcohol ingestion. *Id.*, Page ID 3436-37, 3453. Petitioner had previously been a psychiatric in-patient at Christ Hospital under the care of Bernard DeSilva, M.D., who also treated Petitioner privately. *Id.*, Page ID 3453-54. Dr. Raju noted Petitioner's "depression, agitation, and psychotic behavior in [his] past admissions[,]" problems with family, and "history of substance abuse and alcohol abuse[,]" *id.*, Page ID 3437, and that during his initial interview with Petitioner, Petitioner made a statement about "[k]illing somebody, . . . [b]ut it was nonspecific in the sense he did not say he was going to hurt somebody, a special person or anything." *Id.*, Page ID 3459. After two weeks of in-patient treatment, including taking "antipsychotic [*27] medication [and] antimanic medication," Petitioner was discharged, with Dr. Raju having diagnosed him with "major affective disorder and bipolar disorder, which is of manic episode, [and] drug and alcohol abuse." *Id.*, Page ID 3439. Petitioner was re-admitted to Christ Hospital on or about August 22, 1986, having overdosed on prescription medication. *Id.*, Page ID 3449. Petitioner was discharged two days later, and was never treated by Dr. Raju again. *Id.*, Page ID 3452.

Petitioner's second witness was Dr. DeSilva, who, had treated Petitioner; Gary Sr.; Petitioner's mother, Evangelina Hughbanks ("Angie"), and Petitioner's cousin, Larry Kramer (Trial Trans., ECF No. 163-15, Page ID 3489-91). Dr. DeSilva testified that he had diagnosed Gary Sr. with "a mixture of paranoid schizophrenia with some schizoaffective features." *Id.*, Page ID 3492.

He stated that Gary Sr. had physically abused Petitioner during his hallucinations, and had been hospitalized due to psychotic episodes, most frequently when Petitioner was between the ages of twelve and fourteen (1978-1980). The hospitalizations, Dr. DeSilva testified, strained Gary Sr.'s relationships with Petitioner and other family members. *Id.*, Page [*28] ID 3496-97.

Dr. DeSilva began treating Petitioner in or around 1982, continued to treat Petitioner sporadically thereafter, and diagnosed him with schizoaffective and bipolar disorders (Trial Trans., ECF No. 163-15, Page ID 3501-02), with "intermittent concomitant drug abuse and alcohol abuse[.]" *Id.*, Page ID 3504. During "the manic phase . . . [h]is thinking and his thoughts were — they were disjoined, didn't make much sense[.]" *Id.*, Page ID 3505-06. Dr. DeSilva testified that he did not "remember [Petitioner] ever talking free of hallucinations or delusions or a mood—some type of a mood change that could occur as a result of any stimulus." *Id.*, Page ID 3517. During the depressive phases, Petitioner frequently expressed to Dr. DeSilva his suicidal ideation, and told him that he had "[p]ractically no relationship" with his children. *Id.*, Page ID 3508-09. Petitioner was never in "full compliance" with his medication regimen "except when [he] was in the hospital." *Id.*, Page ID 3511. Dr. DeSilva treated Petitioner as an in-patient in September and December 1984 and January 1985, and that during that time, Petitioner told him that voices in his head were telling him to kill himself. *Id. [*29]*, Page ID 3520-21. In December 1984, Petitioner, in Dr. DeSilva's words, "went berserk[,]" attempting suicide and expressing to Dr. DeSilva his desire to attempt again. *Id.*, Page ID 3522-23. Dr. DeSilva stated that, while Petitioner's drug and alcohol use exacerbated his symptoms, his underlying pathology was independent of any substance abuse. *Id.*, Page ID 3525.

On cross-examination, and over the objection of Petitioner's counsel, Dr. DeSilva testified that Petitioner had been convicted of domestic violence and spent time in prison due to those convictions (Trial Trans., ECF No. 163-15, Page ID 3546, 3568-69). He also relayed Petitioner's statement to him that "when he g[ot] angry, he was afraid that he would hurt people," *id.*, Page ID 3548, and that, in 1987, Petitioner stated to a Dr. Feuss[1], another psychiatrist who treated him, that he had thoughts of killing his father, boss, and fiancée. *Id.*, Page ID 3549-50. Dr. Feuss diagnosed Petitioner with antisocial personality disorder, rather than bipolar, disorder, a diagnosis with which Dr. DeSilva disagreed. *Id.*, Page ID 3551-53. Dr. DeSilva stated that Nancy Schmidtgoessling, Ph.D., the State's psychological expert, did not contact [*30] him to obtain treatment records prior to making her diagnosis of antisocial personality disorder—despite the representation to the contrary in her expert report. *Id.*, Page ID 3557-58. Dr. DeSilva also opined that Dr. Schmidtgoessling had ignored Petitioner's low intelligence and indicia of paranoia in diagnosing him with antisocial personality disorder. *Id.*, Page ID 3559.

Petitioner's uncle, Larry Kramer, and his sister, Larketa Hughbanks ("Larketa"), also testified on behalf of Petitioner (Trial Trans., ECF No. 163-16, Page ID 3586, 3609-10). Larketa testified that Gary Sr. and Angie were verbally and physically abusive toward Petitioner, Larry, and Larketa. *Id.*, Page ID 3616-18. She further stated that Petitioner had attempted suicide at least three times prior to 1992, *id.*, Page ID 3627-29, and that he perceives a shadowy figure that "can be any shape it wants to be. And it has these red piercing eyes." *Id.*, Page ID 3631. Subsequently, Angie testified that Gary Sr. and all of her children had experienced hallucinations. *Id.*, Page ID 3639. She stated that Petitioner frequently observed Gary Sr.'s physical and verbal abuse of her, *id.*, Page ID 3642, but that Petitioner had a good relationship [*31] overall with Gary Sr., and was only physically abused twice by him. *Id.*, Page ID 3652-53, 3655. Further, Angie testified that Petitioner physically abused three of his significant others. *Id.*, Page ID 3668.

Petitioner took the stand, but was not put under oath or cross-examined (Trial Trans., ECF No. 163-16, Page ID 3670). Reading from prepared notes, Petitioner told the jurors that they "did the right thing in finding me guilty[,]" *id.*, Page ID 3671, and that they "have every right in the world to hate me and to want to kill me yourself, because if I was in your position, I would do the same thing." *Id.*, Page ID 3672. He stated that he felt a sense of relief when he confessed to the burglary and murders, and confirmed that he acted alone. *Id.*, Page ID 3673.

In rebuttal, the State called Dr. Schmidtgoessling, who was hired by the trial court prior to evaluate whether Petitioner was mentally competent to stand trial, and/or whether he could pursue a defense of Not Guilty by Reason of Insanity (Trial Trans., ECF No. 163-16, Page ID 3678, 3680). Dr. Schmidtgoessling conducted her initial interview with Petitioner on November 24, 1997, at which time Petitioner denied he had committed the [*32] crimes. *Id.*, Page ID 3684-85. Dr. Schmidtgoessling opined that Petitioner's clear ability to distinguish right from wrong differentiated him from other, incompetent, defendants that she had examined, whose psychiatric disorders prevented them from organizing their thoughts or expressing them coherently, and

[1] Dr. Feuss's first name is not mentioned in the trial transcript or the parties' briefing.

that he was sane at the time of the crimes. *Id.*, Page ID 3688-89. She also concluded that Petitioner's drug and alcohol abuse, although uncontrolled in May 1987, did not affect his ability to discern right from wrong in his actions. *Id.*, Page ID 3688.

Dr. Schmidtgoessling re-interviewed Petitioner on May 23 and May 29, 1998, prior to the start of trial (Trial Trans., ECF No. 163-16, Page ID 3689). She noted that Petitioner's mood, appearance, and presentation during these interviews made him seem "like a completely different person" than he was during the November 1997 interview. *Id.*, Page ID 3698-99. During those interviews, Petitioner told her that he had committed the burglary and murders of the Leemans, and gave a description of the night in question similar to the description he gave to Millstone and Filippelli. *Id.*, Page ID 3690-91. He stated that he was not under the influence [*33] of any substance or hallucination at the time he killed the Leemans. *Id.*, Page ID 3697. Petitioner told Dr. Schmidtgoessling that he killed Mr. Leeman because he was frightened after being accosted by Mr. Leeman, and that the act of killing (number of stab wounds) was so severe because he was "angry that I might be caught." *Id.*, Page ID 3692-93. He told her that he killed Mrs. Leeman because "she had seen him and could identify him." *Id.*, Page ID 3693.

Dr. Schmidtgoessling opined that "[t]here was no indication" that any psychological disorder Petitioner may have had "caused him to do this offense." (Trial Trans., ECF No. 163-16, Page ID 3694). She acknowledged his history of substance abuse and of "irregular moods, paranoia, and reported hallucinations. How much those related to substances, I don't know." *Id.*, Page ID 3695. From Petitioner's "pattern of irresponsibility[,] illegal behaviors and what we call poor impulse control, or very poor judgment, anger outbursts, not working, [and] being irresponsible about bills," Dr. Schmidtgoessling diagnosed petitioner with antisocial personality, rather than bipolar, disorder. *Id.*, Page ID 3696-97. She also discussed the results of the Minnesota [*34] Multiphasic Personality Inventory-II ("MMPI-II"), which she administered to Petitioner in May 1998, opining that his paranoia was exaggerated due to his being incarcerated and the publicity surrounding the case, and consequently, "he endorsed a lot more symptoms in that area than he endorsed in other areas." *Id.*, Page ID 3701-02.

On cross-examination, Dr. Schmidtgoessling acknowledged Petitioner's history of depression and previous diagnoses of bipolar disorder. However, she disagreed with those diagnoses, noting the absence of a history of psychosis, and finding that Petitioner's symptoms were indicative of a "mild depressed state" at the time he committed the crimes (ECF No. 163-16, Page ID 3708). Upon further questioning by Petitioner's counsel, Dr. Schmidtgoessling conceded that she could not "make a diagnos[i]s of him to a reasonable degree of medical certainty," *id.*, Page ID 3711, and that the primary purpose of her testimony was not to rebut the opinions of Petitioner's treating psychiatrists. *Id.*, Page ID 3721. She emphasized that she was being asked to evaluate Petitioner's state of mind at the time of the offense, and because she only interviewed Petitioner while he was incarcerated, [*35] she could not be certain how Petitioner's substance abuse may have affected his depressive state at the time of the murders. *Id.*, Page ID 3711-12. Further, Dr. Schmidtgoessling testified that, in her interactions with Petitioner, the manifestations of his symptomology appeared to be legitimate. *Id.*, Page ID 3720. Nonetheless, in making her assessment, she reviewed "probably ninety-five percent of the known medical records in this particular case[,]" including all of Dr. DeSilva's records, and the records from the eight instances in which he was hospitalized for psychiatric illness. *Id.*, Page ID 3723-24. She reiterated her opinion that, based on those records and her interviews of Petitioner and his family members, Petitioner did not suffer from bipolar disorder. *Id.*, Page ID 3724.

During closing arguments, Prosecutor Richard Gibson stated that counsel for the State and for Petitioner were in agreement that the jury should only consider sentences of death or life without parole (Trial Trans., ECF No. 163-17, Page ID 3755). Gibson discussed the manner in which, and methods by which, Petitioner killed the Leemans, despite those not being among the aggravating circumstances to be considered [*36] by the jury; Petitioner's counsel did not object. *Id.*, Page ID 3760, 3771, 3802. Petitioner's attorney, Stephen Wenke, stated that: he could not explain or excuse Petitioner's conduct; he shared the jurors' outrage at the crimes; and part of him wanted to see Petitioner executed. *Id.*, Page ID 3779-82. However, he emphasized that there was no evidence tying Petitioner to the murders besides his confession, and that absent Petitioner's decision to take responsibility, there would have been no trial. *Id.*, Page ID 3780-82. Dale Schmidt, Wenke's co-counsel, reiterated that there was no possibility of parole in this case, and that, if the jury opted not to recommend a death sentence, the only way Petitioner was leaving prison was "in a pine box, dead." *Id.*, Page ID 3790.

After closing arguments, Judge Marsh instructed her bailiff to lock the door during her charge to the jury, and explained that "[a]nybody who is remaining here for the charge, you understand that you'll have to remain for the complete charge. . . . No one is allowed to come in; no one is allowed to leave during the charge." (ECF No. 163-17, Page ID 3807). Judge Marsh instructed the jury that "[y]ou will decide whether Gary [*37] Hughbanks shall be sentenced to life in prison without parole eligibility for twenty-five full years; to life imprisonment without parole eligibility for thirty full years; to life imprisonment without the

possibility of parole; or to death." *Id.*, Page ID 3808. She instructed that, in order for the jury to recommend a sentence of death, the State must have met its "burden of proving beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty of committing outweigh the factors in mitigation. Gary Hughbanks does not have any burden of proof." *Id.*, Page ID 3809. Judge Marsh continued that, although the jury's returning a verdict of death was technically a recommendation, jurors should "assume that the recommendation shall be the sentence of this Court[,]" while "if you render a verdict for one of the life sentences, . . . the Court must impose the specific life sentence you recommend." *Id.*, Page ID 3819.

As to the weighing of the aggravating circumstances and mitigating factors. Judge Marsh instructed that the jury was

> [N]ot required to unanimously find that the State failed to prove that the aggravating circumstances outweigh the mitigating factors [*38] before considering one of the life sentencing options.
> In other words, you should proceed to consider and choose one of the life sentence options if any one or more of you conclude[s] that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

(Trial Trans., ECF No. 163-17, Page ID 3819-20). She then recited the eight verdict forms, with each of the following for William and Juanita Leeman: life without parole for at least twenty-five years; life without parole for at least thirty years; life without possibility of parole; and death. The jury was instructed to return its chosen forms, signed by all jury members. *Id.*, Page ID 3821-24. Each of the six non-death verdict forms read as follows: "We, the Jury, unanimously find that the aggravating circumstances Gary Hughbanks was found guilty of committing . . . do not outweigh the mitigating factors present in this case, and therefore recommend that the defendant be sentenced to life imprisonment . . . ." *Id.*, Page ID 3821.[2]

Outside the presence of the jury, Petitioner's counsel renewed his objections to Judge Marsh's overruling his requested instructions on mercy and on the [*39] State's having a burden of proof "beyond all doubt." (Trial Trans., ECF No. 163-17, Page ID 3834-35). Additionally, Petitioner stated on record that his counsel had consulted with him on all matters of trial strategy, and that he had assented to said strategy. *Id.*, Page ID 3835. After approximately eleven hours of deliberation, the jury returned verdict forms recommending that Petitioner be sentenced to death for the murders of both Mr. and Mrs. Leeman. The jurors signed verdict forms indicating that they had concluded, unanimously and "by proof beyond a reasonable doubt, that the aggravating circumstances Gary Hughbanks was found guilty of committing in Count One[/Two] outweigh the mitigating factors present in this case[.]" (Trial Trans., ECF No. 163-18, Page ID 3844-45). Upon motion by Petitioner's counsel, the jury was polled, and each juror indicated that he or she assented to the verdicts. *Id.*, Page ID 3846-47.

On July 6, 1998, Petitioner appeared in open court and again accepted responsibility and expressed contrition for committing the burglary and murders (Trial Trans., ECF No. 163-19, Page ID 3854). Judge Marsh adopted the jury's conclusion that the State demonstrated "beyond [*40] a reasonable doubt that the aggravating circumstances that you were found guilty of committing do indeed outweigh any mitigating factors[,]" the latter of which Judge Marsh found to be "unremarkable and unpersuasive. On the other hand, the aggravated [*sic*] circumstances of these murders were among the worse [*sic*] that I have ever seen or read." *Id.*, Page ID 3855-56. Consequently, Judge Marsh sentenced Petitioner to be executed. *Id.*, Page ID 3857-58.

II. POST-SENTENCING PROCEDURAL HISTORY

A. Initial Direct Appeal

1. First District Court of Appeals

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[2] The jury verdict forms modified the Ohio Pattern Criminal Jury Instructions, which provide the following language: "We the jury, being duly impaneled and sworn, do hereby find that the aggravating circumstances that the defendant was found guilty of committing do not outweigh the mitigating factors presented in this case by proof beyond a reasonable doubt." 4 OHIO CRIM. JURY INSTRS. 503.011, § 26.

As the murders happened before January 1, 1995, Petitioner was able to appeal first to the First District Court of Appeals, rather than directly to the Supreme Court of Ohio. *State v. Hughbanks*, 1st Dist. Hamilton No. C-980595, 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *1 (Dec. 3, 1999). On May 21, 1999, Attorneys Herb Freeman and Norm Aubin filed Petitioner's initial brief, (App'x, ECF No. 166-4, Page ID 4569), raising fifteen assignments of error:[3]

1. Where A Capital Defendant Is Indigent And In Need Of Assistance To Present His Defense, The Trial Court Must Grant The Funds Necessary To Conduct A Defense;

2. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the Ohio Constitution Guarantees of the Due Process Clause Require the Prosecution Prove Each and Every Element of a Criminal Offense Beyond a Reasonable Doubt, [*41] and in the Absence of Evidence Sufficient to Persuade a Rationale Fact Finder of Each Such Element to that Degree, A Conviction is Based upon Insufficient Evidence, Offends Due Process and must Be Reversed:

3. The trial court's failure to provide Mr. Hughbanks with the expert assistance of an independent pathologist denied him due process, equal protection, effective assistance of counsel and statutory rights under the Fifth, Sixth, Eighth and Fourteenth Amendments;

4. The trial court's failure to provide Mr. Hughbanks with the expert assistance of an independent neuropharmacologist denied Appellant Hughbanks due process, equal protection, effective assistance of counsel and statutory rights under the Fifth, Sixth, Eighth and Fourteenth Amendments;

5. Denying Mr. Hughbanks reasonable bond prior to trial unconstitutionally infringed upon his right to assist counsel in the preparation of his defense to the underlying charges, as well as in regard to the sentencing phase;
6. The trial court erred in admitting into evidence gruesome and cumulative photographs of the victim;

7. The requirement in Ohio that the mitigating factors be proven by preponderance, before they may be weighed against an aggravating circumstance is unconstitutional;

8. The trial court erred when [*42] it failed to overrule the Ohio statutory definition of reasonable doubt in the mitigation phase;

9. Hughbanks' death sentence must be reversed since Ohio's death penalty statutes are constitutionally defective;
10. The trial court erred to the prejudice of the Defendant-Appellant in that it overruled his Motion to Suppress his statement made to the agents of law enforcement;
11. Defendant-Appellant's trial attorneys provided ineffective assistance of counsel when they proceeded on their Motion to Suppress Defendant-Appellant's statements made to agents of law enforcement without the assistance of supportive expert psychiatric testimony;

12. A Defendant is denied effective assistance of counsel as guaranteed the Fifth, Sixth, and Fourteenth amendments of the United States Constitution and sections 10 and 16 of the Ohio Constitution when defense counsel submits to not having the Prosecutor produce family members who implicated Hughbanks, and not have Hughbanks' family members testify and be cross-examined;
13. A Defendant is denied his right to a fair trial when the trial court allows the State to introduce evidence of "other acts" claimed to have been committed by the Defendant;

14. Allowing the Prosecution to question Hughbanks' psychiatrists as to whether he met [*43] the legal definition of insanity at the time of the Leeman killings when insanity was not a defense was prejudicial error;
15. [It Is] Constitutionally Impermissible For The Court To Instruct The Jury That Their Verdict Is Merely A Recommendation, As Such An Instruction Impermissibly Attenuates The Jury's Sense Of Responsibility For Its Decision, And A Death Sentence Imposed Following Such An Instruction Is Constitutionally Infirm.

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[3] As the issues of procedural default and *res judicata* factor greatly into the parties' arguments, the Court takes pains to list the assignments of error and propositions of law as they were presented to this Court and others.

(Third Amended Petition, ECF No. 213, Page ID 15912-14 (capitalization in original), citing App'x, ECF No. 166-4, Page ID 4532-68).

The First District rejected all fifteen Assignments of Error, and affirmed the trial court's death sentence. *State v. Hughbanks*, 1999 Ohio App. LEXIS 5789, 1999 WL 1488933 (1st Dist. Dec. 3, 1999), at *1. The First District concluded that Petitioner had failed to preserve for appeal his First (overall failure to allocate funds necessary to conduct adequate defense), Third (trial court's failure to provide an independent pathologist), and Fourth Assignments of Error (trial court's failure to provide an independent pharmacologist), since "[t]he record demonstrates that Hughbanks made no request for funds to obtain the experts whose services were not provided to him. (He did, however, request and was granted funds [*44] to obtain a mitigation specialist and neuropsychologist."). 1999 Ohio App. LEXIS 5789, [WL] at *5 (parentheses in original).

As to the Second Assignment (insufficiency of evidence supporting conviction), the First District first discussed

> [T]he three death-penalty specifications attached to each aggravated-murder charge. These required proof that (1) Hughbanks committed the murders in order to escape detection, apprehension, trial, or punishment for the aggravated burglary; (2) the killings were part of a course of conduct involving the purposeful killing of two or more people; and (3) the murders were committed by Hughbanks as the principal offender while he was also committing or attempting to commit, or fleeing after committing or attempting to commit, the aggravated burglary.

1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *5. The court then recited the unrebutted evidence presented by the State at trial, and surmised that the "evidence, viewed in a light most favorable to the State, could have convinced a rational trier of fact that Hughbanks was guilty beyond a reasonable doubt." *Id.* n.6 (citing *State v. Jenks*, 61 Ohio St.3d 259, 259-60, 574 N.E.2d 492, paragraph two of the syllabus (1991), *superseded by statute and constitutional amendment on other grounds as stated in State v. Williams*, 8th Dist. Cuyahoga No. 95796, 2011-Ohio-5483, ¶ 6 (Oct. 27, 2011)). The court also stated "that the evidence was sufficient [*45] to support the aggravated-murder charges, the death specifications, and the aggravated-burglary charge, when viewed in a light most favorable to the state," and that it could not "conclude that in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *Id.* n.7, citing *State v. Martin*, 20 Ohio App. 3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717, (1st Dist. 1983).

The First District overruled the Fifth Assignment, noting that "[a]n indictment charging a capital offense may raise a presumption sufficient to justify the refusal of bail[,]" 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *6 n.9 (citing *State ex rel. Reams v. Stuart*, 127 Ohio St. 314, 319, 188 N.E. 393, 39 Ohio L. Rep. 651 (1933)), and finding that Judge Marsh's decision at the bail hearing that Petitioner had failed to rebut that presumption was proper. *Id.*

Regarding the Sixth Assignment (admission of six autopsy slides and two crime scene photographs over trial counsel's objection), the First District noted that the photos of the Leemans were used by the coroner to describe: (1) the weapon used; (2) the causes of death; and (3) how Mrs. Leeman's "throat had been cut in a way that prevented her from screaming or talking. Further, the slides were probative of the fact that the murders were done purposely. The two photographs of Mr. Leeman were used by the officer who found [*46] the body to describe the scene." 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *6. Accordingly, the First District held, the trial court's admission of the autopsy slides and photographs was not unnecessarily repetitive or cumulative and not an abuse of discretion under Ohio R. Evid. 403. *Id.* The appellate court then noted that Petitioner's Seventh, Eighth and Ninth Assignments, concerning the constitutionality of Ohio's death penalty scheme) had previously been considered and rejected by the Supreme Court of Ohio, and thus, were not viable grounds for relief. 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *7-8 (citations omitted).

As to Petitioner's Fifteenth Assignment—Judge Marsh's alleged error in instructing "the jury that its death verdict would be only a recommendation[,]" 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *9the First District held that because she "also instructed the jury that during its deliberations it would decide which sentence to impose[, w]e find no constitutional violation resulting from the trial court's instructions." *Id.* n.24, citing *State v. Durr*, 58 Ohio St. 3d 86, 568 N.E.2d 674 (1991).

In Petitioner's Tenth Assignment, he argued that Judge Marsh improperly overruled his trial counsel's motion to suppress his confession. He claimed that he was under the influence of drugs when he signed his waiver of *Miranda* rights on September 9, 1997, and "that he was mentally ill [*47] on that date and on September 16, 1997, when he provided his confession." 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *9. Petitioner argued "(1) that he did not voluntarily waive his Fifth

Amendment rights to counsel and against self-incrimination, and (2) his confession was involuntary under the Due Process Clause." *Id.* As to the first argument, the appellate court conceded that law enforcement officers were aware of Hughbanks's mental illness prior to asking Petitioner to sign the *Miranda* waiver, and that "it may be that his illness impaired his judgment and caused him to confess. This alone, however, does not evince the police coercion necessary to determine that Hughbanks's statements to the police were involuntary." 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *10 n.34 at , citing *Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473; *State v. Knotts*, 111 Ohio App. 3d 753, 677 N.E.2d 358 (3rd Dist. 1995); *State v. Malone*, 2nd Dist. Montgomery No. 10564, 1989 WL 150978 (Dec. 13, 1989)). Given Petitioner's history with and knowledge of the legal system, the First District could not conclude that Petitioner's waiver of his rights was not knowing, intelligent, and voluntary. *Id.* As to the second argument, the appellate court reviewed the audio recording of his confession and found concluded that "[t]he police made no threats or inducements to him. The interrogation was not unreasonable in length. Hughbanks sounded alert and appropriate on the tape recording[.]" *Id.* Thus, the First District held, "the trial court [*48] did not err in concluding that Hughbanks's waiver of his Miranda rights and his confession were voluntary." *Id.*

Petitioner's Eleventh and Twelfth Assignments pertained to alleged ineffective assistance of trial counsel, specifically as to counsel's decisions to: (a) proceed on the motion to suppress his confession in the absence of expert psychiatric testimony; and (b) not call Gary Sr. and Larry as witnesses, respectively. 1999 Ohio App. LEXIS 5789, [WL] at *10. The appellate court observed that trial counsel had introduced evidence of Petitioner's history of mental illness, and that the relevant issue for suppression was whether Millstone and Filippelli's interrogation was coercive, rendering Petitioner's confession involuntary. In light of the above, the Court concluded that Petitioner had not rebutted the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* n.38, quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Further, Petitioner's counsel stated, on record, that not cross-examining Gary Sr. and Larry was trial strategy, and Petitioner failed to demonstrate how he was prejudiced by any failure to cross-examine them. Thus, the appellate court overruled the Eleventh and Twelfth Assignments. *Id. [*49]*

For the Thirteenth Assignment, Petitioner claimed that the introduction of prior bad acts evidence—specifically, acts of violence toward his mother, convictions for domestic violence, and imprisonments—at the guilt and sentencing phases was improper and had the effect of denying him a fair trial. 1999 Ohio App. LEXIS 5789, [WL], 1999 WL 1488933, at *11 (citing Ohio R. Evid. 404(B)). Judge Marsh allowed such evidence to be introduced during the cross-examination of Dr. DeSilva, reasoning that "Dr. DeSilva's testimony provided the state with the opportunity to rebut his conclusion that Hughbanks's illness was incurable by asking about the effect that prison, a form of structured environment, would have on Hughbanks's illness." *Id.* The appellate court concluded that the past acts of domestic violence were introduced not to portray Petitioner's bad character, but to provide context to Dr. DeSilva's direct examination testimony about Petitioner's familial relations. Thus, the court concluded, the admission of such testimony was proper under Rule of Evidence 404(B). *Id.*

Further, the First District noted that Dr. DeSilva testified in direct examination about Petitioner's prior hospitalizations and his improvement in that structured environment, largely due to his being [*50] forced to take medication regularly. The court disagreed with Judge Marsh's conclusion that such testimony "opened the door to allow the state to ask Dr. DeSilva about the effect of prison on Hughbanks's conduct or to permit the state to use Hughbanks's incarceration to rebut Dr. DeSilva's testimony that Hughbanks was mentally ill." 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *11. Nonetheless, the First District concluded that the admission of evidence of Petitioner's prior incarcerations did not violate his constitutional rights, and overruled the Thirteenth Assignment. *Id.* Finally, the Fourteenth Assignment related to the State's asking Dr. DeSilva, during the penalty phase of the trial, whether he thought that Petitioner was legally insane at the time he committed the crimes. The First District concluded that, even though Petitioner had not been permitted to raise an insanity defense, among the mitigating factors to consider was whether Petitioner had the mental capacity "to appreciate the criminality of [his] conduct or to conform his conduct to what was legally required." 1999 Ohio App. LEXIS 5789, [WL] at *12., citing OHIO REV. CODE § 2929.04(B)(3). Accordingly, the appellate court held that Petitioner was not unfairly prejudiced by the cross-examination of Dr. DeSilva, and overruled the [*51] Fourteenth Assignment, as well. *Id.*

Having rejected all Assignments of Error, the First District undertook its statutorily-required three-part analysis for death penalty cases, specifically, whether: (1) "the evidence supports the finding that the aggravating circumstances were established beyond a reasonable doubt"; (2) "the aggravating circumstances found by the jury outweigh the mitigating factors"; and (3) "the death sentence is appropriate after considering whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *12, citing Ohio Revised Code § 2929.05. The court

concluded that, in light of Petitioner's confession to Millstone and Filippelli and admissions in open court, the State had proven beyond a reasonable doubt the aggravating circumstances for which he was convicted:

> (1) the offense was committed to avoid detection . . . ;
>
> (2) the offense was part of a course of conduct involving the purposeful killing of two or more persons; and
>
> (3) the offense was committed by Hughbanks as the principal offender while he was also committing or attempting to commit aggravated burglary.

Id., citing Ohio Revised Code § 2929.04(B)(3, 5, 7). The First District held that the State had proved beyond a reasonable doubt [*52] that the aggravating factors outweighed the mitigating circumstances. Specifically, "[n]o credible evidence was presented . . . to establish that the murders of the Leemans were a product of his psychological malfunctioning." 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *13. Finally, the court concluded "that Hughbank's [*sic*] sentence is neither excessive nor disproportionate to the death sentence imposed in similar cases in this district[,]" and affirmed Petitioner's conviction and sentence. 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *14.

2. Supreme Court of Ohio

Hughbanks then appealed to the Supreme Court of Ohio, raising the same fifteen claims he had made in the court of appeals. *State v. Hughbanks*, 99 Ohio St. 3d 365, 2003--Ohio-4121, 792 N.E.2d 1081. The court independently reviewed and rejected each of the Propositions. *Id.* The court then conducted its own independent analysis, pursuant to Ohio Revised Code § 2929.05, and concluded summarily that the State had proved the aggravating circumstances beyond a reasonable doubt. *Id.*, ¶ 106. After examining the evidence put forward by Petitioner in the mitigation phase, and evidence proffered by the State in rebuttal, the court found "nothing in the nature and the circumstances of the offenses to be mitigating." *Id.*, ¶ 134. While the court accorded some weight to Petitioner's age at the time of the offense (twenty-one), expression [*53] of remorse, and history of mental illness, it concluded that "the aggravating circumstances in each count outweigh the mitigating factors beyond a reasonable doubt. Hughbanks's course of conduct in multiple killings during the course of burglarizing the Leeman home is a grave aggravating circumstance. Hughbanks's mitigating evidence pales in significance when compared with the aggravating circumstances." *Id.*, ¶ 144. Finally, the court, noting that death sentences had been imposed and carried out in factually similar cases involving "'course of conduct' murders" and "other aggravated-burglary murder[,]" *id.*, ¶ 145, affirmed the sentences imposed on Petitioner.

B. Application to Reopen Direct Appeal

On March 1, 2000, Petitioner, represented by David H. Bodiker and Lori Leon of the Ohio Public Defender's Office, filed an application with the First District to reopen his direct appeal, claiming ineffective assistance of appellate counsel (App'x, ECF No. 166-6, Page ID 5011; Third Amended Petition, ECF No. 213, Page ID 15917.) Petitioner claimed that he was unable to fully brief the alleged ineffective assistances due to the application's page limit. *Id.*, Page ID 5002, citing Ohio R. App. P. 26(B). Nonetheless, [*54] he argued that "appellate counsel were ineffective for failing to raise meritorious assignments of error, which constitute a 'threshold showing for obtaining permission to file new appellate briefs[.]'" *Id.*, Page ID 5003 n.8, quoting Ohio R. App. P. 26(B), Staff Note (Jul. 1, 1993, Amendment). Specifically, Petitioner claimed that counsel performed deficiently by failing to raise seventy-one meritorious assignments of error on appeal, and that Petitioner was prejudiced by those omissions. *Id.*, Page ID 5003-10. Moreover, of the fifteen assignments actually raised, Petitioner argued that counsel failed to develop adequate factual and legal support for all but the Seventh, Eighth, Ninth, and Eleventh Assignments. *Id.*, Page ID 5010-11.

On August 4, 2000, Petitioner filed a motion to recuse all trial and appellate judges in Hamilton County from presiding over his application to reopen his direct appeal. He argued that one of his assignments of error—"systematic racial and gender discrimination in the selection of forepersons for all grand juries that returned capital indictments in Hamilton County from 1982 through 1998"—created a situation in which the impartiality of the First District Judges might reasonably [*55] be questioned (App'x, ECF No. 166-14, Page ID 7615, 7616-17). Specifically, Petitioner noted that the Presiding Judge of the Court of Common Pleas was responsible for selecting the grand jury foreperson, and three of the First District Judges, Robert H. Gorman, Howard Sundermann, Jr., and Ralph Winkler, had previously served as judges in that court. *Id.*, Page ID 7616-17.

Petitioner claims that Judges Gorman, Sundermann, and Winkler having been "witnesses to the grand jury foreperson selection process[,]" were precluded from serving on the case, and the intricate associations among the Court of Common Pleas and First District Judges and them should disqualify all of them from presiding over Petitioner's application. *Id.*, Page ID 7617. That same day, Plaintiff moved to stay adjudication of his application until a decision was rendered on the motion to recuse. *Id.*, Page ID 7701.

On September 7, 2000, the First District overruled both the Motion to Recuse and Application to Reopen (App'x, ECF No. 166-14, Page ID 7907). As to the Application, the First District held that "[a]ll of the seventy-one assignments except one consist of claims of error that allegedly occurred at trial." *Id.*, Page [*56] ID 7907-08. The First District concluded that because, under Ohio law, an error occurring prior to or during trial cannot be grounds for ineffective assistance of appellate counsel, those seventy claims could not be the basis for an application to reopen. *Id.*, Page ID 7908, citing *State v. McNeil*, 83 Ohio St. 3d 457, 459, 1998- Ohio 38, 700 N.E.2d 613 (1998). The remaining claim of error, that the First District lacked jurisdiction to adjudicate Petitioner's direct appeal, was summarily overruled as unsupported. *Id.* "Further," the court concluded, Petitioner's "claims can be raised in his current direct appeal to the Ohio Supreme Court[,]" rendering premature any adjudication on their merits. *Id.* Finally, Petitioner's lack of argument as to how those seventy-one omissions by appellate counsel actually prejudiced him meant that he had failed to show good cause for reopening his direct appeal. *Id.*, quoting Ohio R. App. P. 26(B)(2)(d).

On October 18, 2000, Petitioner appealed to the Supreme Court of Ohio the denial of his Application and Motion to Recuse (App'x, ECF No. 166-15, Page ID 7914). Petitioner raised seven Propositions of Law in support of his appeal, arguing that:

> 1. The impartiality of all of the First District Judges "might reasonably be questioned because they have personal knowledge [*57] of disputed evidentiary facts." (App'x, ECF No. 166-15, Page ID 7956 (internal quotation marks and citation omitted)). In light of this partiality, the failure of the Judges to recuse themselves deprived Petitioner of his federal and state constitutional right to equal protection. *Id.*, Page ID 7958-59.
>
> 2. As the judgment entered by Judge Marsh against Petitioner failed to include his plea of not guilty, the entry failed to comply with Ohio Rule of Criminal Procedure 32. Consequently, the judgment entry "is a void entry, and fails to confer jurisdiction on the appellate court." (App'x, ECF No. 166-15, Page ID 7960, citing OHIO CONST. art. IV, § 3(B)(2); Ohio Revised Code § 2953.02; OHIO CRIM. R. 32). In light of the above, the First District's affirmation of his conviction and death sentence violated his rights to due process and equal protection, and constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Id.*, Page ID 7961.
>
> 3. His application complied with Appellate Rule 26 by: identifying seventy-one meritorious assignments of error that could have been raised on direct appeal but were not; and claiming that appellate counsel was ineffective in raising those errors (App'x, ECF No. 166-15, Page ID 7963). Therefore, the First District's "holdings that [*58] (1) the application failed to allege appellate counsel's ineffectiveness; and (2) claims of errors that occurred at trial do not allege appellate counsel's ineffectiveness, violate the plain meaning of Appellate Rule 26(B)'s language as well as Appellant's federal and state constitutional and statutory rights[.]" *Id.*, Page ID 7964.
>
> 4. Despite the State not opposing Petitioner's requests for an evidentiary hearing, the right to depose his trial and direct appellate counsel, funds to retain an expert witness, and the appointment of counsel for the evidentiary hearing and Appellate Rule 26(B) proceedings, the First District denied those requests, finding that they were rendered moot after the court denied his Motion to Recuse and Application to Reopen (App'x, ECF No. 166-15, Page ID 7966). Contrary to the First District's finding, however, those requests were essential to his being able to pursue the merits of the claim ineffective assistance of appellate counsel that undergirded his Rule 26(B) Application. *Id.*, Page ID 7967-68. Thus, the First District's denial of the above requests violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. *Id.*, Page ID 7967.
>
> 5. Claims of ineffective assistance of appellate counsel raised in Rule 26(B) Application [*59] could not have been raised on Petitioner's direct appeal, as the ruling on the Application had not been issued prior to Petitioner filing his appellate brief with the Supreme Court of Ohio (App'x, ECF No. 166-15, Page ID 7969). Moreover, appellate counsel's failure to raise the issues to the First District in his direct appeal meant that Petitioner could not raise them to the Supreme Court of Ohio. *Id.*, Page ID 7969-70 (citations omitted). Also, appellate counsel may not raise their own ineffectiveness on petition

to the Supreme Court of Ohio, *id.*, Page ID 7970, and the record was replete with errors by appellate counsel, namely: (1) failure to file appellate brief in a timely manner; (2) conceding during oral argument that they did not raise all meritorious issues; and (3) counsel's motion to withdraw, which the court denied. *Id.*, Page ID 7971-73. Finally, the First District did not consider Petitioner's letter to the court asking that counsel be replaced; "[a] court's failure to inquire into the appellant's allegations constitutes an error as a matter of law." *Id.*, Page ID 7973-74, citing *U.S. v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990); *State v. Carter*, 128 Ohio App. 3d 419, 423, 715 N.E.2d 223 (4th Dist. 1998).

6. The requirement of Appellate Rule 26(B)(2)(c) that a Rule 26(B) application contain "[o]ne or more assignments of [*60] error or arguments in support[,]" is stated in the disjunctive, such that listing assignments was sufficient. In the alternative, the ten-page limit on such applications unduly prejudices capital defendants, in violation of the Fifth, Sixth, and Fourteenth Amendments (App'x, ECF No. 166-15, Page ID 7975-76 (emphasis in original)).

7. Appellate counsel's failure to raise all non-frivolous assignments of error, and thus, failure to guard against default, "met the threshold showing for obtaining permission to file new appellate briefs[.]" (App'x, ECF No. 166-15, Page ID 7977 (internal quotation marks omitted), citing APP. R. 26(B) Staff Note (Jul. 1, 1993 amendment)). Specifically, appellate counsel's failures to contest: the First District's jurisdiction to hear the direct appeal: the issue of the racially biased nature of grand jury foreperson selection; the over-prosecution of women and racial and ethnic minorities; and the under-representation of women and minority groups on grand and petit juries, deprived Petitioner of his rights to due process and equal protection, and against cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. *Id.*, Page ID 7978-83. Appellate counsel's failure to challenge trial counsel's [*61] conduct during *voir dire*, opening statements, and closing arguments meant trial counsel's constitutionally defective assistance could not be reviewed on appeal, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. *Id.*, Page ID 7983-8000. Appellate counsel also failed to challenge trial counsel's constitutionally deficient performance in the pretrial and trial phases, also in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. *Id.*, Page ID 8000-28. Moreover, Petitioner argues, appellate counsel was ineffective in failing to raise as error trial counsel's failure to object to the imposition of a death sentence as violative of binding international law. *Id.*, Page ID 8028-35. Finally, Petitioner claims that appellate counsel's failure to competently pursue the assignments of error actually raised deprived him of a meaningful appeal. *Id.*, Page ID 8035-36.

The Supreme Court of Ohio summarily declined to accept the appeal for review. *State v. Hughbanks*, 100 Ohio St.3d 1484, 2003-Ohio-5992, 798 N.E.2d 1093.

C. First Post-Conviction Petition

1. Application and Denial at Trial Court

On July 24, 2000, Petitioner filed a Petition to Vacate and/or Set Aside Judgment and/or Sentence Pursuant to Ohio Revised Code § 2953.21 ("Initial Petition") (App'x, ECF No. 166-16, Page ID 8192). Therein, Petitioner raised forty-one claims for relief, which [*62] were a combination of alleged errors by the grand jury, State, and trial court in the pretrial and trial phases of his case, ineffective assistance of counsel during those phases, and the unconstitutionality of the death penalty as administered in Ohio. *Id.*, Page ID 8195-8280. Petitioner filed an amended petition on October 20, 2000, adding a forty-second claim for relief and new supporting exhibits (App'x, ECF No. 166-21, Page ID 9443, 9555-56).

On May 8, 2001, the trial court filed Findings of Fact and Conclusions of Law denying all forty-two claims for relief, and dismissed the Initial Petition (App'x, ECF No. 166-23, Page ID 10049-62). The court evaluated the First through Fifth Claims which pertained to the process by which grand jury forepersons in Hamilton County, are selected, errors specific to the grand jury's indictment of Petitioner, and counsel's failure to raise such claims at trial. Judge Marsh held that such claims could have been raised at trial or, for ineffective assistance of trial counsel, on direct appeal, but were not. Consequently, she concluded, all five claims were barred by *res judicata*. *Id.*, Page ID 10050-51, citing *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). Claims Six through Eight, Twenty-Five, [*63] and Thirty-Seven all pertained to trial counsel's alleged failure to introduce evidence of Petitioner's substance abuse, and supposedly deficient performance in voir dire. Judge Marsh similarly concluded that those claims all should have been raised on direct appeal, and thus were barred by *res judicata*. *Id.*, Page ID

10051-52. The trial court concluded that the evidence proffered by Petitioner did not support his claims that the State engaged in misconduct by failing to disclose favorable evidence, and thus the Ninth, Eleventh, and Thirty-Eighth Claims, in addition to being procedurally defaulted, failed on their merits. *Id.*, Page ID 10052-53. Judge Marsh ruled that Petitioner's Tenth Claim—"that the jurors neither understood nor followed the mitigation phase instructions"—was procedurally defaulted and legally erroneous, since "[t]he 'aliunde rule' prevents consideration of juror affidavits." *Id.*, Page ID 10053, citing OHIO R. EVID. 606(B); *State v. Robb*, 88 Ohio St. 3d 59, 2000- Ohio 275, 723 N.E.2d 1019 (2000).

As to Petitioner's Twelfth, Thirteenth, and Fourteenth Claims for Relief, which addressed the racially disproportionate imposition of the death penalty in Ohio, and the death penalty statute's alleged contravention of international law, the trial court held that, [*64] in addition to the claims being procedurally defaulted, Petitioner had not made a prima facie showing of systemic bias in the death penalty's imposition, and that the Ohio death penalty statute had not been held to violate international law (App'x, ECF No. 166-23, Page ID 10053-54). Similarly, the trial court examined Petitioner's Thirty-Ninth and Fortieth Claims, in which he asserted that Ohio's administration of the death penalty constitutes cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. The court found the claims unavailing, both because the Supreme Court of Ohio had held that Ohio's lethal injection protocol does not violate the Eighth Amendment, and because the claims were barred by *res judicata* due to Petitioner's failure to raise them on direct appeal. *Id.*, Page ID 10060-61. Further, Judge Marsh concluded that trial counsel's decisions, actions, and inactions in the pretrial, guilt, and mitigation phases fell within the ambit of acceptable trial strategy; thus, she held, Claims Fifteen through Twenty, Twenty-Two through Thirty-Five, and Forty-Two were without merit. Moreover, she concluded, all of those claims were available to Petitioner on direct appeal, and to the extent that appellate [*65] counsel failed to raise those issues, they were barred by *res judicata*. *Id.*, Page ID 10054-60, 10061-62.

In his Thirty-Sixth Claim for Relief, Petitioner argued that the trial court violated his Fifth, Sixth, and Fourteenth Amendment rights by appointing Dr. Schmidtgoessling to evaluate him (App'x, ECF No. 166-23, Page ID 10060). The trial court held that Petitioner's ability to use the testimony of Drs. Raju and DeSilva in mitigation obviated any prejudice that he might have incurred by the Dr. Schmidtgoessling's appointment, evaluation, and testimony. Further, the court noted, the failure to raise this claim at trial or on direct appeal meant that it was procedurally defaulted. *Id.* Finally, Judge Marsh held that, "because none of his previous claims, either individually or collectively, entitle [Petitioner] to post-conviction relief[,]" his Forty-First Claim—cumulative effect of Claims One through Forty—"is without merit." *Id.*, Page ID 10061. "For all the foregoing Findings of Fact and Conclusions of Law," the trial court denied Petitioner's First Post-Conviction Petition. *Id.*, Page ID 10062.

2. First District Court of Appeals

Petitioner appealed the trial court's denial of his First Petition to the First District, [*66] and raised three Assignments of Error. *First*, he argued that Judge Marsh erred in failing to recuse herself and disqualify all Court of Common Pleas Judges from adjudicating Petitioner's post-conviction proceedings (App'x, ECF No. 166-24, Page ID 10153). He claimed that all the judges in the trial court were witnesses to the grand jury foreperson selection process, and their impartiality could reasonably be called into question. Thus, he argued, the judges' recusals were mandatory, and their failures to do so violated his constitutional rights to due process and equal protection. *Id.*, Page ID 10156-59. *Second*, Petitioner claimed that he presented sufficient facts to support his claims, drawn from evidence *dehors* the record, to justify reopening his appeal, and thus, the trial court erred in dismissing his First Petition. *Id.*, Page ID 10160-76.

Third, Petitioner argued that the trial court's application of *res judicata* to his meritorious claims was improper, and that the denials of his requests for discovery and an evidentiary hearing violated his Fifth, Sixth, and Fourteenth Amendment rights (App'x, ECF No. 166-24, Page ID 10177). Specifically, he claimed that his assertions of prosecutorial misconduct and "of ineffectiveness [*67] [of trial and appellate counsel] required the trial court to reconstruct the circumstances of counsel's performance[.]" Instead, the trial court denied discovery and an evidentiary hearing on these claims. *Id.*, citing *Strickland*, 466 U.S. at 689. He argued that the claims in his First Petition could not have been fully and fairly raised on direct appeal, and thus, should not have been procedurally defaulted. *Id.*, Page ID 10177-82. Finally, he argued that the plain language of the statute for post-conviction petitions "created a presumption in favor of an evidentiary hearing, and against summary dismissal. The petition, files, and records of this case did not show that Appellant was not entitled to relief." *Id.*, Page ID 10182, citing Ohio Revised Code § 2953.21(E). In light of Petitioner's prima facie showing, the trial court's denial of his requests for discovery and

an evidentiary hearing "operated so as to deny [Petitioner] a fair post-conviction conviction proceeding in the trial court." Id., Page ID 10182-83.

On January 17, 2003, the First District rejected all three Assignments of Error, and affirmed the trial court's denial of the First Petition. As to the issue of disqualification, the First District noted that Petitioner had "pursued [*68] the matter . . . by filing with the Ohio Supreme Court an affidavit of bias and prejudice. On March 30, 2001, the chief justice of the supreme court denied the prayer for disqualification." *State v. Hughbanks*, 1st Dist. Hamilton No. C-010372, 2003-Ohio-187, P 6 (Jan. 17, 2003). As "the Ohio Constitution confers upon the Chief Justice of the Ohio Supreme Court or his designee the authority to 'pass upon the disqualification of any judge of the . . . courts of common pleas[.] " the First District lacked jurisdiction to review Petitioner's claim. *Id.*, PP 7-8, quoting **OHIO CONST.** art. IV, § 5(C).

After noting that the trial court "premised its denial of the bulk of Hughbanks's claims for relief on the doctrine of res judicataM[,]" 2003--Ohio-187, P12, the First District noted that

> A postconviction petitioner may resist dismissal of a postconviction claim under the doctrine of res judicata by submitting outside evidence in support of the claim. But the mere submission of such evidence will not, in and of itself, preclude the application of the doctrine of res judicata to deny the claim.

Id., P 13. Rather, that evidence "must materially advance the claim beyond mere hypothesis and a desire for further discovery[,]" such that the "claim could [not] have been determined on direct appeal from the judgment of conviction, based upon information [*69] contained in the trial record." *Id.* (internal quotation marks omitted), citing *State v. Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169 (1982), syllabus; *Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 at paragraph nine of the syllabus; *State v. Coleman*, 1st Dist. Hamilton No. C900811, 1993 Ohio App. LEXIS 1485, at *21 (Mar. 17, 1993)). The appellate court reviewed the additional evidence submitted in support of those claims not pertaining to ineffective assistance of trial or appellate counsel—Claims One through Three, Ten, Twelve, Thirty-Six, Thirty-Nine, and Forty—and concluded that that evidence was either in existence and available to Hughbanks at the time of trial, or did not otherwise constitute acceptable evidence dehors the record. Thus, the trial court barring those claims under res judicata was appropriate. *Id.*, PP 15, 19, 21-24.

As to "the balance of [Petitioner's] claims for relief[,]" 2003-Ohio-187, P 25, the court noted that the Supreme Court of Ohio has "held that *res judicata* is an appropriate basis for the dismissal of a postconviction claim alleging counsel's ineffectiveness at trial when the petitioner was represented by new counsel on appeal and the issue could fairly have been determined without evidence *dehors* the record." *Id.* P 27, citing *Cole*, 2 Ohio St. 3d at 112, syllabus. As to Claims Fourteen, Seventeen through Nineteen, Twenty-One, Twenty-Two, Twenty-Nine, Thirty, and Thirty-Two through Thirty-Four, the First District held that, even [*70] though Petitioner supported them with evidence outside the record, "these claims . . . presented matters that could fairly have been determined on direct appeal without resort to such evidence. We, therefore, hold that [those claims] . . . were subject to dismissal under the doctrine of *res judicata*." *Id.* As to Petitioner's Fourth and Fifth Claims, ineffective assistance due to trial counsel's failure to object to improprieties in the grand jury foreperson selection and the indictment, *id.*, P 28, the court held that Petitioner had not established "a prima facie case of purposeful discrimination in the selection of grand *jurors[,]*" versus the selection of a grand jury foreperson. *Id.*, P 39 (emphasis added). Further, the statutory requirement that all counts of the grand jury indictment be signed by the foreperson is procedural, not substantive. *Id.*, P 42, citing OHIO REVISED CODE §§ 2939.02, 2939.20; *State v. Brown*, 38 Ohio St. 3d 305, 528 N.E.2d 523 (1988), paragraph one of the syllabus. Thus, any failure by Mahaffey to sign all counts of the indictment did not render the indictment unlawful, and any failure by Petitioner's attorneys to raise these issues at trial "cannot be said to have violated a substantial duty to their client." *Id.*, PP 39, 43.

The First District overruled Petitioner's Seventh, Eighth, and Thirty-Seventh [*71] Claims for Relief, pertaining to allegedly deficient performance by trial counsel during voir dire, finding them "unsupported by evidence outside the record or . . . matters that could have been raised on direct appeal. These claims were, therefore, subject to dismissal under the doctrine of res judicata." 2003-Ohio-187, P 47. Petitioner's Sixth and Thirty-Fifth Claims pertained to alleged failure to introduce: evidence of his history of alcohol abuse; alleged belief by law enforcement that Petitioner was drunk when he committed the crimes; and the consideration Larry received for implicating Petitioner. *Id.*, P48. The court considered the post-conviction affidavits of Gary Sr. and Larry, in which they stated that jealousy and self-interest, respectively, motivated their identifying the Petitioner as the perpetrator, rather than any belief that he actually committed the crimes. *Id.*, PP 49-50. Yet, the First District concluded that, in light of the strong evidence against Petitioner, including his detailed confession, calling Gary Sr. and Larry to testify as to these matters would not have changed the jury's decisions to convict Petitioner and sentence him to death. Thus, the Court

concluded that the trial court "properly [*72] dismissed the sixth and thirty-fifth claims without an evidentiary hearing." *Id.*, P 52 (citations omitted).

Similarly, as to trial counsel's alleged failure to introduce available mitigating evidence in the penalty phase, the First District affirmed the trial court's conclusions that counsel provided competent representation in that phase, and that none of the evidence supposedly omitted would have changed the jury's decision to recommend a death sentence. 2003-Ohio-187, P 54. Thus, the First District concluded, Judge Marsh's dismissal of Claims Sixteen, Twenty, Twenty-Three through Twenty-Eight, Thirty One, and Forty-Two without an evidentiary hearing was proper. *Id.*, P 55. The appellate court then reviewed Petitioner's Ninth, Eleventh, Fifteenth, and Thirty-Eighth Claims for Relief, in which he alleged prosecutorial misconduct in failing to turn over evidence that contradicted the State's theory of the case, and ineffective assistance of counsel in failing to unearth that evidence. *Id.*, PP 56, 59. The court noted that "[t]he pivotal issue at trial was not how the murders had been committed, but who had committed them. The bulk of the undisclosed evidence related to the particulars of the murders, rather than to Hughbanks's identity [*73] as their perpetrator." *Id.*, P 60. Therefore, the court concluded, "the absence of the undisclosed evidence was not outcome-determinative," and Petitioner "was denied neither a fair trial by the prosecution's failure to disclose it, nor the effective assistance of counsel by defense counsel's failure to discover it and to present it at trial." *Id.*, P 61, citing *Brady*, 373 U.S. at 87. Accordingly, the court held, those four claims, and his Forty-First Claim for Relief (cumulative error) for relief were without merit. *Id.*, P 62.

Finally, the First District noted that "[t]he postconviction statutes do not grant a postconviction petitioner the right to conduct discovery for the purpose of gathering evidence to establish an entitlement to an evidentiary hearing." 2003-Ohio-187, P 63, citing *State v. Byrd*, 145 Ohio App. 3d 318 (1st Dist. 2001).

As refusing to grant discovery could not have violated a constitutional right, the First District overruled Petitioner's Third Assignment of Error, and affirmed the Trial Judge's denial of the First Post-Conviction Petition. *Id.*, PP 64-65. The Supreme Court of Ohio declined jurisdiction over Petitioner's appeal. *State v. Hughbanks*, 100 Ohio St.3d 1484, 2003-Ohio-5992, 798 N.E.2d 1093.

D. *Atkins Petition*

1. Initial Proceedings

On June 9, 2003, Petitioner filed a new Post-Conviction Petition Pursuant to [*74] *Atkins v. Virginia, State v. Lott*, and Ohio Rev Code § 2953.21 ("*Atkins* Petition"), arguing that the State had failed to prove beyond a reasonable doubt that Petitioner was not mentally disabled (App'x, ECF No. 166-28, Page ID 10757). He argued that, given the evidence available at the time of trial—that Petitioner had a full-scale intelligence quotient ("IQ") score of seventy-three and had been adjudged to be mentally disabled by the Social Security Administration—the State's failure to prove his mental competence was not harmless error. *Id.*, Page ID 10758-59, 10769-84. Thus, he claimed, a new jury had to be empaneled to determine whether the State could prove beyond a reasonable doubt that Petitioner was not mentally disabled; if the State could not do so, he claimed, then *Atkins* precluded him from being executed. *Id.*, Page ID 10760-61, citing *Atkins*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

On July 9, 2003, the State moved to dismiss the *Atkins* Petition, arguing that: (1) even after *Atkins* and *Ring v. Arizona*, there is no Sixth Amendment right to a jury, rather than trial judge, adjudication of mental disability; (2) Petitioner was required to prove by a preponderance of the evidence that he was mentally disabled, and he had failed to rebut the presumption against [*75] a finding of disability, a presumption which is created by virtue of his IQ being above seventy; (3) Dr. Schmidtgoessling provided substantial evidence of record that Petitioner was not mentally disabled; and (4) Petitioner had failed to allege sufficient facts, with evidentiary support, such that an evidentiary hearing on the matter is appropriate (App'x, ECF No. 166-28, Page ID 10800-05, citing Ohio Revised Code § 2953.21; *Ring*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Atkins*, 536 U.S. at 321; *Lott*, 97 Ohio St. 3d 303, 305, 306, 2002-Ohio-6625, 779 N.E.2d 1011; *State v. Penkey*, 68 Ohio St. 2d 58, 428 N.E.2d 413 (1981)).

On December 9, 2003, the trial court granted the State's Motion to Dismiss, noting that, while James Raia, Ph.D., a Bureau of Disability psychologist, concluded in 1995 that Petitioner had a full-scale IQ of seventy-three, he also opined "that this low score may be due more to Hughbanks' alcohol/drug abuse and depression[,]" and "that although the results of the WAIS-R indicate Hughbanks' [s] mental ability falls in the borderline intellectual functioning range, the score is low in comparison to how he previously has functioned." (App'x, ECF No. 166-28, Page ID 10857). The court concluded that, because Hughbanks had not proffered evidence of significantly sub-average intellectual functioning or significant deficits in adaptive functioning, with onset prior to the age of eighteen, [*76] he had "not met the minimum threshold standards for demonstrating mental [disability] and, thus, is not entitled to an evidentiary hearing on this issue." *Id.*, Page ID 10858.

On appeal, Petitioner raised six Assignments of Error, claiming that the trial court erred when it: (1) denied Petitioner's Motion for Discovery; (2) denied his Motion for Funding a Mental Disability Expert; (3) presumed Petitioner not to be disabled because he had an IQ score over seventy in the past; (4) ruled that a defendant has the burden of proof to show by a preponderance of the evidence that he is mentally disabled; (5) denied his Motion for Evidentiary Hearing; (6) denied his motion for a new trial on the issue of mental disability (App'x, ECF No. 166-29, Page ID 10908-27). The First District affirmed the trial court's judgment that Petitioner's execution did not violate the Eighth Amendment, and that he was not entitled to a jury determination of mental disability—and thus, was not entitled to a new trial. *State v. Hughbanks*, 159 Ohio App. 3d 257, 2004-Ohio-6429, PP 19-20, 823 N.E.2d 544 (1st Dist.). However, it held that the trial court erred when it denied Petitioner's Motion for Evidentiary Hearing. Accordingly, it remanded the *Atkins* Petition with instructions to conduct such a hearing and to allow [*77] Petitioner to conduct discovery and retain an expert prior to that hearing. *Id.*, P 20. Petitioner appealed the unfavorable portions of the court's ruling to the Supreme Court of Ohio, which declined to exercise jurisdiction. *State v. Hughbanks*, 105 Ohio St. 3d 1500, 2005-Ohio-1666, 825 N.E.2d 623.

2. Proceedings on Remand

On remand, the trial court appointed "Paul Deardorff, Ph.D., at the request of the State of Ohio, to examine defendant Hughbanks and to prepare a report on the question of mental [disability]." (App'x, ECF No. 166-31, Page ID 11071). Judge Marsh later appointed J. Michael Harding, Ph.D., at the request of Petitioner, for the same purpose. *Id.*, Page ID 11085. On November 8, 2005, Dr. Deardorff and Nicole A. Leisgang, Psy.D., conducted psychological testing, including the Weschler Adult Intelligence Scale-Third Edition on Petitioner, and assessed a Verbal IQ score of ninety-three, Performance IQ score of seventy-eight, and a Full-Scale IQ score of eighty-six (App'x ECF No. 166-33, Page ID 11395). His results on the Wide Range Achievement Test-Revision 3 placed him in the seventh percentile for arithmetic, but in the sixty-first and seventy-ninth percentiles for reading and spelling, respectively. *Id.* Dr. Harding noted that, with the exception of the [*78] arithmetic and Performance IQ scores, Petitioner's scores were within the normal functioning ranges. *Id.*

On November 10, 2005, Dr. Deardorff submitted his report, concluding that, in light of his evaluation of Petitioner and review of educational and mental treatment records, "Hughbanks does not meet the diagnostic criteria for mental [disability]." (App'x, ECF No. 166-33, Page ID 1137576). On December 26, 2005, Dr. Harding submitted a more extensive evaluation of Petitioner, recapitulating his interview with Petitioner, who maintained his innocence as to the crimes for which he was convicted, but repeatedly denied that he was mentally disabled. *Id.*, Page ID 11377, 11393-94. Dr. Harding opined that Petitioner's judgment and insight appeared to be adequate, and that he was intellectually delayed only with respect to mathematics and general numeracy. *Id.*, Page ID 11395. Dr. Harding diagnosed Petitioner with Bipolar I Disorder, Alcohol and Cannabis Abuse, and "Psycho-social Stressors, Severe." *Id.*, Page ID 11396. Dr. Harding reasoned that:

> His poor performance on the IQ test at the time of this 1995 application for disability benefits may have been affected by symptoms of depressed mood [*79] and/or substance abuse. Regardless of his poor performance on the IQ test at that time, it is believed that the test scores obtained in 1995 were not representative of Mr. Hughbanks' [s] actual intellectual abilities.

(App'x, ECF No. 166-33, Page ID 11397). Dr. Harding concluded that, pursuant to the criteria in *Atkins* and *Lott*, Petitioner was not mentally disabled. *Id.*

The trial court conducted an evidentiary hearing on March 13, 2006 (App'x, ECF No. 1671, Page ID 11444). On May 16, 2007, Judge Marsh issued a one-page entry finding that, based on the psychological reports, Petitioner "is not mentally [disabled] and the second claim in his *Atkins* post-conviction petition is denied. The Court further denies the defendant's request to amend his

Atkins petition." *Id.*, Page ID 11413. Petitioner raised three Assignments of Error in appealing that decision, arguing that the trial court erred when it denied: (1) his motion for leave to amend his *Atkins* Petition to include mental illness and cumulative error claims; and (2) his request for an additional evidentiary hearing on his claim that the severity of his mental illness made execution impermissible under the Ohio and United States Constitutions. [*80] *Id.*, Page ID 11502-10. On September 3, 2008, the First District affirmed the decision of the trial court, holding that "*Atkins* does not provide authority for Hughbanks's claim in his motion to amend his petition that his mental illness precluded his execution." *Id.*, Page ID 11537. Moreover, the court concluded, Petitioner's motion to amend had failed to comply with the statutory time restrictions and jurisdictional requirements to amend his *Atkins* petition. Thus, even if the trial court had granted Petitioner leave to amend, it would have lacked jurisdiction to hear new claims. *Id.*, citing **OHIO REV. CODE §§** 2953.21, 2953.23. Petitioner raised a single Proposition of Law to the Supreme Court of Ohio: that the execution of a severely mentally ill individual violates the Eighth Amendment to the U.S. Constitution and Article One, Section Nine of the Ohio Constitution. *Id.*, Page ID 11555. The court did not accept his appeal. *State v. Hughbanks*, 121 Ohio St. 3d 1425, 2009-Ohio-1296, 903 N.E.2d 325.

E. Initial Petition

On February 12, 2007, Petitioner filed his in Petition for Writ of *Habeas Corpus* with this Court (ECF No. 16). On December 3, 2009, after conducting discovery pertaining to the claims raised in his initial Petition, Petitioner moved to remand his Third and Tenth Claims for Relief—the State's alleged failure to turn over [*81] all exculpatory materials, and supposed ineffective assistance of trial counsel, respectively—to the state court (Motion, ECF No. 100, Page ID 1596, 1614-15, citing *Strickler v. Greene*, 527 U.S. 263, 264, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Strickland*, 466 U.S. at 687-88, 690; *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Brady*, 373 U.S. at 86 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)). On January 29, 2010, this Court granted the Petitioner's Motion, noting that: (1) it was undisputed that Petitioner's Third and Tenth Claims were, in part, unexhausted; (2) "principles of comity and federalism require that unexhausted claims be decided in the first instance by the state courts"; and (3) the State had raised the defense of exhaustion and "concede[d that] there is a remedy-a subsequent post-conviction petition under Ohio Rev. Code § 2953.23." (Order, ECF No. 106, Page ID 1701, citing *0 'Guinn v. Dutton*, 88 F.3d 1409, 6th Cir. 1996 (per curiam) (en banc)). The Court stayed all proceedings with respect to the Initial Petition pending exhaustion of the Third and Tenth Claims. *Id.*, Page ID 1702.

F. Second Post-Conviction Petition

On April 1, 2010, Petitioner filed a Second Post-Conviction Petition with the trial court, raising his *Brady* and *Strickland* claims discussed above, and supporting them with documents and deposition transcripts produced during discovery in this case. (Third Amended Petition, ECF No. 213, Page ID 15935-37, citing App'x, ECF No. 167-2, [*82] Page ID 11587-11631,11633-800, 1190912311; App'x, ECF No. 167-3, Page ID 12312-12435; App'x, ECF No.167-5, Page ID 1389914148). The State moved to dismiss his Second Post-Conviction Petition, and the trial court did so (App'x, ECF No. 167-5, Page ID 14185). The only Findings of Fact made by Judge Marsh were the names of the attorneys who represented Petitioner at trial (Schmidt and Wenke), direct appeal (Aubin and Freeman), First Post-Conviction Petition (Leon), and the instant. Second Post-Conviction Petition (Thomas Kraemer and Dennis Sipe). *Id.*, Page ID 14185-86. However, Judge Marsh made Conclusions of Law as to each Ground for Relief, *id.*, Page ID 14186, concluding that she was without jurisdiction to review Petitioner's First through Fourth Grounds for Relief (relating to the trial court's refusal to suppress his confession, refusal to strike jurors for cause, and closing the courtroom during the jury charge, as well as discrepancies between the verdict forms and jury instructions), as Petitioner had "failed to meet the prerequisites of a successive petition to vacate under **[OHIO REVISED CODE §** 2953.23(A)]" and the claims were otherwise barred by *res judicata*. *Id.*, Page ID 14186-88, citing *Perry*, 10 Ohio St. 2d at 176.

As to his Fifth [*83] Ground, the alleged failure by the State to turn over favorable evidence, the Court held that, because Petitioner had raised similar issues in his First Post-Conviction Petition, the law of the case doctrine prevented him from re-raising such claims (App'x, ECF No. 167-5, Page ID 14189). Moreover, the information that the State supposedly suppressed "was not exculpatory[,] and the failure to disclose such information was not 'material' in that it could not reasonably be taken to put the whole case in [such] a different light as to undermine confidence in the verdict." *Id.*, Page ID 14189-90 citing *U.S. v. Bagley*, 473 U.S. 667 (1985); *State v. Davis*, 116 Ohio St. 3d 404, 2008-Ohio-2, PP 338-39, 880 N.E.2d 31. The trial court

denied his Ninth Ground, supposed suppression of evidence of the fingerprints from the crime scene not matching those of Petitioner, on identical grounds. *Id.*, Page ID 14193. It denied Petitioner's Sixth Ground, the State's alleged failure to turn over evidence that impeached the testimony of Leonard and Kemper, concluding that the evidence was not material. *Id.*, Page ID 14191. Specifically, the State did not question Leeman about whether Mrs. Leeman's jewelry was stolen, and thus, did not give off a false impression that a theft occurred, beyond the undisputed theft of [*84] Mr. Leeman's wallet. Moreover, the fingerprint evidence recovered was used only reactively to eliminate individuals as suspects. *Id.*

Judge Marsh overruled the Seventh and Eighth Grounds, relating to the supposed failure to disclose information regarding former suspects, including Burt Leeman, on the grounds that "[a] defendant does not have the right to the names or information of those persons who the State at one time may have considered to be suspects." *Id.*, Page ID 14192, citing *State v. Ayers*, 8th Dist. Cuyahoga No. 79134, 2002-Ohio-4773, 26 (Sept. 12, 2002). Similarly, as to Petitioner's Tenth Ground for Relief, in which he claimed that the State failed to disclose the statements of individuals whose descriptions of the assailant did not match that of Petitioner, Judge Marsh held that, in addition to the claim being barred by the law of the case doctrine and *res judicata*, there was "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Id.*, Page ID 14194, quoting *Moore v. Illinois*, 408 U.S. 786, 795, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972); *citing U.S. v. Mullins*, 22 F.3d 1365, 1372 (6th Cir. 1994). Thus, "[i]nformation gathered from witnesses about persons seen near the Leeman home near or around the time of the murders merely amounted to information gathered as part of the investigation [*85] and was not *Brady* material." *Id.* The trial court denied Petitioner's Eleventh Ground for Relief, cumulative error, as none of Petitioner's *Brady* Grounds for Relief was meritorious. *Id.*, Page ID 14195, citing *State v. Gau*, 11th Dist. Lake No. 2004-L-020, 2005--Ohio-4906 (Sept. 16, 2005); *State v. Mills*, 1st Dist. Hamilton No. C-930817, 1995 Ohio App. LEXIS 910, 1995 WL 109127 (Mar. 15, 1995).

Judge Marsh summarily rejected Petitioner's Twelfth Ground, alleged prosecutorial "misconduct by knowingly using false testimony and making false statements to the jury[,]" both pursuant to law of the case doctrine and because Petitioner "failed to establish that prosecutors knowingly used or made false statements to the jury." (App'x, ECF No. 167-5, Page ID 1419596). Finally, as to the Thirteenth and Fourteenth Grounds, alleged ineffective assistance due to trial counsel failing: to present certain evidence; to challenge the grand jury; or to perform competently during the motion to suppress hearing or on cross-examination, the trial court held that, in addition to those claims being barred by the law of the case doctrine and *res judicata*, Petitioner "failed to show that trial counsel violated an essential duty that resulted in prejudice." *Id.*, Page ID 14196-97, citing *Strickland*, 466 U.S. at 668.

On direct appeal, Petitioner raised ten Assignments of Error, [*86] arguing that the trial court erred when it failed to find that Ohio's post-conviction statutes comported with the Ohio and U.S. Constitutions (App'x, ECF No. 167-5, Page ID 14301). He also claimed that Judge Marsh erred by: not allowing him leave to conduct discovery; refusing to provide funding for experts; finding that he had not met the statutory threshold for a second or successive petition; and not granting relief or leave to conduct discovery on the fourteen Grounds for Relief raised. *Id.*, Page ID 1430208. On March 6, 2013, the First District overruled all ten assignments, noting that Ohio's post-conviction statutes have been repeatedly held to satisfy the United States Constitution's guarantee of due process and the "due course of law" and "open courts" provisions of the Ohio Constitution. *Id.*, Page ID 14430, citing *State v. Bies*, 1st Dist. Hamilton No. C-020306, 2003-Ohio-442, PP 1215 (Jan. 31, 2003); *State v. Fautenberry, Pt* Dist. Hamilton No. C-971017, 1998 Ohio App. LEXIS 6415 (Dec. 31, 1998)).

The appellate court also held Petitioner had failed to file his petition within the time specified by statute, and failed to demonstrate, by clear and convincing evidence, that "'but for' the claimed constitutional errors, 'no reasonable fact finder would have found him guilty of the offenses of which he was convicted or . . . would have [*87] found him eligible for the death sentence'" (App'x, ECF No. 167-5, Page ID 14431 (alterations removed), quoting Ohio Revised Code § 2953.23(A)(1)(b); citing Ohio Revised Code § 2953.23(A)(2)).[4] Thus, the trial court lacked jurisdiction to consider the new claims raised in his second petition. Finally, "[b]ecause his petition was subject to dismissal, Hughbanks was not entitled to discovery or to the

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[4] A petition for post-conviction relief:

> [S]hall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. This time period was changed from 180 days in 2014 H 663.

funding for experts to help develop his postconviction claims." *Id.*, citing **OHIO REV. CODE** §§ 2953.21(C), 2953.23(A); *Bies*, 2003-Ohio-442, PP 9-11.

Petitioner raised ten Propositions of Law in his appeal to the Supreme Court of Ohio, arguing that the ineffective assistance of his trial counsel, the State's failure to disclose exculpatory evidence and use of false or misleading testimony, Judge Marsh's refusal to strike certain jurors for cause, and her decision to close the courtroom during the jury charge, violated Petitioner's rights under [*88] the Fifth, Sixth, and Fourteenth Amendments (App'x, ECF No. 167-5, Page ID 1444445). Petitioner also claimed that the trial court's refusal to grant relief, allow discovery, or permit funds for retention of experts as to her claims for relief violated her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. *Id.*, Page ID 14445. Petitioner also argued that the statute governing post-conviction petitions violates his rights under the Ohio and U.S. Constitutions, *id.*, citing Ohio Revised Code § 2953.23), and that, the claims in his Second Post-Conviction Petition met the gatekeeping criteria of Ohio Rev. Code § 2953.23(A). Thus, he claimed that, he was entitled to adjudication of those claims on their merits by the trial court. *Id.* On May 20, 2015, the Supreme Court of Ohio summarily declined to accept Petitioner's appeal, *id.*, Page ID 14542, at which time Petitioner's claims became ripe for litigation in this Court.

III. LEGAL STANDARDS

A. 28 U.S.C. § 2254

As Petitioner is imprisoned based on a state court judgment, he may petition for a writ of habeas carpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petition "shall not be granted with respect to any claim" that:

> [W]as adjudicated on the merits in State court proceedings unless the [*89] adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented[.]

28 U.S.C. § 2254(d). A habeas carpus petitioner must also satisfy additional procedural requirements, including but not limited to exhaustion of State court judicial remedies. 28 U.S.C. § 2254(b). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, the Court's review of claim adjudicated on its merits in a State court proceeding is sharpy circumscribed; "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A state court may be found to have acted "contrary to" federal law in two ways: (1) if the state court's decision is "substantially different from the relevant precedent" of the U.S. Supreme Court; or (2) if "the state court confronts a set of facts that are materially indistinguishable from a decision of [*90] [the U.S. Supreme] Court and nevertheless arrives at a result different from [U.S. Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405, 406, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2006). A state court does not act contrary to federal law simply because its application of federal law was correct. Rather, the decision must have been "mutually opposed[,]" *Id.* at 406, to "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), which encompasses only the holdings of Supreme Court decisions, and not their dicta. *Williams*, 529 U.S. at 412.

The "unreasonable application" standard is distinct from and more deferential than that of "clear error." "It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court decision was erroneous. . . . Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75, 76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (internal quotation marks omitted). "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). However, this deferential standard applies only when the state court has addressed the merits of a claim raised on appeal; "[w]here a state court has not adjudicated [*91] a claim on the merits, the issue is reviewed *de novo* by a federal court on collateral review." *Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir. 2015).

B. Exhaustion, Procedural Default, and *Res Judicata*

A federal habeas carpus petitioner must exhaust his claims in the state court before he may bring those claims before this Court. 28 U.S.C. § 2254(b)(2). This can be shown by demonstrating that: (1) the highest court of a state has adjudicated the merits of the claim; or (2) under state law, the claims are procedurally barred. *Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996). "[T]he doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998). However, if a claim is procedurally barred under state law because "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, [then] federal habeas review of the claims is barred." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Under Ohio law, failure to make timely objections at trial or to raise the issue on direct appeal from the trial court, if possible, bars a petitioner from raising that claim in a federal habeas carpus petition. *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000), citing *Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104, paragraphs eight and nine of the syllabus; *Leroy v. Marshall*, 757 F.2d 94, 97-99 (6th Cir. 1985); *see also, e.g., Coleman v. Mitchell*, 244 F.3d 533, 538-39 (6th Cir. 2001) (holding that the "*Perry* rule" regarding *res judicator [*92]* was an adequate and independent state law ground upon which to find a claim procedurally defaulted, and thus, bar its consideration of claims district courts); *Wong*, 142 F.3d at 322 ("Under Ohio law, the failure to raise on appeal a claim that appears on the face of the record constitutes a procedural default under the State's doctrine of res judicata.") A claim of ineffective assistance of counsel—i.e., an argument that failure to make timely objections at trial should be excused—normally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 489, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

Further, in raising the claims in the state court, a petitioner must set out why he believes his federal constitutional rights have been violated to avoid procedural default. 28 U.S.C. § 2254; *Gray*, 518 U.S. at 162-63. The procedural default analysis focuses on the "last explained state court judgment." Therefore, a decision by a state supreme court in which the court declines to exercise jurisdiction over an appeal from an intermediate appellate court, but that does not provide reasons for its declination, does not constitute the "state judgment" upon which this Court resolves the procedural default question. *Munson v. Kapture*, 384 F.3d 310, 314 (6th Cir. 2004), citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). However, [*93] the threshold for what constitutes an "explained state court judgment" is modest—the Sixth Circuit has held that an order from a state supreme court stating nothing more than "that the petitioner had failed to meet the burden of establishing entitlement to relief under [Michigan Rule of Criminal Procedure] 6.508(D) — though brief— constituted the last explained state court decision in the case." *Id.* (internal quotation marks omitted), quoting *Simpson v. Jones*, 238 F.3d 399, 407-08 (6th Cir. 2000). A decision by a state court to review the merits of an otherwise-defaulted claim, as an act of grace to an appellant, does not save that claim from being procedurally defaulted in the federal district court. *Coleman v. Mitchell*, 268 F.3d at 429; *Amos v. Scott*, 61 F.3d 333, 342 (5th Cir. 1995). Finally, a District Court may not consider claims raised collaterally in a habeas carpus petition that are not supported by substantial evidence from outside the trial or appellate record. *Mapes v. Coyle*, 171 F.3d 408, 421-422 (6th Cir. 1999).

Nonetheless, there are certain requirements that the government must prove by a preponderance of the evidence before the procedural default rule bars claims in this Court. *First*, a petitioner must have actually violated the state procedural rule; a state court's mistaken interpretations of a rule, in finding that the petitioner violated that rule, [*94] will not suffice. *Lee v. Kemna*, 534 U.S. 362, 376-77, 387, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002); *Trevino v. Texas*, 503 U.S. 562, 567, 112 S. Ct. 1547, 118 L. Ed. 2d 193 (1992). *Second*, the case must not fall within an exception to the state procedural rule which the petitioner is alleged to have violated; *e.g.*, if the gravamen of a petitioner's ineffective assistance of counsel claim is based on evidence outside the trial court record, then failure to raise that claim on direct appeal does not constitute a procedural default. *Morales v. Mitchell*, 507 F.3d 916, 937 (6th Cir. 2007). *Third*, the state court, in its last explained decision, must expressly state that a claim has been procedurally defaulted by failing to comply with a procedural rule; otherwise, "[w]hen a federal claim has been presented to a state court[,] and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication [of such a holding] or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99. *Finally*, the state procedural rule must be "adequate"—that is, it must have been "clearly announced, firmly established[,] and regularly and consistently applied by the state[]." (Traverse, ECF No. 234, Page ID 16253, citing *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991); *James v. Kentucky*, 466 U.S. 341, 348-

49, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1983); *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143, 21 Ohio L. Rep. 322 (1923)).

A petitioner may circumvent the procedural default bar by "demonstrat[ing] cause for the default and actual prejudice as a result [*95] of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750; *McCleskey v. Zant*, 499 U.S. 467, 494-95, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). The U.S. Court of Appeals for the Sixth Circuit adopted a four-part test in *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), in which the Court must examine whether: (1) a petitioner failed to comply with a procedural rule; (2) the state court enforced the procedural sanction; (3) the state procedural bar is "an adequate and independent ground" upon which the state can foreclose federal review; and (4) a petitioner can demonstrate good cause for not complying with the procedural rule, and actual prejudice from enforcement of the default. *Id.* at 138. A petitioner must show that: an objective factor, external to petitioner, prevented him from complying with the procedural rule, *Murray*, 477 U.S. at 488; and that his trial was "infected with error so 'plain' that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *U.S. v. Frady*, 456 U.S. 152, 163 (1982), citing FED. R. CRIM. P. 52(b).

Procedural default may also be excused only if a Petitioner can show, by a preponderance of the evidence, that he is "actually innocent," such that "a court cannot have confidence in the outcome of the trial[,]" *Lott v. Coyle*, 261 F.3d 594, 602 (6th Cir. 2001), quoting [*96] *Schlup v. Delo*, 513 U.S. 298, 316, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), and thus, his conviction constituted a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750; *Murray*, 477 U. S. at 515. Finally, as a procedural default is not an adjudication on the merits, if a petitioner can successfully set aside such a default, then this Court must review the claim *de novo*. *Harrington v. Richter*, 562 U.S. 86, 99, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

IV. ANALYSIS

Petitioner raises twenty-two Claims for Relief, arguing that the errors or misconduct alleged render his convictions and death sentences constitutionally infirm.

A. Interrogation Claims for Relief

1. Claim One: Trial Court Erred in Admitting Petitioner's Custodial Statements, which Kemper and Filippelli Obtained Without Properly Advising Petitioner of his Constitutional Rights

a. Claim is Partially Procedurally Defaulted

Petitioner argues that the form which he signed on September 16, 1997, in which he consented to take a polygraph examination, did not fully advise him of his *Miranda* rights—specifically, his rights to terminate the interrogation and to consult with counsel—and did not extend to the interrogation that followed the polygraph, in which he confessed to the crimes (Third Amended Petition, ECF No. 213, Page ID 15948-49). Thus, he argues, his incriminating statements were obtained in violation of *Miranda*, and [*97] the trial court's denial of his motion to suppress and subsequent admission of those statements into evidence violated his rights under the Fifth, Sixth, and Fourteenth Amendments. *Id.*, Page ID 15949 (citing Trial Trans., ECF No. 16313, Page ID 3258-84). Respondent argues that he did not challenge the voluntariness of his statement on direct appeal; rather, Petitioner claimed only that his waiver of constitutional rights was not knowing and intelligent (Initial Return of Writ, ECF No. 22, Page ID 691 (citations omitted). As voluntariness of the waiver is a distinct and independent inquiry from knowing and intelligent understanding of the waiver, the Warden argues, Petitioner did not raise the Claim One on direct appeal, and thus, Petitioner has procedurally defaulted this claim. *Id.*, citing *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

Petitioner claims that he raised the issue of voluntariness as part of: (a) his Tenth Assignment of Error on direct appeal to the First District, in which he argued that the trial court erred in denying his motion to suppress his confession; and (b) his Tenth Proposition of Law in his petition to the Supreme Court of Ohio, in which he argued that trial counsel was ineffective in not

offering expert psychiatric testimony in the [*98] motion to suppress Petitioner's confession (Traverse, ECF No. 234, Page ID 16290-92, citing App'x, ECF No. 166-4, Page ID 4559-61; ECF No. 166-5, Page ID 4828-31).

The Court agrees with Petitioner on this issue. The First District stated that "[a]t issue in this case is whether Hughbanks's waiver was voluntary." (App'x, ECF No. 166-4, Page ID 4664). The Supreme Court of Ohio held that the "police officers had no obligation, *sua sponte*, to supply Hughbanks with a lawyer or consult a psychiatrist prior to questioning him, nor did their failure to do so impact the voluntariness of his confession or the waiver of his *Miranda* rights." 2003-Ohio4121, P 66.

As Petitioner has exhausted the issue of the voluntariness, this Court will analyze the claim pursuant to the standards listed in 28 U.S.C. § 2254(d). However, the review will be circumscribed to the arguments actually raised on direct appeal, which are discussed in greater detail below. Petitioner did not raise on direct appeal the issue of whether the waiver he signed was a complete waiver of his *Miranda* rights. Petitioner argues that any failure to fully raise the claim on direct appeal should be a factor in this Court's analysis of his Claim Fourteen, [*99] Ineffective Assistance of Appellate Counsel (Traverse, ECF No. 234, Page ID 16292), which the Court addresses below. However, contrary to Petitioner's assertion, *id.*, he did not assert the gravamen of Claim One in his petition to reopen his direct appeal.[5] Rather, Petitioner raised it for the first time in his second post-conviction petition (App'x, ECF No. 167-2, Page ID 11600), which the trial court dismissed for lack of jurisdiction, concluding that Petitioner had failed to meet the time requirements of Ohio Rev. Code § 2953.21(A)(2) or the jurisdictional requirements of Ohio Rev. Code § 2953.23(A)(1)(b) *(See* App'x, ECF No. 167-5, Page ID 14430-31 (affirming Trial Court's dismissal for lack of jurisdiction)).

Petitioner argues that Ohio Rev. Code § 2953.23(A)(1)(b) may not act as a jurisdictional bar, as the Supreme Court of Ohio has not consistently applied it as such. In support, he claims that the Supreme Court was willing to evaluate the merits of a successive post-conviction petition in two capital cases when lower courts had dismissed for failure to meet the threshold requirements of Ohio Rev. Code § 2953.23(A)(1)(b) (ECF No. 234, Page ID 16260-61, citing *State v. Broom*, 146 Ohio St. 3d 60, 2016-Ohio-1028, 51 N.E.3d 620, PP 21-54; *Lott*, 2002-Ohio-6625, PP 16-19, 97 Ohio St. 3d 303, 779 N.E.2d 1011).

Neither *Broom* nor *Lott* stands for the proposition proffered by Petitioner. The court in *Lott* stated that, because *Atkins* created a new constitutional [*100] right "applying retroactively to convicted defendants facing the death penalty[,] . . . Lott's petition is more akin to a first petition than a successive petition for postconviction relief." 2002--Ohio-6625, P17, 97 Ohio St. 3d 303, 779 N.E.2d 1011. The petition in *Broom* centered on the narrow question of whether: (a) subjecting a death row inmate to repeated "needle sticks" in an ultimately futile attempt to find a vein suitable for lethal injection, or forcing that inmate to go through the execution procedure a second time, constituted a violation of the due process guarantees of the Fifth and Fourteenth Amendments, or cruel and unusual prohibited by the Eighth Amendment. 2016--Ohio-1028, PP32-54, 146 Ohio St. 3d 60, 51 N.E.3d 620. Such a petition would not be ripe until and unless an inmate survived the first execution attempt—an extraordinary circumstance that does not apply to Petitioner. Further, as this Court explained:

> Extensive research into the state courts' treatment of Ohio Rev. Code § 2953.23(A)(1)(b) establishes that the state courts of appeals unanimously interpret the requirement that petitioners demonstrate outcome-determinative constitutional error by clear and convincing evidence as a prerequisite to the courts' subject matter jurisdiction.

Gumm v. Mitchell, No. 1:98-cv-838, 2009 U.S. Dist. LEXIS 130791, 2009 WL 7785750, at * 18 (S.D. Ohio Sept. 28, 2009) (Merz, Mag. J.) (citations omitted), *report and recommendations adopted in part [*101] and rejected in part*, 2011 U.S. Dist. LEXIS 32842, 2011 WL 1237572 (S.D. Ohio Mar. 29, 2011) (Rice, J.). The Sixth Circuit noted that "Ohio courts have clearly indicated that § 2953.23 denies courts subject matter jurisdiction over claims that cannot meet the statute's stringent requirements. . . . This Court should not reinterpret an issue of state law that has already been interpreted by the state courts." *Gumm v. Mitchell*, 775 F.3d 345, 362 (6th Cir. 2014). Thus, Ohio Rev. Code § 2953.23(A)(1)(b) has been consistently applied.

Alternatively, Petitioner argues that the requirements of Ohio Rev. Code § 2953.23(A) impose a higher standard than those imposed by the Supreme Court upon a petitioner bringing a federal constitutional claim, and thus, violate the Supremacy Clause of the U.S. Constitution (Traverse, ECF No. 234, Page ID 16261-62, citing *Montgomery v. Louisiana*, --- U.S. ----, 136 S.Ct. 718, 732, 193 L. Ed. 2d 599 (2016); *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) *Testa*

[5] In that petition, he claimed instead that trial counsel erred in not introducing evidence regarding his physical and mental state at the time of interrogation (App'x, ECF No. 166-6, Page ID 5006).

v. Katt, 330 U.S. 386, 389, 67 S. Ct. 810, 91 L. Ed. 967 (1947); *D'Ambrosio v. Bagley*, 527 F.3d 489, 497-98 n.5 (6th Cir. 2008)). *D'Ambrosio*, as the Sixth Circuit stated, was an "extraordinary case" in which the warden had waived the exhaustion requirement by expressly consenting to the petitioner amending *his pending* habeas corpus petition to allow the addition of a *Brady* claim. 527 F.3d at 490-91, 495-96. Nothing in the record in this case suggests that the Warden undertook any conduct that could qualify as the "express waiver" of compliance with a procedural rule, as mandated under the AEDPA. *Id.* at 495, citing 28 U. S.C. § 2254(b)(3).

In general, moreover, Ohio Revised Code § 2953.23(A) is not a violation of the Supremacy Clause because it is not an [*102] attempt by Ohio to impose a higher or different standard for proof of violation of a federal right than adopted by the federal courts. In *Montgomery*, the principal case on which the Petitioner relies, the Supreme Court held that when it has announced a new substantive rule of constitutional law, retroactively applicable under *Teague v. Lane*, 489 U.S. 288, 297-98, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), state courts are not free to decide the new rule does not apply retroactively. But the Supreme Court has never adopted a constitutional rule governing a state defendant's ability to file a second or successive application for post-conviction relief. Once a defendant has satisfied the jurisdictional threshold established by the State, the state court must apply any relevant federal standard for deciding whether a constitutional violation has occurred. For example, the federal materiality standard for a *Brady* violation would apply. But there is no federal constitutional standard for when a defendant must be given a second opportunity to raise constitutional claims post-conviction.[6] In *Montgomery* itself, the Court said the state courts had to apply Supreme Court substantive rulings "assuming the claim is properly presented," 136 S. Ct. at 732, a phrase respecting the state procedural [*103] limitations on the presentation of claims.

The restrictions on access to court for a successor post-conviction petition in Ohio Revised Code § 2953.23(A) closely parallel the restrictions on second or successive habeas corpus applications adopted by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") and codified at 28 U.S.C. § 2244(b), e.g., a retroactively applicable decision of the United States Supreme Court and clear and convincing evidence there would not have been a conviction. A holding that Ohio Revised Code § 2953.23(A) was unconstitutional would raise serious questions of the constitutionality of § 2244(b) under the Suspension Clause (U.S. Constitution, Art. I, § 9, cl. 2). But so far as this Court is aware, no court has seriously considered that possibility.

Petitioner argues that Claims Seven, Eight, and Thirteen, *Brady*, prosecutorial misconduct, and ineffective assistance of counsel, respectively, require lower standards to obtain relief than the "clear and convincing evidence" and "no reasonable factfinder" standards of Ohio Rev. Code § 2953.23(A) (Traverse, ECF No. 234, Page ID 16262, 16393), and the Court will address those arguments in due course. However, Petitioner does not argue that the federal threshold for obtaining habeas relief is lower than the threshold of Ohio Rev. Code § 2953.23(A) with respect to the gravamen of Claim One. [*104] Thus, Petitioner's second argument with respect to Ohio Rev. Code § 2953.23(A) is without merit as to Claim One.

Further, Petitioner argues that Ohio Rev. Code § 2953.23(A) is inoperative as a procedural bar, because its statutory requirement that "but for the constitutional error at trial" or "at the sentencing hearing," "'no reasonable fact finder' would have found the petitioner guilty or eligible for the death sentence[,]" is not independent of federal law (Traverse, ECF No. 234, Page ID 16263, quoting Ohio Revised Code § 2953.23(A)(1); citing *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); *Delaware v. Prouse*, 440 U.S. 648, 652-53, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)). He claims that, because the above requirement is "inextricably intertwined with federal law . . . , this Court may review the merits of the federal claims." *Id.*, Page ID 16263-64, citing *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007); *Johnson v. Pinchak*, 392 F.3d 551, 557 (3rd Cir. 2004)).

However, Petitioner's statement of the law is incomplete—the *Johnson* Court, for example, expressly stated that "[t]he threshold question, therefore, is whether New Jersey courts, in denying Johnson's death-eligibility claim, relied independently on a violation of state procedure *or based their decision on the merits of the claim*." 392 F.3d at 557 (emphasis added), citing *Ylst*, 501 U.S. at 801; *Coleman v. Thompson*, 501 U.S. at 735, 740; *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). In other words, the state court decision is only "inextricably intertwined" with federal law if the state court decision itself addressed the merits of the petitioner's federal [*105] claims. If, on the other hand, the state court relied solely

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[6] Whether the States are constitutionally bound to provide a first post-conviction remedy is not in issue here, but has never been decisively settled by the Supreme Court.

and expressly on a procedural bar, then this Court may not address the merits of that procedurally defaulted claim. *Id.*, citing *Ylst*, 501 U.S. at 802, 803.

Because the Supreme Court of Ohio summarily denied review of Petitioner's second post-conviction petition, 2015-Ohio-1896, this Court must "look through" to the last explained decision, in this case, the First District's decision on March 6, 2013 (App'x, ECF No. 167-5, Page ID 1442931). Apart from overruling Petitioner's First Assignment of Error regarding the constitutionality of Ohio's post-conviction statutes, *id.*, Page ID 14430, citing *Bies*, 2003-Ohio-442, PP 12-15; *Fautenberry*, 1998 Ohio App. LEXIS 6415, the First District affirmed the trial court's dismissal of the petition because it "represented his third [sic] request for postconviction relief and was filed well after the time afforded under [Ohio Revised Code §] 2953.21(A)(2) had expired." *Id.*, Page ID 14430-31. While the First District set forth the statutory exception for untimely filing, *id.*, Page ID 14431, quoting Ohio Revised Code § 2953.21(A)(1)(b)), it did not address the merits any of his remaining assignments of error. Rather, it concluded that, in light of Petitioner's failure to comply with the procedural requirements of Ohio Revised Code §§ 2953.21 and 2953.23, the trial [*106] court lacked jurisdiction over the petition. *Id.* Thus, the state courts relied solely on a state procedural bar in dismissing the successive petition, foreclosing merits review by this Court of claims raised for the first time in that petition. *Ylst*, 501 U.S. at 802, 803, 805.

Finally, Petitioner's argument that he meets the cause and prejudice standard, and thus is excused from any procedural default, appears to be made only with respect to Claims Seven *(Brady)* and Eight (the State supposedly eliciting false testimony from Kemper and Leonard Leeman) (Traverse, ECF No. 234, Page ID 16264, citing *Bies v. Sheldon*, 775 F.3d 386, 395, 396 (6th Cir. 2014)). Moreover, such an argument with respect to Claim One would be unavailing. Any circumstance surrounding the September 16, 1997, interrogation that could have rendered the confession involuntary should have reasonably been available to Petitioner upon direct appeal, and Petitioner does not argue that any information regarding that interrogation became known for the first time immediately prior to the filing of the 2010 petition. Accordingly, he has procedurally defaulted Claim One except to the extent raised as part of Tenth Proposition of Law to the Supreme Court of Ohio on direct appeal (App'x, ECF No. 166-5, Page ID 4828-31). [*107]

b. Petitioner has not met his burden under 28 U.S.C. § 2254(d)

Petitioner argues that "[the Supreme Court of Ohio's finding that Hughbanks waived his constitutional rights on September 16, 1997[,] was an unreasonable determination as to the facts before that court for two separate reasons." (Traverse, ECF No. 234, Page ID 16294). *First*, Petitioner argues that the waiver he signed on September 16, 1997, only extended to his taking a polygraph examination, not to the subsequent interrogations that led to his confession. Moreover, that polygraph consent form did not list all of his rights he was waiving, unlike a *Miranda* waiver. *Id.*, Page ID 16295. *Second*, while Petitioner did sign a waiver of his *Miranda* rights prior to his initial interview on September 9, 1997, that waiver did not extend to the September 16 interrogation and confession. *Id.* Thus, Petitioner claims, law enforcement did not obtain a voluntary waiver from him prior to obtaining the confession, and the Supreme Court of Ohio's finding to the contrary was erroneous. *Id.*, Page ID 16296. As "there was no forensic evidence linking Hughbanks to the murders [and t]here were no eyewitnesses[,]" *id.*, the confession was the State's strongest evidence, [*108] and its admission, Petitioner claims, "had a substantial or injurious effect or influence on the verdict." *Id.*, citing *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

Contrary to Petitioner's argument, the Supreme Court of Ohio conducted a thorough "totality of the circumstances" analysis, "including 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." 2003-Ohio-4121, P 59, quoting *State v. Mason*, 82 Ohio St. 3d 144, 154, 1998- Ohio 370, 694 N.E.2d 932 (1998); citing *State v. Green*, 90 Ohio St. 3d 352, 366, 2000- Ohio 182, 738 N.E.2d 1208 (2000). That court noted that Petitioner was not arguing, as he does here, that he was not fully advised of his rights prior to being questioned. *Id.*, P 60. Rather, he argued that Millstone and Filippelli knew that he lacked the mental capacity to waive his rights knowingly, despite his seeming "willingness to purport to waive his rights and give a statement." (App'x, ECF No. 166-5, Page ID 4830). Thus, Petitioner argued, his waiver could not have been truly voluntary absent the detectives offering to obtain a lawyer for him or consulting with a psychiatrist, neither of which they did. *Id.*

The Supreme Court of Ohio rejected this argument, noting that the United States Supreme Court had "rejected [*109] the premise that voluntariness of a confession depended on notions of 'free will.' Rather, 'voluntariness . . . has always depended on

the absence of police overreaching, not on "free choice" in any broader sense of the words'" 2003-Ohio-4121, P 62, quoting *Connelly*, 479 U.S. at 170. The court found that: there was no evidence that Petitioner ever requested and was denied an attorney; the interrogation on September 16, 1997, "lasted only several hours"; and the detectives "never subjected Hughbanks to threats or physical abuse or deprived him of food, sleep, or medical treatment." *Id.*, PP 63. The court also noted that, unlike September 9, the results of the polygraph examination on September 16 indicated that he was not under the influence of crystal methamphetamine. *Id.*, P 64. Taken together, the trial court's conclusion that the confession was voluntary was a reasonable one. *Id.*, P 66.

As *Connelly* is still binding precedent, this Court cannot reasonably conclude that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). Nor can it conclude that the decision "was based on an unreasonable determination of the facts in light of the [*110] evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2). Accordingly, the Court denies Petitioner's Claim One.

2. Claim Two: Trial Court Erred in Admitting his Custodial Statement, which was not the Product of a Knowing, Intelligent, and Voluntary Waiver of his *Miranda* and other Constitutional Rights

a. **Claim is not Procedurally Defaulted Except as to Voluntariness**

As discussed above, Petitioner argued in his Tenth Proposition of Law to the Supreme Court of Ohio that the trial court erred in admitting his confession (App'x, ECF No. 166-5, Page ID 4828-31). This Court addressed issues of procedural default with respect to the voluntariness of Petitioner's confession, and the Warden does not argue that any other portion of Claim Two has been procedurally defaulted.

b. **Petitioner has not met his burden under 28 U.S.C. § 2254(d)** Petitioner argues that his bipolar disorder, PTSD, substance abuse, and history of hallucinations impaired his judgment and rendered him unable to make a knowing, intelligent, and voluntary waiver of his rights (Third Amended Petition, ECF No. 213, Page ID 15950-52). 68 Further, Petitioner claims that during the interrogation, Millstone and Filippelli repeatedly asked leading questions and [*111] made suggestions about the crimes and their evidence that planted in his mind the seeds of his confessional statement (Traverse, ECF No. 234, Page ID 16300-01).[7] Even with these suggestions, however, Petitioner notes that many of his statements he provided during the interrogation "were inconsistent with the evidence the Ohio officials developed during their investigation." *Id.*, Page 16301. Consequently, he claims, the trial court erred in admitting his custodial statement via Millstone and Filippelli's testimony and the audiotape of his statement (Third Amended Petition, ECF No. 213, Page 15952).

"In habeas proceedings[,] the burden of proof is transferred to Petitioner to demonstrate by a preponderance of the evidence that the purported waiver was ineffective." (Traverse, ECF No. 234, Page ID 16304). Petitioner argues that he has met his burden by showing that Millstone and Filippelli did not fully advise him of his rights prior to beginning the September 16, 1997, interrogation, or, in the alternative, showing that even if he was so advised, his mental state prevented him from being able to effect a voluntary waiver. *Id.* He claims that the Supreme Court of Ohio, in evaluating the [*112] statements made by Petitioner to Millstone and Filippelli regarding his discontinuation of medication and psychiatric treatment, erroneously concluded that Petitioner's mental illness had been "cured." *Id.*, Page 16304-05. Petitioner concludes by arguing that his lack of medication and treatment had exacerbated his severe depression and bipolar disorder, which, in turn, made it "less likely that he voluntarily waived his *Miranda* rights." *Id.*, Page ID 16305.

Contrary to Petitioner's argument, the Supreme Court of Ohio never suggested that Petitioner was "cured." Rather, the court considered, in analysis, that:

> (a) "Hughbanks's tape-recorded interview on September 16 indicates that he was alert and responsive to police questioning and that he was not suffering from any apparent mental problem" during the actual interrogation, 2003-Ohio-4121.P 64;

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[7] The Court already addressed the conduct of Millstone and Filippelli in denying Claim One, and incorporates that discussion by reference.

(b) While Petitioner ingested crystal methamphetamine prior to his September 9, 1997, interrogation and polygraph examination, rendering the results of the examination invalid, he had been in police custody from that date until September 16, during which time the illegal drugs had passed out of his system, id.,P 65; and

(c) The "lines on charts from Hughbanks's polygraph examination [*113] on September 16 were no longer flat line, he was responsive [and] reacting to the questions."

Id. (alteration in original) (internal quotation marks omitted). Petitioner does not claim that the waiver he executed on September 9, 1997, was invalid, and he has not proffered any evidence that would permit the conclusion that his not being under the influence of drugs somehow made him *less* able to make a valid waiver of his *Miranda* rights on September 16. Accordingly, the Supreme Court of Ohio's overruling of Petitioner's Tenth Proposition of Law did not violate 28 U.S.C. § 2254(d), and Claim Two is denied.

3. Claim Three: Trial Court Erred in Admitting Custodial Statements Made After Plaintiff Requested that Interrogation Cease

Petitioner states that, on September 10, 1997, he asked Fletcher to cease the interrogation, and that Fletcher honored that request (Third Amended Petition, ECF No. 213, Page ID 15954, citing ECF No. 167-3, Page ID 12485, 12488-90). Yet, on September 16, after completing the polygraph examination, Millstone and Filippelli resumed their interrogation of Petitioner, and Petitioner confessed to the crimes. *Id.*, citing Trial Trans., ECF No. 163-13, Page ID 3263, 327172; App'x, ECF No. 167-3, [*114] Page ID 12925-13019. Petitioner argues that the admission of statements made by him during the September 16 interrogation "violated [his] rights to not incriminate himself, right to counsel, and due process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments." *Id.*

In its Supplemental Return of Writ, the Warden argues that Petitioner could have raised this claim on direct appeal, and his failure to do so means that the claim is procedurally defaulted (Supp. Return of Writ, ECF No. 194, Page ID 15661). Petitioner raised Claim Three for the first time in his successor petition as a subset (along with Claims One and Two) of his claim that his custodial statements were admitted in violation of his constitutional rights *(See, e.g.*, App'x, ECF No. 167-5, Page ID 14420 (Reply Brief in support of appeal to First District of trial court's dismissal of the second post-conviction petition)). As with the procedurally defaulted portions of Claim One, the Warden argues that the facts regarding the cessation and resumption of his interrogation were known to Petitioner both at the time of his trial (when portions of the September 16 interrogation were introduced into evidence) and his direct appeal (Supp. Return of Writ, [*115] ECF No. 194, Page ID 15661). Further, the Warden claims, because the First District relied solely on the state procedural bar in concluding that the trial court lacked jurisdiction over the post-conviction petition, Claim Three may not be considered by this Court. *Id.*, citing App'x, ECF No. 167-5, Page ID 14429-31, 14542).

In his Traverse, Petitioner argues that it was only in 2007, after he was able to conduct discovery related to the claims in his initial Petition in this Court, that "it first came to light that Investigator Fletcher and Detective Kemper had re-interviewed Hughbanks on September 10, 1997. The records produced by the Hamilton County Prosecutor's Office also contained references to the September 10, 1997[,] interview of Hughbanks." (Traverse, ECF No. 234, Page ID 16307, citing App'x, ECF No. 167-3, Page ID 12525, 12531; *see generally* App'x, ECF No. 167-3, Page ID 12524-31 (Bates-stamps reflect that documents were produced by the Springfield Township Police Department). He claims that no records of the September 10, 1997, interview were produced in pretrial discovery. *Id.*, Page ID 16309, citing App'x, ECF No. 166-2, Page ID 3948-51. Further, at the motion to suppress [*116] hearing, no evidence was introduced—via exhibits, Fletcher's live testimony, or the videotaped depositions of Millstone and Filippelli—about the September 10 interview. *Id.*, Page 16306, citing Trial Trans., ECF No. 163-7, Page ID 2400, 2405-19, 2421-29. Petitioner's trial counsel, during closing argument on the motion, stated that Petitioner "was interviewed at length on two different occasions[,]" presumably referring to September 9 and 16 (Trial Trans., ECF No. 163-7, Page ID 2423). It was only during his September 14, 2007, deposition that Fletcher confirmed that he interviewed Petitioner on September 10, and that he ceased the interview at Petitioner's request (App'x, ECF No. 167-3, Page ID 12482-83, 12488-89). In light of these late discoveries and the materiality of the discovered material, Petitioner argues that he has demonstrated "cause and prejudice" to excuse any procedural default of Claim Three (Traverse, ECF No. 234, Page 16309-10, citing *Strickler v. Green*, 527 U.S. 263, 282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Bies*, 775 F.3d at 396; *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002).

While the above materials were required to be produced in pretrial discovery, Ohio R. Crim. P. 16(B), it is unclear whether the State actually failed to do so. On October 30, 1997, Piepmeier represented that he had already provided [*117] to Petitioner: a summary of the father's statement to Fletcher and Kemper; and Kemper's notes from that statement (App'x, ECF No. 1662, Page ID 3948). The documents produced by the Springfield Township Police Department to Petitioner in 2007 (App'x, ECF No. 167-3, Page ID 12524-31), appear to be the statement and notes described by Piepmeier in 1997. Nonetheless, even if those documents were not produced until 2007, and that tardy production constitutes good cause to excuse his procedural default, Petitioner cannot demonstrate the requisite prejudice. Petitioner argues that he has shown prejudice because, "[i]f counsel had been properly notified, they could have properly prepared and prevailed at the motion to suppress." (Traverse, ECF No. 234, Page ID 16310). In other words, Petitioner claims that, had he been able to introduce into evidence that he had requested that Fletcher stop the interrogation on September 10, 1997, and that Millstone and Filippelli resumed the interrogation on September 16, without his express consent, then that evidence would have persuaded Judge Marsh to sustain his motion to suppress. Petitioner claims that, because "there was no forensic evidence linking [*118] Hughbanks to the murders. There were no eyewitnesses[, and t]here was strong evidence as to the existence of other suspects[,]" had the confession been suppressed, there may not have been sufficient evidence for the jury to convict him *Id.*, Page ID 16311

The premise of Petitioner's argument is that the resumption of the interrogation on September 16 without his express consent was sufficient to render the entire interrogation and confession a violation of his constitutional rights, and thus, the "*Edwards* Rule"— which mandates suppression of confessions elicited after a suspect asks for the assistance of counsel and an interview does not cease, *Edwards v. Arizona*, 451 U.S. 477, 478-79 (1981 , 101 S. Ct. 1880, 68 L. Ed. 2d 378 applies. Yet, unlike in cases where the rule has been successfully applied, *see, e.g., Minnick v. Mississippi*, 498 U.S. 146, 148-49, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); *Arizona v. Roberson*, 486 U.S. 675, 678, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988); *Edwards*, 451 U.S. at 47879, Petitioner never asked to speak with an attorney until after his confession on September 16. Courts have been clear that, absent an express invocation of right to counsel, the *Edwards* Rule does not apply, and the resumption of an interrogations will not be grounds for suppressing the confession. *See Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) ("the suspect must unambiguously request counsel."); *Perreault v. Smith*, 874 F.3d 516, 520-21 (6th Cir. 2017) (collecting Sixth Circuit cases holding that anything less than an "unequivocal invocation" of the right [*119] to counsel was insufficient). As Petitioner made no request for counsel, the resumption of the interrogation on September 16 was not a violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights, and the Court cannot reasonably conclude that Judge Marsh would have ruled differently on the motion to suppress had this evidence been introduced. Consequently, Petitioner has failed to demonstrate prejudice sufficient to excuse his procedural default, *Coleman*, 501 U.S. at 749-50, and his Third Claim for Relief must be denied.

4. Claim Four: Trial Court Erred in Admitting Custodial Statements, as they were not Product of his Free Will The Court previously dismissed this Claim as untimely filed (Order, ECF No. 202).

B. Jury Selection Claims for Relief

1. Claim Five: Grand Jury Foreperson was Chosen in a Racially Discriminatory Manner

Pursuant to statute, Debbie Mahaffey was selected by Judge Marsh in her then-capacity as Presiding Judge of the Hamilton County Court of Common Pleas (Traverse, ECF No. 234, Page ID 16313, citing **OHIO REV. CODE** § 2939.02). Mahaffey is Caucasian, just as ninety-five percent of all grand jury forepersons in Hamilton County were between 1982 and 1998, despite Caucasians comprising less than eighty percent of Hamilton County's population [*120] during that time (Third Amended Petition, ECF No. 213, Page ID 15958-59). Petitioner further notes that Former Presiding Judge Thomas Crush stated publicly that, as Presiding Judge, he never appointed a non-Caucasian grand jury foreperson (App'x, ECF No. 166-20, Page ID 9296). Petitioner claims that, in light of both the statistical evidence, Judge Crush's comments, and other evidence from outside the record, Hamilton County's foreperson selection process violates the Equal Protection guarantees of the United States Constitution (Traverse, ECF No. 234, Page ID 16319-20, citing *Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998); *Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977); *Jefferson v. Morgan*, 962 F.2d 1185, 1189 (6th Cir. 1992)). Further, Petitioner argues that, because grand juries with Caucasian forepersons were

statistically more likely to return a capital indictment than those grand juries with a non-Caucasian foreperson, the selection of Mahaffey violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights (Third Amended Petition, ECF No. 213, Page ID 15959). Petitioner raised this claim in his initial post-conviction petition (App'x, ECF No. 166-16, Page ID 8195-97), and the Warden does not argue that the claim is procedurally defaulted.

To obtain habeas carpus relief on Claim Five, Petitioner "must demonstrate [that] the procedure employed to [*121] select the grand jurors, or grand jury foreperson in this circumstance, resulted in substantial underrepresentation' of an 'identifiable group.' (Initial Return of Writ, ECF No. 22, Page ID 689, quoting *Castaneda*, 430 U.S. at 493, 494). Petitioner must: (1) establish that a particular group is singled out under the law, as written or as applied; (2) compare the proportion of the group in total population versus those called to serve on grand jury; and (3) use any statistical disparity to show that the selection process was susceptible to abuse or not racially neutral. *Id.*, Page ID 689-90, citing *Castaneda*, 430 U.S. at 494-95.

Petitioner argues that Ohio Rev. Code § 2939.02, and the discretion it vests in the Presiding Judge, results in the systematic under-representation of African-Americans as grand jury forepersons, in violation of the Fourteenth Amendment (Traverse, ECF 234, Page ID 16318-20, citing *Campbell*, 523 U.S. at 395-97; *Castaneda*, 430 U.S. at 492-95; *Alexander v. Louisiana*, 405 U.S. 625, 628, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972)). In support, he notes that African-Americans served as grand jury forepersons with less than one-quarter of the frequency that would be expected, given the proportion of African-American residents in Hamilton County. *Id.*, Page ID 16320. Yet, the Sixth Circuit has stated that "comparing straight racial percentages is of little value to this court." *Jefferson*, 962 F.2d at 1189. Rather, in the equal-protection context, [*122] the Court uses "standard deviation analysis as a means of predicting the significance of racial disparities." *Id.*, citing *Castaneda*, 430 U.S. at 495-96 n.17; *Ford v. Seabold*, 841 F.2d 677, 684 n.5 (6th Cir. 1988). In *Jefferson*, the Sixth Circuit held that a "z-score" of "-6 standard deviations is sufficient to establish a prima facie case of racial discrimination[,]" as "the odds that the county would have *randomly* selected only 20 blacks for the 338 grand jury positions are approximately 1,000,000,000 to 1." *Id.* (emphasis in original). As "[the selection procedure in Hamilton County resulted in" a z-score of [-]6.19 standard deviations[,]" Petitioner argues that he has sufficiently established a prima facie claim for an as-applied equal protection violation (Traverse, ECF No. 234, Page ID 16321, citing App'x, ECF No. 166-16, Page ID 8344).

In *Campbell*, the Supreme Court held that non-Hispanic white criminal defendants, such as Petitioner, have standing to raise equal protection claims based on alleged systematic underrepresentation of African-Americans on grand juries. 523 U.S. at 397-98, citing *Powers v. Ohio*, 499 U.S. 400, 409-11, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Yet, as the First District noted, Mahaffey was included in the September 1997 venire from which grand jury members were chosen. "Therefore, the foreperson of the grand jury, while perhaps not [*123] selected from the ranks of the already-seated grand jurors, was not, as Hughbanks contended, selected from outside the 'grand jury venire'" 2003-Ohio-187, P 33. Further, Petitioner had not designated any evidence that Mahaffey's responsibilities as foreperson were anything more than clerical or ministerial—i.e., her status as foreperson did not give her any additional voting power or other authority vis-à-vis that of the other grand jurors. Under those circumstances, the appellate court held, any discrimination in the selection of Mahaffey as foreperson "will not provide a basis for reversing a conviction or dismissing an indictment." *Id.*, P 35, citing *Hobby v. United States*, 468 U.S. 339, 344, 104 S. Ct. 3093, 82 L. Ed. 2d 260 (1984).

Petitioner argues that the issue of purposeful discrimination "is present regardless of whether the trial judge selects the foreperson from inside or outside the venire. The analysis instead focuses on the discretion of the trial judge in choosing the foreperson." (Traverse, ECF No. 234, Page ID 16319, citing *Campbell*, 523 U.S. at 396-97 (noting that Ohio uses a similar procedure to the one at issue in *Campbell*)). Yet, *Campbell* was concerned with the risk that the selection of a Caucasian foreperson would cause the composition of the grand jury itself to be racially biased. *Campbell*, 523 U.S. at 402-03, citing *Hobby*, 468 U.S. at 347-48. Petitioner [*124] has not claimed that the composition of the grand jury that returned the indictment against him was racially biased. In light of the above, and because *Campbell* did not overrule *Hobby*, the Supreme Court of Ohio's adjudication was not "decision that was contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d)(1). Accordingly, the Fifth Claim for Relief is denied.

2. Claim Six: Trial Court Improperly Denied Trial Counsel's Challenges for Cause on Rosalie Van Nuis and Samuel Allen

During voir dire, as discussed above, Petitioner's trial counsel moved that Van Nuis and Allen be removed from for cause. Counsel argued that they could not be objective toward Petitioner, due to Van Nuis's ambivalence about imposing a sentence of less than death against Petitioner, and the fact that Petitioner's trial counsel had represented an individual who had been charged with the murder of Allen's friend. Petitioner argues that Judge Marsh denying the challenges for cause deprived him of a petit jury whose members could fairly consider Petitioner's mitigation evidence. (Traverse, ECF No. 234, Page ID 16322, 16328, citing Trial Trans., ECF No. 163-9, Page ID 2687-88, 2696-97, [*125] 2700, 2702; ECF No. 163-10, Page ID 2802-04, 2808-09; *Morgan v. Illinois*, **504** U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)).

Petitioner's claim is unavailing for two reasons. *First*, this claim was raised for the first time in his second post-conviction petition, and the First District "found the ground for relief procedurally barred because Hughbanks did not satisfy the jurisdictional requirements[.]" *Id.*, Page ID 16223 citing App'x, ECF No. 167-5, Page ID 14429-31. *Second*, even if Petitioner had demonstrated good cause to excuse the procedural default, *id.*, Page ID 16323-24, he cannot demonstrate the requisite prejudice. Trial counsel exercised peremptory challenges to remove Van Nuis and Allen from the jury, and declined to exercise his sixth peremptory challenge (Trial Trans., ECF No. 163-12, Page ID 3106-08, 3113-17). In other words, the evidence shows that no one who served on the petit jury would have been excluded had Van Nuis and Allen been removed for cause. Accordingly, Claim Six is denied.

C. Prosecutorial Misconduct Claims for Relief

1. Claim Seven: Prosecution's Failure to Provide Exculpatory, Material Evidence

Petitioner claims that the State "failed to provide trial counsel with favorable, material evidence and information[,] in violation [*126] of the Fourteenth Amendment." (Traverse, ECF No. 234, Page ID 16329, citing *Brady*, 373 U.S. at 87). "The suppressed evidence included documents that: a) impeached the State's theory of the case; b) impeached the State's witnesses; c) identified Burt Leeman as a suspect; d) identified other suspects; e) contained favorable *[i.e.*, negative] results of trace evidence . . . ; and f) contained favorable eyewitness statements." *Id.* Petitioner did not raise any *Brady* claim on direct appeal. Rather, in his first post-conviction petition, Petitioner claimed that the State suppressed evidence that:

(a) neighbors had seen Mrs. Leeman in her yard around 8:30 p.m., 9:00[]p.m., and 9:15[]p.m. on the night of the murders (contrary to the State's theory that the Leemans arrived home at 9:30 p.m.;
(b) Mr. Leeman's wallet had not been taken;
(c) The State believed that the prints found in the house [which were not those of Petitioner] were those of the perpetrator;
(d) A composite sketch of the believed perpetrator did not match Petitioner's physical description;
(e) A witness stated that she saw the man from the composite sketch near the scene of the crime;
(f) The victims' house appeared undisturbed;

(g) The State believed that the perpetrator's [*127] clothes were bloody; and
(h) The Leemans' front and rear doors were unlocked.

(App'x, ECF No. 166-16, Page ID 8213, 8272). Petitioner attached as exhibits newspaper articles dated between 1987 and 1998 containing the above information (App'x, ECF No. 166-18, Page ID 8956-8981).

The First District rejected Petitioner's claims, holding "that the absence of the undisclosed evidence was not outcome-determinative," and thus, Petitioner "was neither denied a fair trial by the prosecution's failure to disclose it, nor the effective assistance of counsel by defense counsel's failure to discover it and to present it at trial." 2003-Ohio-187, P 61 (citations omitted). The court stated that "[t]he pivotal issue at trial was not *how* the murders had been committed, but *who* had committed them. The bulk of the undisclosed evidence related to the particulars of the murders, rather than to Hughbanks's identity as their perpetrator." *Id.*, P 60 (emphasis added). Thus, the First District concluded, "the undisclosed evidence, viewed collectively, was not 'material' in that it could not 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict'" *Id.*, quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

In his second post-conviction [*128] proceeding, Petitioner alleged that the State failed to produce evidence:

(a) That supported Petitioner's theory that Burt Leeman committed the murders;

(b) That would have impeached the testimony of Kemper and Leonard Leeman;
(c) About other suspects;
(d) Of inconsistent eyewitness statements; and
(e) Negative trace analyses

(Traverse, ECF No. 234, Page ID 16333-34, citing App'x, ECF No. 167-2, Page ID 11617-22). Petitioner supported these claims with discovery he had received from the Springfield Township Police Department in 2007, and from the 2007 deposition of Kemper. *Id.*, Page ID 16631-34, citing App'x, ECF No. 167-2, Page ID 11607-09, 11612-15, 11617-22. On March 6, 2013, the First District held that the *Brady* claims raised for the first time in the second petition were "defaulted because Hughbanks had failed to satisfy . . . the jurisdictional requirements of [Ohio Rev. Code] § 2953.23[(A)(1)(b)]." (App'x, ECF No. 167-5, Page ID 14430-31).

The Warden concedes that the *Brady* claims in his first post-conviction petition are properly preserved for review (Initial Return of Writ, ECF No. 22, Page ID 698), but argues that those claims in his second post-conviction petition are procedurally defaulted (Supp. Return [*129] of Writ, ECF No. 194, Page ID 15661, citations omitted). The Court addresses these subsets in turn.

a. Claims Raised in First Petition

The Warden argues that the First District's "decision that none of this evidence" underpinnings claims raised in the first petition "was 'material' under *Brady* and its progeny is sound and not an unreasonable application of the clearly established federal law." (Initial Return of Writ, ECF No. 22, Page ID 699). In support, the Warden notes that Petitioner conceded his guilt at trial and had provided a detailed and lengthy confession to Millstone and Filippelli that, over Petitioner's motion, was allowed into evidence. *Id.*, Page ID 699-700. Further, the Warden reiterates the First District's finding that the evidence allegedly suppressed was immaterial, as it was primarily probative as to how the murders were committed, not who committed them. *Id.*, Page ID 700. Thus, the Warden argues, even if the evidence had been disclosed, it is unlikely that the disclosure would have altered trial strategy, much less the verdict. *Id.*, Page ID 699-700.

Under *Brady*, a conviction is subject to reversal if: (1) evidence was suppressed; (2) the suppressed evidence was favorable [*130] to the defendant; and (3) the suppressed evidence was material—*i.e.*, "in its absence he [had not] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. In *Kyles*, the Supreme Court listed three situations in which the prosecution has an affirmative obligation, under *Brady*, to disclose exculpatory evidence:

(1) Where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured;
(2) When a defendant requests disclosure of particular evidence;
(3) When the evidence, even if not specifically requested, is so exculpatory that its suppression would be of sufficient significance to result in the denial of the defendant's right to a fair trial.

Id. at 433, citing *U.S. v. Agurs*, 427 U.S. 97, 103-08 (1976). Petitioner claims that the second circumstance applies: "Defense counsel, in two of the [pretrial] discovery motions, requested that the prosecution disclose all exculpatory evidence[,]" and the "court ordered the prosecution to provide all exculpatory evidence." (ECF No. 234, Page ID 16341, citing Trial Trans., ECF No. 163-5, Page ID 2356-58; App'x. ECF No. 167-3, Page ID 12773-12807).

Petitioner argues that the State's response to [*131] the first motion was so misleading and incomplete that it deprived him of a fair trial (Traverse, ECF No. 234, Page ID 16341-42, citing App'x, ECF No. 166-2, Page ID 3950). Specifically, Petitioner argues that the State did not disclose Burt Leeman's incriminating statements and actions shortly after the murders. *Id.*, Page ID 16350-52, citing ECF No. 167-5, Page ID 14006, 14022, 14061-63, 14064, 14137-38. Petitioner also claims that the State failed to disclose the information that the police had received about the existence of other suspects besides, including a C. Douglas Hayes, who confessed to the murders, and a Stacy Grisby, who had confessed to the burglary. *Id.*, Page ID 16342, 16352-53 (citing App'x, ECF No. 167-5, Page ID, 14034-35, 14058-60, 14070-71, 14141). He further states that the identity of a Michael Hensley was not disclosed, despite his having been treated for cuts or stab wounds in the hours after the Leemans' murders, his girlfriend's withdrawing the alibi she had originally provided to police on his behalf, and Hensley's fleeing to Florida after his girlfriend withdrew the alibi (App'x ECF No. 167-5, Page ID 14001, 14020). Petitioner claims that the State

failed [*132] to disclose the names of witnesses who, when questioned by police, provided physical descriptions of the alleged perpetrator that did not match that of Petitioner (Traverse, ECF No. 234, Page ID 16342, citing App'x, ECF No. 167-5, Page ID 14008-14, 14018, 14028-29, 14056-57).

Finally, Petitioner argues that the State failed to disclose forensic evidence that should have reasonably eliminated him as a suspect, *e.g.*, palm-prints and fingerprints from the crime scene that did not match those of Petitioner (Traverse, ECF No. 234, Page ID 16354, citing ECF No. 167-2, Page ID 11961; ECF No. 167-5, Page ID 13998, 14002-03, 14015-16, 14067-69, 14081, 14083-85 14136).[8] He claims that, had trial counsel been aware of this exculpatory evidence prior to trial, rather than conceding guilt, counsel would have mounted a vigorous defense, attempting to instill reasonable doubt in the minds of the jurors. *Id.*, Page ID 16366. Accordingly, Petitioner concludes, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[,]" the evidence is material for *Brady*, and the State's failure to disclose the materials mandates issuance [*133] of a conditional writ ordering that he receive a new trial. *Id.*, Page ID 16356, 16378 (citations omitted).

Even if Petitioner could show that the State failed to turn over the evidence discussed above, however, he has not shown that its failure to do so undermines confidence in the verdict, as is required. Petitioner's confession was comprehensive and detailed (Petitioner Statement, ECF No. 193-1). During Millstone and Filippelli's interrogation, prior to the confession proper, Petitioner[9]:

(1) Conceded that, at the time of the Leemans' murders, he possessed a knife identical or very similar to the one with which the Leemans were murdered (Petitioner Statement, ECF No. 193-1, Page ID 15488-89);

(2) Stated that he may have been in the vicinity of the Leemans' house on the night of the murder. *Id.*, Page ID 15489; and

(3) Failed the portion of a polygraph test in which the detectives asked Petitioner if he killed the Leemans. *Id.*, Page ID 15517-18;

(4) Stated that he entered the Leemans' residence with the knife, was confronted by Mr. Leeman, and began physically struggling with him. *Id.*, Page ID 15537-38;

(5) Provided a detailed description of the attire Mr. Leeman was wearing. *Id.*, Page ID [*134] 15538-39; and

(6) Conceded that he was under the influence of alcohol and psychiatric drugs on the night of the murders. *Id.*, Page ID 15550-51.

During the confession, Petitioner stated, among other things, that:

(1) Prior to stabbing Mr. Leeman with the knife, he had stabbed Mr. Leeman in the chest with a screwdriver (Petitioner Statement, ECF No. 193-1, Page ID, 15556-57);

(2) Several years after the crimes, he confessed to his uncle that he had broken into a house, and that he "might have killed somebody." *Id.*, Page ID 15561;

(3) He stabbed Mr. Leeman with a knife. *Id.*, Page ID 15568;

(4) He had previously told his doctor, mother, father and brother that he thought he had killed someone. *Id.*, Page ID 15563, 15577-79;

(5) He told his brother that "I think I threw a knife or a screwdriver behind the [Leemans'] house where the creek was or something like that." *Id.*, Page ID 15579;

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[8] In suggesting that the evidence should have eliminated him as a suspect (Traverse, ECF No. 234, Page ID 16354, citing App'x, ECF No. 167-2, Page ID 11691), Petitioner implies that his palm and fingerprints did not match those found at the Leemans' house. Yet, in his 2007 deposition, Kemper merely testified that "there was [n]ever any testimony that [Petitioner's] prints matched" those at the crime scene (App'x, ECF No. 167-2, Page ID 11691).

[9] During the interrogation, Petitioner's recitation of facts was often not in chronological order as to the events of the night of the crimes. For ease of reading, the details contained in the confession are presented in the order in which Petitioner recited them.

(6) He entered the Leemans' house to commit a burglary, and "I got scared. I fought with [Mr. Leeman]. . . . And I probably ran after the woman and killed her, too." *Id.*, Page ID 15588;

(7) He remembered seeing pictures of people in military uniforms in the house. *Id.*, Page ID 15597;

(8) He went through the Leemans' [*135] dressers and took some of Mrs. Leeman's jewelry as he left the house. *Id.*, Page ID 15599-15600;

(9) He used a screwdriver to pry out the window screen. *Id.*, Page ID 15601;

(10) That Mr. Leeman, after being stabbed by Petitioner, came to rest on the bedroom floor, lying on his back. *Id.*, Page ID 15602;

(11) He slashed Mr. Leeman's throat from the right side to the left, and deeply cut Mrs. Leeman's throat, figuring that if he "cut her enough that she — she'd bleed to death." *Id.*, Page ID 15604;

(12) After cutting Mrs. Leeman, he went to the creek behind the Leemans' house to clean himself off. *Id.*, Page ID 15604-05;

(13) There was a breakfast bar in the Leemans' house with a formica countertop, and the living room had a coffee table, couch, and recliner. *Id.*, Page ID 15615-16; and
(14) There was no one with him when he went to the Leemans' house and committed the crimes.

Id., Page ID 15616-17. Petitioner's confession, as discussed before, was admitted at trial, and the statements therein constituted more than enough evidence for the jury to conclude beyond a reasonable doubt that Petitioner had committed the burglary and murders, even if he had contested guilt at trial. Moreover, the scope [*136] and detail of the confession far outweighs the minimal probative value of the evidence supposedly not disclosed by the State, much of which focused on the existence of other suspects in the time immediately after the murders. In sum, Petitioner has not shown that he "would more likely than not have received a different verdict with the evidence." (Traverse, ECF No. 234, Page ID 16340, quoting *Kyles*, 514 U.S. at 434)"

Petitioner argues that the confession he provided was unreliable, due to: (a) Millstone and Filippelli's supposedly providing him with details about the crime, and (b) Petitioner giving conflicting statements regarding whether he acted in concert with others in committing the burglary and murders. Further, he argues that many of his original statements regarding the nature of the crimes and the description of the Leemans' house were inaccurate or inconsistent with other evidence, sharply diminishing the confession's probative value (Traverse, ECF No. 234, Page ID 16358-66). Yet, absent a showing that the jury's determination was objectively unreasonable in light of the evidence before it—which Petitioner has not made—this Court cannot overturn that determination. For those reasons, Claim Seven [*137] is denied with respect to the claims raised in the first petition.

b. Claims Raised in the Second Petition

Petitioner argues that the claims raised in the second post-conviction are not procedurally defaulted, because they are based on evidence disclosed by the Springfield Township Police Department and discovered during Kemper's deposition, both of which occurred in 2007 (Traverse, ECF No. 234, Page ID 16331-34, 16336-37). In support, he argues that the standard to avoid procedural default on a second or successive petition—"clear and convincing evidence that no reasonable juror would have found him guilty[,]" *id.*, Page ID 16336, citing Ohio Revised Code § 2953.23(A)(1)(b)—violates the Supremacy Clause as to *Brady* claims, which require "only . . . that a reasonable probability exists that the outcome would have been different." *Id.*, citing U.S. Const. art. VI, § 2, *Kyles*, 514 U.S. at 434.

The Court rejects the Supremacy Clause argument for the reasons given above. However, even assuming that the claims in the second petition were not procedurally defaulted, they suffer from the same flaw as those raised in the first petition: by themselves or as a whole, they do not present a reasonable probability that the jury would have opted not to convict Petitioner or sentence him to death.

Five of the *Brady [*138]* claims in the second post-conviction petition were raised by Petitioner in the first: (1) the State's possession of evidence that supposedly impeached Kemper and Leonard Leeman's respective testimonies: (2) Burt Leeman's status as a suspect; (3) the existence of other suspects; (4) the allegedly inconsistent palm and fingerprint analyses; and (5) the fact that the eyewitness descriptions of the assailant did not match Petitioner's physical description (App'x, ECF No. 167-2, Page ID 11612-20; Traverse, ECF No. 234, Page ID 16331-34). Petitioner does not identify the discovery materials produced in 2007 that made these claims, for the first time, viable. *Kyles*, 514 U.S. at 434.

Petitioner's remaining claim for relief in the second petition was that the State possessed, but failed to disclose, evidence that: (1) the FBI agents assisting in the investigation concluded that the Leemans had been targeted as homicide victims; (2) the Leemans' house had not been vandalized or ransacked; and (3) the Leemans had returned home and were inside their house at the time that the perpetrator entered the dwelling (App'x, ECF No. 167-2, Page ID 11607-09; App'x, ECF No. 167-5, Page ID 14061, 14108, 14121, 14127, 14135, 14137). [*139] Petitioner argues that the evidence would have undermined the State's theory that he: (1) did not know the Leemans; (2) entered the Leemans' house with the intent of committing a burglary; and (3) killed the Leemans when they arrived home and confronted him during the burglary (Traverse, ECF No. 234, Page ID 16331, citing App'x, ECF No. 167-2, Page ID 11607-09). He further claims that disclosure by the State would have caused counsel to pursue a different strategy, meaning that the evidence was material and that he was prejudiced by its suppression. *Id.*, Page ID 16367, citing *D'Ambrosio*, 527 F.3d at 496-97.

Petitioner, in his argument, overstates how probative and exculpatory the evidence at issue actually is. For instance, while the police report stated that "although the male victim's wallet was taken, . . . other items of value were left untouched[.]" (App'x, ECF No. 167-5, Page ID 14135), Petitioner confessed to Millstone and Filippelli that he took Mr. Leeman's wallet (Petitioner Statement, ECF No. 193-1, Page ID 15582). Further, while the Springfield Township Police Investigator's narrative summary of the investigation stated that "no motive [was] established" (App'x, ECF No. 167-5, Page ID 14108), the summary [*140] also stated that Kemper found "Juanita Leeman . . . lying at the end of the driveway . . ., bleeding profusely from multiple stab wounds[.]" and that, upon entering the house, Kemper found William Leeman "lying dead on the floor in a pool of blood, from numerous stab wounds. William Leeman also had his throat cut." *Id.* Those descriptions are consistent with the way in which Petitioner, in his confession, described killing the Leemans (Petitioner Statement, ECF No. 193-1, Page ID 15599-15604). Finally, while several factors led law enforcement to conclude that the crimes were "of a personal nature," rather than a burglary gone awry, the investigator's report identified the perpetrator as "most likely a white male"[;] who "resides, works, or visits the area of the homicides"[;] "may be known to possess the knife used in the assault"[;] and whose "prior criminal activity could include . . . assaultive behavior such as domestic disturbances." (App'x, ECF No. 167-5, Page ID 14138-39). Petitioner met all of those criteria.

In sum, it is unclear whether the evidence produced in 2007 was exculpatory, and at any rate, Petitioner has not demonstrated that these items of evidence, either by themselves [*141] or collectively[10], allowed for a reasonable possibility that the outcome would have been different at the guilt or penalty phase of the trial. Thus, the evidence in the second post-conviction petition, is not material, and Claim Seven must be overruled in its entirety.

2. Claim Eight: Prosecution's Failure to Correct Incorrect Testimony of Leonard Leeman and Pat Kemper

Petitioner claims that the evidence produced in 2007 led him to discover, for the first time, that the State had knowingly adduced false trial testimony from Kemper and Leonard and failed to correct that inaccurate testimony (Traverse, ECF No. 234, Page ID 16370-73).[11] Specifically, Leonard testified that the portions of Petitioner's confession describing the interior of the Leemans' house, containing details that could only be known by someone who had actually been in the house, led him to

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[10] Petitioner's final claim in the second petition was that the cumulative effect of the above-enumerated suppressions of evidence constituted a violation of the Fifth, Sixth, Eight, and Fourteenth Amendments (ECF No .234, Page ID 16334 (citing ECF No. 167-2, Page ID 11620-22).

[11] Petitioner also asserts that the State engaged based its opening statement and closing arguments on evidence that it knew to be false—specifically, that the perpetrator: (1) did not know the Leemans; (2) entered the Leemans' house with the intent of committing a burglary; and (3) killed the Leemans when they arrived home and confronted him during the burglary (Traverse, ECF No. 234, Page ID 16373-76). This Court concluded, as to Claim Seven, that Petitioner had not shown these statements to be false; thus, they cannot be the basis for relief in Claim Eight.

believe that Petitioner had murdered his parents (Trial Trans., ECF No. 163-13, Page ID 3179-81). Yet, Petitioner argues, many of the statements he made about the Leemans' house were inaccurate, or made only in response to leading questions by Millstone and Filippelli (Traverse, ECF No. 234, Page ID 16371, citing Petition, ECF No. 16; Petitioner [*142] Statement, ECF No. 193-1, Page ID 15612, 15615). "The prosecution never corrected the testimony of [Leonard]; nor did [it] provide [Petitioner's] trial counsel with the documents necessary to cross[-]examine this prosecution witness." Kemper also "testified at length concerning the manner in which Hughbanks'[s] description of the crime scene matched the interior of the [Leemans'] residence." (Traverse, ECF No. 234, Page ID 16372, citing Trial Trans., ECF No. 163-13, Page ID 3241-42). Yet, Petitioner's original statements as to many of the features of the house (*e.g.*, whether the house had one or two stories; the location of the master bedroom; and the light fixture in the master bedroom closet) were initially inaccurate, and he corrected only after suggestions and leading questions from the detectives. *Id.*, Page ID 16372-73, citing Petitioner Statement, ECF No. 193-1, Page ID 15546, 15549, 15553, 15555-56, 15558, 15598). Petitioner claims that the State did not correct Kemper's testimony or "provide defense counsel with the reports and statements which documented the inconsistencies in the witness'[s] testimony." *Id.*, Page ID 16373.

The First District rejected this Claim, finding that [*143] Petitioner had not met the requirements of Ohio Rev. Code § 2953.23(A)(1)(b), and thus, the Claim was procedurally defaulted (App'x, ECF No. 167-5, Page ID 14430-31). Petitioner argues, as he did in Claim Seven, that the procedural default rule violates the Supremacy Clause, as there is a lower standard for a writ of *habeas corpus* in instances of knowingly eliciting false testimony ("reasonable probability" that the outcome would have been different had the material been disclosed) than the standard in Ohio Rev. Code § 2953.23(A)(1)(b) ("clear and convincing evidence" that, but for the constitutional error, a reasonable factfinder would not have convicted Petitioner or sentenced him to death) (Traverse, ECF 234, Page ID 16262, 16368-69, citing *Agurs*, 427 U.S. at 103 nn.7-9). Yet, *Agurs* applies only when "the *undisclosed* evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury[,]" 427 U.S. at 103 (emphasis added), citing *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). Kemper and Leonard testified regarding matters about which Petitioner and his trial counsel knew or should have reasonably been aware of at the time of trial—descriptions and characteristics of the Leemans' house and portions of Petitioner's confession. Petitioner does not identify the evidence [*144] disclosed in federal discovery that would have caused him for the first time—in 2007—to realize that portions of their testimonies were false. Thus, Petitioner's Supremacy Clause argument is unavailing as to Claim Eight. It is also rejected for the general reasons given above.

"Because the Ohio Court of Appeals applied a state law procedural bar to reject [petitioner's] *Brady* claim, the claim is procedurally defaulted." *Bies*, 775 F.3d at 396, citing *Coleman v. Thompson*, 501 U.S. at 729-33; *Davie v. Mitchell*, 547 F.3d 297, 311 (6th Cir. 2008). Petitioner argues that he has demonstrated cause and prejudice, because he "did not obtain some of the evidence supporting this claim until the federal discovery" (Traverse, ECF No. 234, Page ID 16369. Yet, Petitioner did not identify the specific evidence he obtained, and thus, he has not "establish[ed] that some objective factor external to his defense impeded his ability to comply with the state's procedural rule." *Bies*, 775 F.3d at 396. Consequently, Claim Eight is denied as procedurally defaulted.

D. Trial Phase Claims for Relief

1. Claim Nine: Admission of Crime Scene Photographs

Over the objections of trial counsel, 2003-Ohio-4121, ¶ 70, the trial court admitted into evidence, during both the guilt and penalty phases of the trial, twenty-six graphic slides and photographs of the crime scene and of the Leemans [*145] (Third Amended Petition, ECF No. 213, Page ID 15980-82 (citations omitted)). "Five of the jurors," in affidavits signed as part of post-conviction proceedings, "reported that the photographs were a factor in their decisions to vote to impose the death penalty." *Id.*, Page ID 15982 (citing App'x, ECF No. 166-17, Page ID 8412, 8414, 8417, 8421, 8425-26). On direct appeal, Petitioner argued that the photographs "were so gruesome and cumulative that their admission into evidence was prejudicial." 1999 Ohio App. LEXIS 5789, 1999 WL 1488933, at *6. The First District rejected Petitioner's argument, noting that the slides and photographs were used by the State's witnesses to describe the crime scene, the manner in which the Leemans were murdered, and how they actually died. Given their probative value, the court "conclude[d] that the trial court did not abuse its discretion in admitting the slides and photographs." *Id.*, citing *State v. Maurer*, 15 Ohio St.3d 239, 15 Ohio B. 379, 473 N.E.2d

768 (1984), paragraph seven of the syllabus; *see also State v. Slagle*, 65 Ohio St. 3d 597, 601, 605 N.E.2d 916 (1992) ("Under Evid.R. 403 and 611(a), the admission of photographs is left to the sound discretion of the trial court.").

Petitioner appealed the First District's ruling to the Supreme Court of Ohio, arguing that the trial court erred in admitting the slides and photographs in [*146] the guilt and penalty phases (App'x, ECF No. 166-5, Page ID 4807-08). The court concluded that the slides and photographs of the victims and the crime scene, illustrated the testimony of the State's witnesses and helped prove Petitioner's intent. 2003-Ohio-4121, ¶ 73. Thus, the court held, that "the trial court could have reasonably found that the probative value of each photograph and autopsy slide outweighed any prejudicial impact on the jury[,]" and "did not abuse its discretion in admitting these photographs and autopsy slides." *Id.*, ¶ 74.

Petitioner argues that, because the First District and Supreme Court of Ohio only ruled on the admissions during the guilt phase, "the standards of review contained in 28 U.S.C. § 2254(d) are inapplicable." (Traverse, ECF No. 234, Page ID 16379, citing *Wiggins v. Smith*, 539 U.S. 510, 527-28, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Frazier v. Huffman*, 343 F.3d 780, 797 (6th Cir. 2003)). Even assuming Petitioner is correct, the Court's review of Claim Nine—an Ohio trial court's application of Ohio Rule of Evidence 403—is circumscribed: "It is a well-established rule that state court rulings on the admission or exclusion of evidence 'may not be questioned in a federal habeas corpus proceeding, unless they render the trial so fundamentally unfair as to constitute a denial of federal rights.'" *Logan v. Marshall*, 680 F.2d 1121, 1123 (6th Cir. 1982), quoting *Gillihan v. Rodriguez*, 551 F.2d 1182, 1193 (10th Cir. 1977), *abrogated on other grounds by Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980).

Petitioner [*147] argues that the trial court's admission of the slides and photographs during the guilt phase had a "carryover effect" due to the trial court re-admitting that evidence during the penalty phase (Traverse, ECF No. 234, Page ID 16381, citing Trial Trans., ECF No. 163-15, Page ID 3429-30; *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1098 (6th Cir. 1990)). In other words, the trial court's initial admission of the slides and photographs during the guilt phase is not being challenged in Claim Nine. Moreover, the slides and photographs, while readmitted during the penalty phase, were not republished for the jury. Rather, the State moved that all the testimony and exhibits be readmitted as evidence of aggravating circumstances, which the trial court sustained over the specific objections of Petitioner's counsel (Trial Trans., ECF No. 163-15, Page ID 3429-30). Petitioner is correct that "[b]ecause sentences of death are quantitatively [*sic*] different from prison sentences, factors that infect the reliability of the capital process cannot be tolerated." (Traverse, ECF No. 234, Page ID 16382, citing *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (O'Connor, J., concurring); *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)). However, the mere readmission of the slides and photographs as evidence of aggravating circumstances is not, on its face, so unreasonable [*148] as to render the penalty phase unreliable or fundamentally unfair, and Petitioner cites no caselaw to the contrary. Accordingly, Claim Nine must be denied

2. Claim Ten: Trial Court not Allowing People to Enter and Exit During Jury Charges

As discussed above, during the jury charges for both the guilt and penalty phases, Judge Marsh ordered her bailiff to lock the courtroom door so that people could not enter or exit during her reading of the charge (Trial Trans., ECF No. 163-14, Page ID 3363-64; Trial Trans., ECF No. 163-17, Page ID 3807). However, she did not order anyone to leave the courtroom during the charge. Petitioner argues that the closure of the courtroom during the charge denied him the right to a public trial guaranteed by the Sixth and Fourteenth Amendments (Third Amended Petition, ECF No. 213, Page ID 15983). As Petitioner did not raise this claim until his second post-conviction petition (App'x, ECF No. 167-2, Page ID 11604-05), the First District found that the claim was procedurally defaulted (App'x, ECF No. 167-5, Page ID 14430-31).

Petitioner argues that his appellate counsel was ineffective in failing to raise this claim on direct appeal, and because the Supreme Court of Ohio addressed the [*149] merits of his ineffective assistance of counsel claim, the claim was not procedurally defaulted (Traverse, ECF No. 234, Page ID 16384, citing *McClellan v. Rapelje*, 703 F.3d 344, 348 (6th Cir. 2013); *Hughbanks*, 2004-Ohio-6, ¶¶ 6-7, 101 Ohio St. 3d 52, 800 N.E.2d 1152). Yet, trial counsel did not object to Judge Marsh's instructions to lock the courtroom doors during either the guilt or penalty phases (Trial Trans., ECF No. 163-14, Page ID 3363-64; ECF No. 163-17, Page ID 3807), meaning that the issue had not been properly preserved for direct appeal, and appellate counsel *could not* have raised it. Thus, the First District's finding of procedural default was proper, and Claim Ten is denied.

E. Claims Eleven and Twelve: Jury Instruction Claims for Relief

In his Traverse, Petitioner withdrew Claim Eleven, and noted that he had previously withdrawn Claim Twelve (Traverse, ECF No. 234, Page ID 16387).

F. Claim Thirteen: Ineffective Assistance of Trial Counsel

Petitioner claims that prior to and during trial, trial counsel's performance was constitutionally deficient in seven areas, and but for that performance, it is reasonably likely that he either would not have been convicted, or he would not have been sentenced to death (Third Amended Petition, ECF No. 213, Page ID 15988; Traverse, ECF No. 234, Page ID 16387-88, [*150] citing *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 687). Thus, Petitioner argues, his convictions or death sentences should be vacated by this Court as violating his rights under the Fifth, Sixth, and Fourteenth Amendments. *Id.*, Page ID 16006. The Warden argues that many of these sub-claims are procedurally defaulted, and that none is meritorious (Initial Return of Writ, ECF No. 22, Page ID 722-47; Supp. Return of Writ, ECF No. 194, Page ID 15665-66). The Court analyzes each sub-claim in turn.

1. Sub-Claim A: Trial Phase Investigation

Petitioner claims that "[t]rial counsel failed to conduct a reasonable investigation with respect to the trial phase." (Third Amended Petition, ECF No. 213, Page ID 15988). As a result of the failure to conduct a thorough investigation as preparation for his defense, counsel did not discover: (1) that Petitioner's confession was inadmissible; (2) the existence of other suspects; (3) the existence of evidence that would impeach the State's theory of the case and the testimony of Kemper and Leonard Leeman; and (4) that the State's arguments and witness testimony were inaccurate (Traverse, ECF No. 234, Page ID 16392, citing Third Amended Petition, ECF No. 213, Page ID 15948-55, 15963-79). The Warden argues that this sub-claim is procedurally [*151] defaulted, because as Petitioner raised it for the first time in his second post-conviction petition, and the First District held that he had failed to satisfy Ohio Rev. Code § 2953.23(A)(1)(b) (Supp. Return of Writ, ECF No. 194, Page ID 15665, citing ECF No. 167-2, Page ID 11624-25; ECF No. 167-5, Page ID 14429-31). Petitioner counters that the procedural default rule cannot be applied to an ineffective assistance of counsel claim, as his burden under *Strickland* (deficiency and prejudice) is less than what is required under Ohio Rev. Code § 2953.23(A)(1)(b) (Traverse, ECF No. 234, Page ID 16393, citing *Strickland*, 466 U.S. at 687).

However, even assuming that the sub-claim is not procedurally defaulted, Petitioner has failed to meet either prong of *Strickland*. Petitioner may only satisfy the deficiency prong by showing that his trial attorneys made errors so serious that they were, for all intents and purposes, not serving as counsel at all. *Strickland*, 466 U.S. at 687. The Court, in its review must be "highly deferential" to decisions made during trial and trial preparation, and may not second-guess those decisions unless, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

Petitioner argues that counsel's performance [*152] was constitutionally deficient because counsel failed to reasonably investigate and discover favorable facts regarding his confession (Traverse, ECF No. 234, Page ID 16395). Consequently, counsel "failed to raise critical challenges" regarding the September 16, 1997, confession, specifically that Petitioner: (1) requested on September 10 that all questioning cease; (2) had been held at the Pima County Jail for seven days without being brought before a judicial officer; (3) had not waived his *Miranda* rights prior to the September 16 interrogation; and (4) was not appointed an attorney within forty-eight hours of being arrested. Petitioner claims that, had his trial counsel raised these issues, there is a reasonable probability that his confession would have been suppressed. *Id.*, citing *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991).[12] The Court discussed Petitioner's first and third points in Claims

[12] Petitioner argues that *McLaughlin* mandates that counsel be appointed within forty-eight hours of an arrest (Traverse, ECF No. 234, Page ID 16395). However, *McLaughlin* pertains to the Fourth Amendment right to a speedy probable cause determination, not Sixth Amendment right to counsel. 500 U.S. at 56, citing *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

Two and Three, respectively, and found that neither his September 10 request to cease questioning, nor any failure to waive his *Miranda* rights on September 16, invalidated his confession. Thus, any failure to include these arguments in the motion to suppress could not have prejudiced Petitioner.

As to the second and [*153] fourth points, as discussed above, Petitioner never invoked his Fifth Amendment right to counsel during the interrogation. Moreover, the Sixth Amendment right to counsel attaches only as to crimes for which an individual has been charged, *Texas v. Cobb*, 532 U.S. 162, 168, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001), and not when, as here, a defendant is subject to an interstate extradition proceeding. A confession under these circumstances "does not require invalidation . . ., even where the defendant is being extradited on the same crime on which he is ultimately tried, and the confession is with respect to that crime." *U.S. v. Doherty*, 126 F.3d 769, 782 (6th Cir. 1997), *abrogated on other grounds by Cobb*, 532 U.S. at 168. For that reason, even if Petitioner's Fourth Amendment rights were violated by not having a probable cause hearing while awaiting extradition, *see McLaughlin*, 500 U.S. at 56, his interrogation and confession did not violate his rights under the Fifth or Sixth Amendment. Thus, counsel's failure to discover this evidence and include it in the motion to suppress could not have violated *Strickland*.

Petitioner's argument is similarly unavailing as to the other three areas in which trial counsel was supposedly deficient, specifically, their failure to discover—(1) the existence of other suspects; (2) the existence of evidence that would impeach the State's theory of the case and the testimony of Kemper and [*154] Leonard Leeman; and (3) that the State's arguments and witness testimony were inaccurate (Traverse, ECF No. 234, Page ID 16395-96). Petitioner stated on the record that he had consulted with counsel and approved of counsel's trial strategy of conceding guilt during the guilt phase (Trial Trans., ECF No. 163-17, Page ID 3835). Further, given the great weight of evidence against Petitioner, particularly after the motion to suppress his confession was denied, counsel's decision to concede guilt cannot be said to have fallen outside the ambit of reasonable trial strategy. *Florida v. Nixon*, 543 U.S. 175, 190-91, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004). Finally, as the Warden correctly notes, there was a serious risk of Petitioner's losing credibility "with the jury, which could have hurt the defense during the critical mitigation phase, if the defense would have acutely challenged the charges in light of Hughbanks'[s] . . . confession." (Initial Return of Writ, ECF No. 22, Page ID 734). Accordingly, any failure by counsel to discover and introduce the above evidence, which was of modest probative value, did not prejudice Petitioner, *Strickland*, 466 U.S. at 687, and cannot be the basis for a viable ineffective assistance of counsel claim.

2. Sub-Claim B: Failure to Challenge Indictment

In his [*155] initial and second post-conviction petitions, Petitioner asserted that counsel was deficient in failing to challenge the method by which Mahaffey was selected as grand jury foreperson, and that he was prejudiced by that failure, as grand juries with Caucasian forepersons were statistically more likely to return indictments with capital specifications (App'x, ECF No. 167-2, Page ID 11625). As discussed above, the First District reached the merits of Petitioner's claim of unconstitutional grand jury foreperson selection, 2003-Ohio-187, ¶¶ 29-43, and that court's conclusion was neither contrary to nor an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). Thus, counsel's failure to object to the selection of Mahaffey did not constitute ineffective assistance under *Strickland*.

3. Sub-Claim C: Challenge to the Admission of Petitioner's Custodial Statements

Petitioner argues that the motion to suppress filed by his trial counsel was deficient because counsel failed to include that Petitioner: (1) was not provided with counsel in a timely manner; (2) had requested on September 10, 1997, that questioning cease; and (3) had not waived his *Miranda* rights prior to the resumption of questioning on September [*156] 16 (Traverse, ECF No. 234, Page ID 16401). He also asserts that, at the evidentiary hearing on the motion, counsel was deficient in failing to elicit testimony from mental health experts and enter into evidence citations to the custodial statement in which Millstone and Filippelli allegedly "fed [Petitioner] facts to which they wanted him to confess[,] because he did not know the facts surrounding the murder." *Id.* This Court, as discussed above, has already held that Petitioner has not demonstrated cause and prejudice as to any Sixth Amendment right to counsel claim, such that his procedural default of the underlying claim could be excused. Further, the Supreme Court of Ohio's holding that none of the circumstances underlying the September 16, 1997, resumption of interrogation rendered Petitioner's subsequent confession anything less than knowing, intelligent, and voluntary, 2003-Ohio-

4121, ¶¶ 50-69, was not contrary to clearly established federal law. As these underlying claims are not meritorious, failure of Petitioner's counsel to include those claims in the motion to suppress was not deficient performance.

As to the failure to elicit testimony of mental health experts, the Supreme Court of Ohio held on direct appeal [*157] that any failure to provide funds for a neuropharmacologist "did not result in an unfair trial." 2003-Ohio-4121, ¶ 40. The court noted that "nothing indicates that Hughbanks was under the influence of drugs or alcohol at the time of his confession, and he denied having taken any drugs or medication that morning." *Id.*, ¶ 44 (internal quotation marks omitted). Moreover, the trial court authorized funds for a neuropsychologist, and Drs. DeSilva and Raju were able to testify during mitigation. *Id.*, ¶ 45. The Supreme Court of Ohio held that the trial court would have had no basis to grant motions for additional experts, and thus, trial counsel could not have been deficient in failing to seek funding for such experts. *Id.*, ¶ 48. The court also held that "counsel's decision not to present psychiatric testimony during the hearing on the motion to suppress was not deficient performance pursuant to *Strickland*[.] . . . The voluntariness of his statement depends on whether the police engaged in coercion and misconduct and not whether Hughbanks was mentally ill." *Id.*, ¶ 69, citing 466 U.S. at 687. "Neither Dr. DeSilva nor Dr. Raju testified during mitigation that Hughbanks was incapable of making a voluntary statement. Moreover, [*158] their description of Hughbanks's mental problems does not support a conclusion that he was unable to voluntarily make a statement or waive his *Miranda* rights." *Id.* As the state court properly applied federal law, this Court cannot issue a writ for any failure to introduce expert testimony at the motion to suppress hearing.

Finally, as to failure to highlight the statements allegedly "fed to Petitioner" by Millstone and Filippelli, this portion of the sub-claim was not raised until the second post-conviction petition. Accordingly, the First District found it to be procedurally defaulted (App'x, ECF No. 167-5, Page ID 14430-31).

Moreover, Petitioner's argument is not meritorious. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *State v. Were*, 118 Ohio St. 3d 448, 2008-Ohio-2762, ¶ 222, 890 N.E.2d 263. Trial counsel's choice to premise Petitioner's motion to suppress on a theory that the confession was not knowing, intelligent, and voluntary—rather than how Petitioner changed his story, supposedly as a result of suggestions made by Millstone and Filippelli—was within the ambit of reasonable trial strategy, [*159] and that choice did not become deficient performance simply because it was unsuccessful. As trial counsel's performance did not constitute ineffective assistance as to the motion to suppress, Sub-Claim C is denied.

4. Sub-Claim D: Improper Performance During *Voir Dire*

In his initial and second post-conviction petitions (App'x, ECF No. 166-16, Page ID 8209-12, 8229-33, 8236-38, 8270-71; ECF No. 166-21, Page ID 9450-54, 9461-63), Petitioner argued that trial counsel's performance during *voir dire* was constitutionally ineffective by: (1) conceding Petitioner's guilt during his questioning of the venire, while portraying the Leemans in a sympathetic light; (2) asking few questions about the mitigating evidence (youth, mental health issues, etc.) that would be introduced, while emphasizing the brutality of the crimes committed; and (3) failing to challenge, for cause or peremptorily, prospective jurors who could not fairly consider mitigation evidence or impose a sentence of life without parole (Traverse, ECF No. 234, Page ID 16409-12 (citations omitted)). Petitioner argued in that petition, as he does here, that trial counsel's actions lowered Petitioner's esteem among potential jurors and [*160] resulted in the seating of jurors who were unable or unwilling to consider a sentence of less than death, prejudicing him in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. *Id.*, Page ID 16412, citing *Strickland*, 466 U.S. at 687.

The First District held that the ineffective assistance of counsel claims in the post-conviction petition were barred by *res judicata*, as "Hughbanks was represented by new counsel on [direct] appeal[,]" and "[t]he challenges to trial counsel's performance advanced in these claims, although supported by evidence *dehors* the record, presented matters that could fairly have been determined on direct appeal without resort to such evidence." 2003-Ohio-187, ¶ 27, citing *Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169, syllabus. Consequently, the Warden argues, the sub-claim is procedurally defaulted (Initial Return of Writ, ECF No. 22, Page ID 683-84, 731 citing *Engle v. Isaac*, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); *Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104; *Coleman v. Mitchell*, 244 F.3d at 538).

Petitioner counters that the evidence outside the record submitted in the initial and second post-conviction petitions was necessary for full adjudication of his claims, and thus, the state court's application of the procedural default rule is improper (ECF No. 234, Page ID 16407-08, citing *Hoffner v. Bradshaw*, 622 F.3d 487, 501 (6th Cir. 2010); *White v. Mitchell*, 431 F.3d 517, 527 (6th Cir. 2005); *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005)). Yet, even if Petitioner's sub-claim were not properly held to be procedurally defaulted, it still fails on its [*161] merits. The statements made and questions posed by trial counsel during voir dire were consistent with the overall strategy of: admitting guilt; conceding the horrific nature of the crimes for which Petitioner was charged; avoiding portraying the victims in a negative light; and focusing on seating jurors who would fairly consider the evidence presented in mitigation (Trial Trans., ECF No. 163-9, Page ID 2555, 2662-63, 2678-79). That some of members the petit jury found the tactic off-putting (App'x, ECF No. 166-17, Page ID 8418, 8423-24), does not mean "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Further, Petitioner asserts that trial counsel was ineffective in failing to challenge the seating of a Betty Boyd ("Boyd") on the petit jury, and that this failure "in effect waived Hughbanks'[s] right to a fair and impartial jury[,]" in violation of his Sixth Amendment rights (Traverse, ECF No. 234, Page ID 16411-12, citing *Miller v. Webb*, 385 F.3d 666, 675-76 (6th Cir. 2004); *Hughes v. United States*, 258 F.3d 453, 456 (6th Cir. 2001)). He argues that Boyd's answers during *voir dire* indicated that she could not fairly consider a sentence of less than death; consequently, Petitioner claims, counsel was deficient in not challenging her for cause or peremptorily, and he was [*162] prejudiced by Boyd's actually sitting on the petit jury. *Id.*, Page ID 16411, citing Trial Trans., ECF No. 163-11, Page ID 2851-66; ECF No. 163-18, Page ID 3847.

Petitioner does not claim that a juror's general favorability toward capital punishment by itself renders her biased; nor could he reasonably do so. Further, the Court cannot conclude that Boyd was biased, such that counsel's decision not to challenge her placement on the petit jury was deficient performance under *Strickland*. Boyd did state that the death penalty was the appropriate punishment for some crimes, and that she identified as a "ten" on a scale of one to ten, with one being strongly opposed to the death penalty, and ten being strongly in favor (Trial Trans., ECF No. 163-11, Page ID 2854-55). However, Boyd also declared that she did not believe that the death penalty was the only appropriate punishment for someone convicted of murder, stating instead that the imposition of capital punishment "should be according to the circumstances" of each case. *Id.*, Page ID 2855. Boyd further stated that she could put aside all personal feelings about the death penalty "to make the best decision I feel that I can make." *Id.*, Page [*163] ID 2858. During examination by Petitioner's counsel, Boyd reiterated that she would only decide whether to vote for the death penalty after hearing all the facts and listening to Judge Marsh's instructions on the law. *Id.*, Page ID 2862-64.

Finally, Petitioner's general claim that counsel was not vigilant in challenging potentially biased jurors is belied by Claim Six in this Court, in which Petitioner recounts his counsel's vigorous challenges for cause, and subsequent peremptory challenges, of Van Nuis and Allen. As trial counsel's performance during voir dire did not constitute ineffective assistance of counsel, Sub-Claim D is denied

5. Sub-Claim E: Deficient Performance During Guilt Phase

Petitioner argues that trial counsel's performance during the guilt phase was deficient in four areas: (1) counsel's opening statement; (2) failing to challenge the introduction of Petitioner's custodial statements in the State's case-in-chief; (3) failing to challenge Kemper and Leonard Leeman's testimonies on cross-examination; and (4) failing to object to portions of Kemper and Jay's testimonies regarding purported inculpatory statements made by Petitioner to family members and Leggett (Third Amended [*164] Petition, ECF No. 213, Page ID 15993-95).

a. Procedural History

Petitioner raised the first issue in his initial post-conviction petition and the second and third issues in his second petition, and the First District held that *res judicata* barred consideration of all three issues (Traverse, ECF No. 234, Page ID 16415-17, citing App'x, ECF No. 166-26, Page ID 10608; ECF No. 167-2, Page ID 11627-28; ECF No. 167-5, Page ID 14430-31). Petitioner raised the fourth issue on direct appeal in the context of counsel's decision not to call Gary Sr. and Larry as witnesses (App'x, ECF No. 166-5, Page ID 4833-34).

b. Issue One: Deficient Performance in Counsel's Opening Statement

Petitioner claims that, by stating fourteen times during the opening statement that Petitioner's life was a lie, counsel "personally attacked the defendant." (Traverse, ECF No. 234, Page ID 16419, citing Trial Trans., ECF No. 163-13, Page ID 3165-69; *Fisher v. Gibson*, 282 F.3d 1283, 1300 (10th Cir. 2002)). He claims that the opening statement poisoned Petitioner in the minds of the jury. *Id.*, Page ID 16423. The First District, as discussed above, held that this claim, as part of his initial post-conviction petition, was barred on *res judicata* grounds, as Petitioner had failed [*165] to raise this issue on direct appeal (App'x, ECF No. 166-26, Page ID 10608). Petitioner does not argue that the facts regarding this issue were outside the record or not available to him on direct appeal; nor could he reasonably do so. Ohio's doctrine of *res judicata* in criminal cases, enunciated in *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967), is an adequate and independent state ground of decision, as the Sixth Circuit has repeatedly held. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994) (citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001).

c. Issues Two and Three

In the second petition, Petitioner supplemented the second and third issues with evidence *dehors* the record (App'x, ECF No. 166-17, Page ID 8412-26, 8495-96; ECF No. 166-21, Page ID 9461-63, 9497-9507). Nonetheless, the First District ruled that Petitioner had failed to meet the requirements of Ohio Rev. Code § 2953.21(A)(1)(b) (App'x, ECF No. 167-5, Page ID 14429-31). The Warden argues that the First District's renders the issues procedurally defaulted, and that Petitioner cannot show the cause and prejudice or fundamental miscarriage of justice required to set aside the procedural default. (Supp. Return of Writ, ECF No. 194, Page ID 15683-84, citing App'x, ECF No. 167-5, Page ID 14429-31, 14542).

The issues, as set forth by Petitioner, should have been contained in the [*166] trial record, and nowhere in the Third Amended Petition or Traverse does Petitioner identify any evidence *dehors* the record that made these issues viable for the first time after conducting discovery in this Court. Moreover, the issues are not valid grounds for relief. As discussed above, the decision to concede guilt, in the face of the strong evidence against Petitioner, was within the ambit of reasonable trial strategy, and even if counsel had more vigorously cross-examined Kemper and Leonard (the third issue), the Court cannot conclude that the jury would not have convicted Petitioner. *See, e.g., Joseph v. Coyle*, 469 F.3d 441, 462 (6th Cir. 2006) (prejudice can be demonstrated only by showing a reasonable probability that, but for the error, the outcome would have been different). Petitioner's second issue pertains to trial counsel's alleged failure to:

> [A]ddress the officers' extensive knowledge of the murders, their direct examination to the contrary. Furthermore, defense counsel did not cross examine the officers as to their use of leading questions, to suggest or provide Petitioner with the answers that the officers desired. Instead[,] defense counsel elicited that: 1) the interrogating officers did not coerce Mr. Hughbanks, [*167] 2) his statement contained details only the assailant would know, 3) Mr. Hughbanks was remorseful, and 4) his statement had a cathartic effect.

(Traverse, ECF No. 234, Page ID 16413, quoting ECF No. 167-2, Page ID 11629). "It is well settled that *Strickland* does not require counsel to raise every possible non-frivolous argument in representing a criminal defendant." *Percan v. United States*, 294 F. Supp. 2d 505, 513 (S.D.N.Y. 2003), citing *Jones*, 463 U.S. at 754. Thus, failing to raise arguments outside of those contained in the motion to suppress does not, by itself, constitute deficient performance. Further, Petitioner's own description of counsel's cross-examination showed that it was consistent with the strategy—to which Petitioner agreed—of appearing contrite about committing the crimes with which he was charged. The Court cannot conclude that changing strategy in the middle of the guilt phase would have given Petitioner a reasonable probability of a better outcome. Thus, the second and third issues cannot form the basis for a viable *Strickland* claim.

d. Issue Four: Failure to Object to Hearsay Statements

As discussed above, as to the claim that trial counsel unreasonably failed to object to Kemper and Jay's hearsay testimony regarding inculpatory statements supposedly [*168] made by Leggett and Petitioner's family members regarding Petitioner,

Petitioner raised that issue on direct appeal in the context of counsel's alleged failure to call Gary Sr. or Larry to rebut Kemper and Jay's testimonies (App'x, ECF No. 166-5, Page ID 4833-34). The Supreme Court of Ohio rejected Petitioner's claim that trial counsel unreasonably failed to object to Kemper and Jay's hearsay testimony regarding inculpatory statements supposedly made by Petitioner to family members and Leggett (App'x, ECF No. 166-5, Page ID 4833-34), finding that the testimonies of Gary Sr. and Larry "would likely have strengthened the state's case, since the jury would have viewed Hughbanks's confession to family members as overwhelming evidence of his guilt." 2003-Ohio-4121, ¶ 82. This Court cannot conclude that that ruling was "a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

Thus, the Court's remaining analysis is limited to the narrow question of counsel's purported failure to object to hearsay testimony. Petitioner argues that death penalty trial counsel must object as to any issue that may be reasonably raised on appeal, so that the [*169] record is preserved (Traverse, ECF No. 234, Page ID 16422, citing *White v. McAninch*, 235 F.3d 988, 999 (6th Cir. 2000); *Washington v. Hofbauer*, 228 F.3d 689, 707-08 (6th Cir. 2000); 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, § 11.7.3 ("1989 ABA Guidelines")). Petitioner claims that his attorneys' decision not to challenge the hearsay testimony could not have been reasonable, since they did not interview Gary Sr. or Larry. If they had, he argues, they would have discovered that Gary Sr. and Larry had recanted their statements to the police. *Id.* n.26, citing App'x, ECF No. 166-17, Page ID 8490-94.

Petitioner may be correct that counsel's "failure to conduct a reasonable investigation 'does not reflect a *strategic* decision, but rather an abdication of advocacy[.]'" (Traverse, ECF No. 234., Page ID 16423 (emphasis in original), quoting *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997)). He may also be correct that objections to the hearsay testimony, if sustained, would have weakened the State's case. However, given the probative value of the confession and the other evidence presented by the State, the failures to object do not undermine confidence in the outcome. Thus, Petitioner was not prejudiced under *Strickland* as to the fourth issue, and Sub-Claim E of Claim Thirteen must be denied in its entirety.

6. Sub-Claim F: Deficient Performance in the Defense Case

Petitioner argues that his attorneys' [*170] performance in the defense case-in-chief was deficient in failing to: (1) impeach the prosecution's case; (2) identify other individuals seen in the vicinity of the Leemans' house at the time of the murders; (3) identify other suspects; (4) elicit testimony about Hughbanks's having been eliminated as a suspect because his palm and fingerprints did not match those found at the crime scene; and (5) call Gary Sr. and Larry as witnesses (Traverse, ECF No. 234, Page ID 16424-25). The Court has already held that the Supreme Court of Ohio's rejection of the fifth issue is not a basis upon which this Court may grant the writ. Petitioner initially raised issues one through four in his second petition as part of his ineffective assistance of trial counsel claim (Traverse, ECF No. 234, Page ID 16424, citing ECF No. 167-2, Page ID 11625). The First District rejected issues one through four for failing to meet the requirements of Ohio Rev. Code § 2953.23(A)(1)(b) (App'x, ECF No. 167-5, Page ID 14430-31), and the Warden argues that these issues are procedurally defaulted (Supp. Return of Writ, ECF No. 194, Page ID 15665). However, even if the First District had erred in its application of Ohio Rev. Code § 2953.23(A)(1)(b), the Court discussed in Claim Seven the [*171] evidence underlying issues one through four, and concluded that none of that evidence, alone or in combination, gives rise to a reasonable probability that, had such evidence been presented, there would have been a different result. *Kyles*, 514 U.S. at 434; *Joseph*, 469 F.3d at 462. Consequently, trial counsel's failure to discover and introduce such evidence cannot have prejudiced Petitioner, *Strickland*, 466 U.S. at 690, and Sub-Claim F must be denied.

7. Sub-Claim G: Deficient Performance in Mitigation Phase

Petitioner claims that his attorneys 'investigation and preparation for the mitigation phase of the trial was deficient due to their "failure to: a) interview necessary witnesses; b) collect critical records; and c) retain reasonably [*sic*] and necessary experts." (Traverse, ECF No. 234, Page ID 16431). They were also supposedly deficient during the mitigation phase proper by calling only Drs. Raju or DeSilva, neither of whom was treating Petitioner at the time, and failing to present "[a] current and competent mental evaluation[,]" which "would have documented for the jury that Hughbanks suffers from . . . bipolar, post-traumatic stress[,] and substance abuse disorders. Two of the three disorders were the product of the environment in which he was

raised[,] [*172] including having been twice sexually assaulted." *Id.*, Page ID 16431-32. Petitioner also argues that trial counsel was deficient in failing to call Gary Sr. and Larry as mitigation witnesses, and for stating, in closing argument, that it would be understandable if jurors wanted to return a death sentence. *Id.*, Page ID 16432. Petitioner claims that prejudice under *Strickland* exists, because "[a] reasonable probability exists that if counsel had performed reasonably and met the prevailing standards of practice, one or more jurors would have voted to recommend sentences of less than death[,]" which under Ohio law would have required the imposition of a non-death sentence. *Id.*

Petitioner did not raise this Sub-Claim on direct appeal. Rather, he raised twenty claims pertaining to ineffective assistance in the mitigation phase as part of his initial post-conviction petition (Traverse, ECF No. 234, Page ID 16432-33, citing App'x, ECF No. 166-16, Page ID 8207-08, 8257-58, 8261-63, 8266-67; ECF No. 166-21, Page ID 9456-60, 9464-90). The First District concluded that trial counsel's purported failure to present "evidence of [Petitioner's] history of alcohol abuse, evidence of law enforcement's [*173] belief that he had been drunk when he committed the crimes, and evidence of the consideration received by his brother for turning him in[,]" 2003-Ohio-187, ¶ 48, was not a valid ground for relief. Given the weight of the evidence against Petitioner, that court stated, "the evidence offered in support of these claims cannot be said to demonstrate a reasonable probability that, but for counsel's failure to present this evidence at trial, the results of the trial would have been different." *Id.*, ¶ 52. The First District considered and rejected Petitioner's argument that trial counsel had been ineffective in: (1) preparation and presentation of evidence during the penalty phase regarding Petitioner's mental health issues; (2) cross-examining or rebutting the testimony of Dr. Schmidtgoessling; and (3) not playing audiotapes of his conversations with his parents, "which, he argued, was mitigating in the sense that it would have humanized him and revealed to the jury his feelings and troubled history." *Id.*, ¶ 53 (alterations and internal quotation marks omitted). In so doing, the court noted that trial counsel had presented much of that evidence at trial, and found that "the record demonstrates that counsel [*174] presented the case in mitigation competently in view of the facts available to him." *Id.*, ¶ 54, citing *State v. Post*, 32 Ohio St. 3d 380, 388-89, 513 N.E.2d 754 (1987).

The First District also examined Petitioner's arguments that trial counsel was ineffective by purportedly: (1) inadequately presenting life sentencing options; (2) not asking the jury to return a sentence of life without parole; (3) not objecting to the readmission of evidence in the sentencing phase; (4) not moving for the admission of certain exhibits; (5) not objecting during the State's closing argument; (6) abandoning Petitioner during the defense's closing argument; and (7) failing to request a "*Brooks* instruction"—"a penalty-phase instruction regarding the power of a solitary juror to prevent a death penalty recommendation." 2003-Ohio-187, ¶ 26 (internal quotation marks omitted). The First District rejected these arguments on *res judicata* grounds, noting that, as with Petitioner's claims of ineffective assistance during the guilt phase: Petitioner was represented by new counsel on direct appeal; these arguments were known to him at the time of direct appeal; and he could have raised them without relying on evidence *dehors* the record. *Id.*, citing *Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169, syllabus.

Petitioner claims that the evidence [*175] *dehors* the record he submitted precludes procedural default as to: (1) the appointment, examination, and testimony of Dr. Schmidtgoessling; and (2) failure to play the audiotapes of Petitioner's conversations with his family (Traverse, ECF No. 234, Page ID 16435-37). Yet, Petitioner also concedes that this Court's review of virtually all of his claims is governed by 28 U.S.C. § 2254(d), *id.*, Page ID 16437[13], and the statute's exacting standards for granting relief are fatal to this Sub-Claim. The Court, for the reasons discussed below, cannot reasonably conclude that the First District's holding that Petitioner did not meet both prongs of *Strickland* was either "contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented[.]" 28 U.S.C. § 2254(d)(1-2).

a. Investigation and Preparation

[13] Petitioner argues that the portion of his sub-claim relating to counsel's failure to object to the trial court's appointment of Dr. Schmidtgoessling is not subject to 28 U.S.C. § 2254(d) (Traverse, ECF No. 234, Page ID 16437). However, the First District reached the merits of that portion of Petitioner's ineffective assistance claim, 2003-Ohio-187, ¶¶ 53-55, rendering 28 U.S.C. § 2254(d) applicable to his entire sub-claim.

Petitioner notes that the ABA standards "accurately reflect the prevailing norms for purposes of evaluating counsel's performance[,]" and argues that counsel failed to meet those standards both in their preparation for the mitigation phase, and in the mitigation phase itself (Traverse, ECF No. 234, Page ID 16437-38, citing *Wiggins*, 539 U.S. at 524; *Strickland*, 466 U.S. at 688 [*176]). Petitioner argues that his trial attorneys failed to collect at least twenty-nine sets of relevant mental health records, including those concerning his thirteen mental health-related hospitalizations between 1987 and 1997, and that they failed to locate and interview Petitioner's family members and close acquaintances, despite Gary Sr.'s and Larry's making themselves available to be interviewed. *Id.*, Page ID 16439, citing App'x, ECF No. 166-17, Page ID 8492, 8494; ECF No. 166-20, Page ID 9283, 9285, 9299; *Campbell v. Coyle*, 260 F.3d 531, 553 (6th Cir. 2001). Nor did they compile any social history, including Petitioner's history as a victim of abuse and as a witness to other family members suffering abuse. *Id.*

Petitioner also argues that trial counsel was deficient in failing to retain any experts who could opine on Petitioner's PTSD and bipolar and substance abuse disorder (Traverse, ECF No. 234, Page ID 16439, citing App'x, ECF No. 166-20, Page ID 9301; ECF No. 167-2, Page ID 11860, 11896). Rather, counsel only called, as lay witnesses, Drs. Raju and DeSilva, despite not having treated Petitioner since 1986 and 1995, respectively. *Id.*, Page ID 16440 citing Trial Trans., ECF No. 163-15, Page ID 3432, 3452, 3483, 3542-43; ECF No. 167-2, Page ID 11875. "They were not[,]" Petitioner claims, "substitutes for a clinical psychologist who would have evaluated Mr. Hughbanks in the context of his social history[.]" *Id.*, Page ID 16440, citing App'x, ECF No. 166-20, Page ID 9301. Taken together, Petitioner [*177] argues, trial counsel lacked the necessary information to represent him competently in the mitigation phase, which, in turn, made his death sentence more likely. *Id.*, Page ID 16449.

Petitioner's argument is not persuasive, for several reasons. *First*, and contrary to his argument, his trial counsel moved that Dr. Raju be qualified as an expert (Trial Trans., ECF No. 163-15, Page ID 3465). The State did not object, with its attorney responding only as follows: "I don't think the Court declares people experts anymore. The jury just weighs his testimony." *Id.* The State's attorney referred to Dr. DeSilva in open court as an expert. *Id.*, Page ID 3479. Thus, Drs. Raju and DeSilva were presented to the jury as expert psychiatrists, not as lay witnesses.

Second, Drs. Raju and DeSilva's treatment of Petitioner was, as discussed above, intensive in nature, and their testimonies detailed the severe symptomology of Petitioner's bipolar and substance abuse disorders, his history of abuse, and Dr. DeSilva's diagnosis of schizoaffective disorder (Trial Trans., ECF No. 163-15, Page ID 3434-51, 3483-3528). Moreover, Dr. DeSilva's treatment of both Gary Sr. and Loretta, in addition to Petitioner, meant [*178] that he was aware of Petitioner's social history. Petitioner does not identify any additional evidence about which another psychiatrist would have testified that would have made a non-death sentence more likely.[14]

Third, as discussed above, counsel called Petitioner's mother, uncle, and sister as witnesses, to discuss Petitioner's mental illness and substance abuse, and the corporal and mental abuse that his parents inflicted upon him. Counsel was under no obligation to present every piece of potentially mitigating evidence, or to call every witness who could have testified as to Petitioner's social history and background. Further, while Gary Sr. and Larry recanted the statements that they made to the police, there was no indication that they had done so at the time of the mitigation phase. Thus, they were still adverse to Petitioner at that time, and counsel's decision not to even interview them was reasonable trial strategy. In sum, Petitioner has failed to identify any evidence that: (a) should have reasonably been discovered in trial preparation by counsel; and (b) alone or in combination, likely would have resulted in at least one juror voting not to recommend a death sentence. Thus, [*179] Sub-Claim G, as it pertains to counsel's investigation and preparation, must be denied.

b. Performance during Mitigation Phase

Petitioner claims that trial counsel was deficient in the following areas of the mitigation phase: (a) opening statement; (b) presentation of evidence, specifically, the failure to present certain lay and expert testimony; (c) the State's rebuttal; (d) closing arguments (Traverse, ECF No. 234, Page ID 16441-43). Petitioner argues that these failures prejudiced him because it deprived

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[14] In an affidavit filed in support of Petitioner's initial post-conviction petition, a Dorian Hall avers that "one juror, Michael Lord, stated that a 'good specific explanation of Bipolar Disorder as it related to Mr. Hughbanks' would have made a difference in his sentencing decision." (App'x, ECF No. 166-20, Page ID 9301). Yet, Dr. DeSilva testified at length regarding Petitioner's bipolar disorder (Trial Trans., ECF No. 163-15, Page ID 3505-06).

him of arguments and evidence that, alone or in combination, would have made the imposition of a death sentence less likely, and "[b]ecause the State of Ohio is a weighing state, it is sufficient that the new evidence would tip the scales[,] no matter how slight[ly,] in favor of life." *Id.*, Page ID 16443, quoting 1989 ABA Guidelines, § 11.8.6(A) ("Counsel should present to the sentencing entity or entity all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence."), citing *Coleman v. Mitchell*, 268 F.3d at 452-53.

Petitioner argues that counsel prejudiced him in the opening statement by stating that the crimes were horrific and that the verdicts in the guilt phase were to be expected, [*180] and by not providing details on the expected testimony of the witnesses that the defense would call (Traverse, ECF No. 234, Page ID 16441, citing Trial Trans., ECF No. 163-15, Page ID 3426, 3428). He claims that counsel prejudiced him in closing argument by reiterating Petitioner's culpability and portraying him in a negative light, *id.*, Page ID 16443, citing Trial Trans., ECF No. 163-17, Page ID 3784, 3787, specifically stating that "[t]here's a part of you that wants to execute him, and I don't discount that, because if I was in your position, I would feel the same way." *Id.*, quoting Trial Trans., ECF No. 163-17, Page ID 3782. Petitioner argues that, in doing so, counsel violated "[t]he purpose of mitigation[,]" which "is to offer an explanation . . . so the jury would at least understand and not hate the defendant." (Traverse, ECF No. 234, Page ID 16443, citing App'x, ECF No. 166-21, ¶ 42, Page ID 9506).

The portions of the opening and closing statements cited by Petitioner in the Traverse do not reflect the complete message that counsel conveyed in those statements. For instance, in the opening statement, immediately after discussing the horrific nature of the crimes, counsel began [*181] a lengthy overview of the mitigation evidence, which he claimed would show that Petitioner "never had a chance from the get-go, so to speak, from the very start, that Gary Hughbanks was a product of a dysfunctional family [and] genetically impaired." (Trial Trans., ECF No. 163-15, Page ID 3426). Therein, counsel discussed the expected testimony of Drs. Raju and DeSilva as evidence that Petitioner had been suffering from severe mental illness his entire life. *Id.* Moreover, counsel's reiteration of Petitioner's culpability can reasonably be viewed as acceptance of the jury's verdict in the guilt phase. Similarly, in the closing argument, counsel's statement that he would not blame the jury for hating Petitioner was balanced by his repeated requests that the jury "follow the law" and impose a life sentence on Petitioner (Trial Trans., ECF No. 163-17, Page ID 3782, 3787). In sum, counsel, during opening and closing statements, attempted to explain to the jury the reasons why Petitioner should not be sentenced to die. Accordingly, the Court may not reasonably conclude that the First District's ruling was "based on an unreasonable determination of the facts[.]" 28 U.S.C. § 2254(d)(2).

The Court has already ruled [*182] that counsel's decisions on which evidence and witnesses to present in the defense case-in-chief was within the ambit of reasonable trial strategy, and did not constitute deficient performance under *Strickland*. Petitioner cites the report of Robert L. Smith, Ph.D., who was retained as a forensic psychology expert in post-conviction proceedings, as evidence that the testimonies of Drs. Raju and DeSilva were inadequate, as they did not detail the synergistic effects of Petitioner's bipolar, substance abuse, and post-traumatic stress disorders, or Petitioner's mental state at the time he allegedly committed the murders (Traverse, ECF No. 234, Page ID 16445-46, citing App'x, ECF No. 166-20, Page ID 9283-95). Yet, Dr. DeSilva testified as to Petitioner having all three of the above disorders, and that the onset of his bipolar disorder preceded his alleged commission of the crimes. Thus, the Court is left with only an alleged failure to introduce the synergistic effects of Petitioner's disorders, and the Court cannot reasonably conclude that any failure to introduce evidence as to that narrow area prejudiced Petitioner by making a death sentence more likely.

Petitioner claims that counsel [*183] erred in failing to object to the trial court's May 19, 1998, appointment of Dr. Schmidtgoessling, who had already evaluated Petitioner as to his competency to stand trial, so that she could re-evaluate Petitioner "to assist the Court in determining the proper disposition of the case." (Traverse, ECF No. 234, Page ID 16442, quoting App'x, ECF No. 166-3, Page ID 4372). Petitioner argues that, because Ohio law permits such an appointment in a capital case to be made only with a defendant's consent, and because Petitioner did not consent to Dr. Schmidtgoessling's appointment, that appointment, and the trial court's acceptance of her testimony, violated Ohio law. Further, Petitioner claims, trial counsel erred by failing to preserve these supposed errors as grounds for appeal. *Id.*, citing Ohio Revised Code § 2929.03(D)(1); App'x, ECF No. 166-21, ¶¶ 28-34, Page ID 9503-04; 1989 ABA Guidelines, § 11.7.3. Petitioner is correct that, in an aggravated murder case, a presentence investigation and mental evaluation, for the purposes of aiding the Court in disposition, may only be made upon the request of a defendant. Ohio Revised Code § 2929.03(D)(1). Yet, as the Warden points out, even if Ohio law prevented Dr. Schmidtgoessling from conducting a presentence mental evaluation, it [*184] did not prevent her from testifying in the mitigation phase (Initial Return of Writ, ECF No. 22, Page ID 747). Dr. Schmidtgoessling had previously examined Petitioner as to his competency to stand trial, and the Court is unaware of any bar as to her testifying

as to her impressions from that examination. Importantly, Petitioner does not argue that Dr. Schmidtgoessling's appointment and testimony actually prompted any otherwise-uncertain juror to agree to recommend a death sentence. Thus, he has not demonstrated the requisite "but for" prejudice, and Sub-Claim G, and all of Claim Thirteen, must be denied.

G. Claim Fourteen: Ineffective Assistance of Appellate Counsel

Petitioner argues that his attorneys on direct appeal, appellate counsel's performance was deficient in their: (1) preparation and litigation of Petitioner's appeal, including refusing to raise certain assignments of error specifically identified and requested by Petitioner; (2) raising weak assignments of error that had no realistic chance of affording Petitioner relief, such as reversal or vacating of Petitioner's convictions and death sentences; (3) failure to raise stronger issues that, alone or together, would have led [*185] a reasonable appellate court to order, at a minimum, new appellate briefing; and (4) failure to argue adequately the assignments of error actually raised (Traverse, ECF No. 234, Page ID 16450-52, 16454-56, citing *Maupin*, 785 F.2d at 138).

Petitioner raised these issues in his application to the First District for reopening of his direct appeal, in which he cited seventy-one allegedly meritorious assignments of error that appellate counsel failed to raise (App'x, ECF No. 166-6, PageID 5002-11). The First District denied Petitioner's application, noting that the seventy-one alleged assignments of error all happened at trial; under Ohio law, such assignments "do[] not allege ineffective assistance of appellate counsel, and therefore [are] not properly raised in an App.R. 26(B) application." (App'x, ECF No. 166-14, Page ID 7908, quoting *McNeill*, 83 Ohio St.3d at 459). Further, the court held, the application failed to meet the requirements of App. R. 26(B)(2)(d), as "there is no discussion or argument with respect to any of the seventy-one assignments of error[,]" and how "the deficiency in appellate counsel's performance prejudicially affected the outcome of the appeal." *Id.* (alterations removed) (citations omitted). On January 14, 2004, [*186] the Supreme Court of Ohio affirmed the denial of Petitioner's application, concluding that Petitioner had not met the *Strickland* standard of deficient and otherwise reasonable probability of success. 2004-Ohio-6, ¶¶ 4-5 (*per curiam*). Consequently, Petitioner had failed to raise a genuine issue of fact as to his alleged denial of effective assistance of counsel. *Id.*, ¶ 6, citing OHIO APP. R. 26(B)(5).

The decision on the merits of Petitioner's application, albeit brief, 2004-Ohio-6, ¶¶ 4-6, means that, contrary to the Warden's argument (Initial Return of Writ, ECF No. 22, Page ID 748), the above claim is not procedurally defaulted. Nonetheless, Petitioner's claim, and all the arguments raised therein, fail on their merits. The decision by Petitioner's appellate counsel not to meet with Hughbanks except for immediately after the imposition of the death sentence (App'x, ECF No. 166-6, ¶¶ 5-6, 10, Page ID 5069-70), does not by itself constitute deficient performance. Rather, it is simply one factor amongst many that this Court must consider in determining whether appellate counsel's performance was deficient. *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999).[15] Similarly, while his appellate counsel may have erred in failing to respond to Petitioner's letter requesting that certain [*187] issues be raised, that failure did not constitute constitutionally deficient performance, as, counsel is under no obligation to raise every relevant, non-frivolous argument on appeal. *Barnes*, 463 U.S. at 752-53.

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[15] (1) Were the omitted issues "significant and obvious"?

(2) Was there arguably contrary authority on the omitted issues?

(3) Were the omitted issues clearly stronger than those presented?

(4) Were the omitted issues objected to at trial?

(5) Were the trial court's rulings subject to deference on appeal?

(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

(7) What was appellate counsel's level of experience and expertise?

(8) Did the petitioner and appellate counsel meet and go over possible issues?

(9) Is there evidence that counsel reviewed all the facts?

(10) Were the omitted issues dealt with in other assignments of error?

(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Petitioner identified seven specific issues he claims appellate counsel was deficient in failing to raise as assignments of error (App'x, ECF No. 166-6, ¶ 8a-g, Page ID 5069-70). However, appellate counsel raised claims of ineffective assistance of counsel and improper admission of Petitioner's confession, the gravamen of issues a through c. Issues d through g pertained to certain evidence that was supposedly inconsistent with him having committed the crimes. In light of Petitioner's confession and statement to the petit jury accepting responsibility for the crimes, it was reasonable for appellate counsel to conclude that any utility in raising those issues as assignments would be far outweighed by the risk of confusion of the issues. While appellate counsel's failure to file a reply brief was undoubtedly a missed opportunity to rebut the points raised in the state's response, Petitioner does not identify what, if any, arguments should have been raised in that brief. Thus, he has not demonstrated prejudice [*188] under *Strickland* as to the preparation and litigation of Petitioner's appeal in general.

Petitioner argues that, of the fifteen assignments raised in the appellate brief, only three were meritorious, as four were inappropriate for direct appeal, four were premised on legal theories that had been rejected repeatedly by the Supreme Court of Ohio, two were governed by the deferential abuse of discretion standard, and "two of the other issues were so weak that they could be termed 'nonstarters.'" (Traverse, ECF No. 234, Page ID 16455, citing *State v. Keith*, 79 Ohio St. 3d 514, 536, 1997-Ohio 367, 684 N.E.2d 47 (1997)). Also, Petitioner claims that appellate counsel was deficient in omitting the following assignments of error from the direct appeal:

(1) Trial Court violated Petitioner's Fifth and Sixth Amendment rights when it admitted Petitioner's custodial statements;
(2) Trial Court violated Petitioner's Sixth, Eighth and Fourteenth Amendment rights when it did not excuse Samuel Allen, Betsy Boyd, and Rosalie Van Nuis for cause;
(3) Trial Court violated Petitioner's Sixth and Fourteenth Amendment rights when it ordered the courtroom closed during the jury charges;
(4) Trial Court violated Petitioner's Sixth and Fourteenth Amendment rights by performing deficiently during:
(a) Voir dire;
(b) Cross-examination of Kemper, Millstone, Filippelli, and Leonard Leeman;

(c) [*189] The mitigation phase; and
(d) Preserving the record or appeal.

(Traverse, ECF No. 234, Page ID 16455-68). Petitioner argues that, even given the broad latitude which appellate counsel is afforded, appellate counsel's performance was ineffective. *Id.*, Page ID 16454, citing *Franklin v. Anderson*, 434 F.3d at 429 (6th Cir. 2006); *Greer v. Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001); *Mapes*, 171 F.3d at 427-28.

Petitioner's argument is unavailing. The Court considered the substance of omitted assignments one through three and sub-sections a through c of assignment four as part of Claims One through Four, Six, Ten and Thirteen, and denied all of the claims. Thus, the Court cannot conclude that the omitted issues were "clearly stronger than those presented[.]" *Coleman v. Mitchell*, 268 F.3d at 430. Similarly, Petitioner's only claim for sub-section d is that "counsel's failure to properly preserve for review the constitutional violations asserted in the First to Third Omitted Assignments of Error constituted deficient performance." (Traverse, ECF No. 234, Page ID 16468). As the claims underlying those omitted assignments are not meritorious, any failure to preserve adequately the trial record as to those issues cannot constitute deficient performance. *Second*, and contrary to Petitioner's argument, *id.*, Page ID 16455, the alleged failure of the trial court [*190] to appoint experts, and trial counsel's alleged failure to request said appointments, were issues that could, and should, have been raised on direct appeal. Thus, if appellate counsel had not included those allegedly inappropriate issues in the direct appeal, they would have been procedurally defaulted. *See Keith*, 79 Ohio St. 3d at 536-37, citing *State v. Scott*, 63 Ohio App. 3d 304, 308, 578 N.E.2d 841 (8th Dist. 1989).

Third, several of the purportedly weak assignments of error were actually raised by Petitioner in his Third Amended Petition. Had appellate counsel not raised those issues on direct appeal, Petitioner would have been unable to litigate them before this Court.

Fourth, Petitioner has not shown a reasonable probability that, had appellate counsel raised the "correct" issues, he would have obtained meaningful relief, *i.e.*, the reversal or vacation of his conviction. Accordingly, Petitioner's claim is denied as to the assignments of error raised or not raised by appellate counsel, and Claim Fourteen must be denied in its entirety.

H. Claims Fifteen through Eighteen

The Court dismissed these claims on January 31, 2017, as barred by the statute of limitations (Decision and Order, ECF No. 202, Page ID 15773).

I. Claim Nineteen: Cumulative Error

Petitioner's cumulative error claim arises [*191] solely out of the claims that were considered procedurally defaulted, arguing that the "default rulings take those constitutional claims outside the scope of 28 U.S.C. § 2254(d)." (Traverse, ECF No. 234, Page ID 16472, citing *Jalowiec v. Bradshaw*, 657 F.3d 293, 301 (6th Cir. 2011); *Post v. Bradshaw*, 621 F.3d 406, 413 (6th Cir. 2010)). Petitioner's argument is unpersuasive for two reasons. *First*, the Sixth Circuit has "held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief." *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005). *Second*, Claims One through Ten, Thirteen, or Fourteen were adjudged not to be meritorious, and notwithstanding Petitioner's conclusory statement that "[t]aken together, these constitutional errors overwhelmingly establish that Hughbanks was denied a constitutionally fair trial[,]" (Traverse, ECF No. 234, Page ID 16474), he has not demonstrated how the whole of the errors alleged in the non-meritorious individual claims become meritorious when combined. Accordingly, Claim Nineteen is denied.

J. Remaining Claims

Petitioner previously withdrew Claim Twenty (Traverse, ECF No. 234, Page ID 16475), and on November 13, 2017, the Court dismissed without prejudice Claim Twenty-Two, in which Petitioner claimed that Ohio's lethal injection protocol violated [*192] his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment (Decision and Order, ECF No. 240, Page ID 16528).[16] In his Traverse, Petitioner requests leave to withdraw Claim Twenty-One, in which he claims that he will be "Incompetent and Insane at the Time of his Scheduled Execution[,] and Consequently[,] his Execution Will Violate the Eighth and Fourteenth Amendments." (Traverse, ECF No. 234, Page ID 16475). As Petitioner does not currently have an execution date scheduled, Ohio Dep't of Rehab. & Corr. "Execution Schedule," http://drc.ohio.gov/execution-schedule (last visited Sept. 7, 2018), he seeks to withdraw Claim Twenty-One "without prejudice to permit a prayer for relief should he become incompetent to be executed when he faces execution[.]" *Id.* Finding good cause shown, the Court dismisses Claim Twenty-One without prejudice to refiling if Petitioner is adjudged incompetent or insane upon the date of his execution.

V. CONCLUSION

For the foregoing reasons, the Court DISMISSES Petitioner's Third Amended Petition (ECF No. 213). Claims One through Twenty are DISMISSED WITH PREJUDICE. As no reasonable jurist would find that Hughbanks "has made a substantial showing of the [*193] denial of a constitutional right," 28 U.S.C. § 2253(c)(2), or would disagree with this conclusion, Petitioner is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*. Claim Twenty-One is DISMISSED WITHOUT PREJUDICE, subject to refiling if Petitioner is determined to be incompetent or insane upon the date of his execution. Claim Twenty-Two is DISMISSED WITHOUT PREJUDICE "to his pursuit of the method-of-execution constitutional claims in the Protocol Case." (Decision and Order, ECF No. 240, Page ID 16528). The Clerk shall enter judgment shall enter in favor of the Warden and against Petitioner.

September 7, 2018.

/s/ Michael R. Merz

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[16] Petitioner remains a plaintiff before this Court in *In re Ohio Execution Protocol Litigation*, No. 2:11-cv-1016, the omnibus case regarding the constitutionality of the State's lethal injection protocol.

United States Magistrate Judge

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APPENDIX F

State v. Hughbanks

Supreme Court of Ohio

May 20, 2015, Decided

2013-0629.

Reporter
2015 Ohio LEXIS 1295 *; 142 Ohio St. 3d 1464; 2015-Ohio-1896; 30 N.E.3d 973

State v. Hughbanks.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] Hamilton App. No. C-120351.

Judges: Pfeifer, J., dissents.

Opinion

APPEAL NOT ACCEPTED FOR REVIEW

Pfeifer, J., dissents.

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APPENDIX G

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-120351 TRIAL NO. B-9706761
Respondent-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
GARY L. HUGHBANKS, JR.,	:	
Petitioner-Appellant.	:	


D101213582

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Petitioner-appellant Gary L. Hughbanks, Jr., appeals from the Hamilton County Common Pleas Court's judgment dismissing his petition seeking postconviction relief pursuant to R.C. 2953.21 et seq. We affirm the court's judgment.

Hughbanks was convicted in 1998 upon jury verdicts finding him guilty of two counts of aggravated murder and a single count of aggravated burglary. For each aggravated murder, he was sentenced to death. He unsuccessfully challenged his convictions in direct appeals to this court and to the Ohio Supreme Court, *State v. Hughbanks*, 1st Dist. No. C-980595 (Dec. 3, 1999), *aff'd*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, and in postconviction petitions filed in 2000, 2003, and 2010. *See State v. Hughbanks*, 1st Dist. No. C-010372, 2003-Ohio-187, *appeal not accepted*, 100 Ohio St.3d 1484, 2003-Ohio-5992, 798 N.E.2d 1093; *State v. Hughbanks*, 159 Ohio App.3d 257, 2004-Ohio-6429, 823 N.E.2d 544, *appeal not*

accepted, 105 Ohio St.3d 1500, 2005-Ohio-1666, 825 N.E.2d 623; *State v. Hughbanks*, 1st Dist. No. C-070773 (Sept. 3, 2008), *appeal not accepted*, 121 Ohio St.3d 1425, 2009-Ohio-1296, 903 N.E.2d 325. In this appeal from the dismissal of his 2010 postconviction petition, Hughbanks presents ten assignments of error.

We overrule the first assignment of error, challenging the common pleas court's refusal to declare the postconviction statutes unconstitutional. We have long held that the postconviction statutes comport with the dictates of due process as guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Supremacy Clause of the federal constitution, the doctrine of separation of powers embodied in the state and federal constitutions, and the "due course of law" and "open courts" provisions contained in Article I, Section 16 of the Ohio Constitution. *See State v. Bies*, 1st Dist. No. C-020306, 2003-Ohio-442, at ¶ 12-15; *State v. Fautenberry*, 1st Dist. No. C-971017, 1998 Ohio App. LEXIS 6415 (Dec. 31, 1998).

The balance of the assignments of error challenge the common pleas court's dismissal of Hughbanks's postconviction petition, the consequent denial of the relief sought in each of his postconviction claims, and the court's refusal to permit the "factual development" of his claims by affording him discovery or the funding for experts. We overrule the assignments of error upon our determination that the common pleas court had no jurisdiction to entertain Hughbanks's postconviction claims.

The postconviction statutes did not confer upon on the common pleas court jurisdiction to entertain Hughbanks's postconviction petition, because he did not satisfy either the time restrictions of R.C. 2953.21(A)(2) or the jurisdictional requirements of R.C. 2953.23. His 2010 petition represented his third request for postconviction relief and was filed well after the time afforded under R.C.

2953.21(A)(2) had expired. And R.C. 2953.23 precluded the common pleas court from entertaining Hughbanks's tardy and successive petition, when he failed to demonstrate by clear and convincing evidence that, "but for" the claimed constitutional errors, "no reasonable factfinder would have found [him] guilty of the offense[s] of which [he] was convicted or * * * would have found [him] eligible for the death sentence." *See* R.C. 2953.23(A)(1)(b).

A trial court retains jurisdiction to correct a void judgment. *See State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. But the claimed constitutional deprivations, even if demonstrated, would not have rendered Hughbanks's judgment of conviction void.

Because the common pleas court had no jurisdiction to entertain Hughbanks's postconviction claims, his petition was subject to dismissal. *See* R.C. 2953.21(C) and 2953.23(A). Because his petition was subject to dismissal, Hughbanks was not entitled to discovery or to the funding for experts to develop his postconviction claims. *See Bies*, 1st Dist. No. C-020306, 2003-Ohio-442, at ¶ 9-11.

We, therefore, hold that the common pleas court did not err in declining to hold the postconviction statutes unconstitutional, in dismissing Hughbanks's postconviction petition, or in refusing to afford him discovery. Accordingly, we affirm the court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on March 6, 2013

per order of the court _____.
Presiding Judge

A-17

APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
APR 19 2012

STATE OF OHIO	:	Case No. B9706761
Plaintiff	:	Judge MARSH
vs	:	
GARY HUGHBANKS	:	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ENTRY DISMISSING GARY L. HUGHBANKS, JR.'S POST-CONVICTION PETITION
Defendant	:	

This matter came before the court on the successive post-conviction petition filed by defendant-petitioner Gary L. Hughbanks, Jr on April 10, 2010, the exhibits appended thereto, the entire record in case B-9706761 and related appeals, the motion to dismiss the post-conviction petition filed by the State of Ohio, and any other pleadings of the parties.

Based upon the above, the court makes the following Findings of Fact, which are applicable to all causes of action:

(1) Hughbanks was represented by attorneys Dale Schmidt and Stephen Wenke at trial.

(2) Hughbanks was represented on direct appeal by attorneys A. Norman Aubin and Herbert E. Freeman.

(3) Hughbanks was represented by attorney Lori Leon in his first post-conviction petition.

A- 01

(4) Hughbanks is represented by attorneys Dennis Sipe and Thomas Kraemer in this successive post conviction-conviction petition.

The court makes the following specific findings as to each of defendant's fourteen (14) grounds for relief raised in his successive post-conviction petition that was filed on April 8, 2010. Each of the **Conclusions of Law** can serve as independent basis for denying Hughbanks post-conviction relief.

(1) Hughbanks' first ground of relief alleges that the statements he made to police confessing to the Leeman murders should not have been admitted at trial because the statements were not voluntarily made because he was addicted to drugs, had a history of severe mental illness and was not taking his prescribed medications for his mental illness. The court makes the following **Conclusions of Law:**

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) Issues surrounding the voluntariness of Hughbanks's confession could have been raised at trial and/or direct appeal and are barred by res judicata. State v. Perry (1967), 10 Ohio St. 2d 175, 226 N.E.

2d 104. Hughbanks did raise issues surrounding the voluntariness of his confession in his direct appeal, State v. Hughbanks, 99 Ohio St. 3d 365, 792 N.E. 2d 1081, 2003-Ohio-4121 at ¶'s 50-66.

(2) Hughbanks' second ground for relief alleges that the trial court should have excused two jurors for cause Hughbanks claimed could not be fair and impartial. The court finds that both jurors indicated in questioning that they could be fair and impartial. The court makes the following **Conclusions of Law:**

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) This claim could have been raised at trial and/or direct appeal and is barred by res judicata. State v. Perry, supra.

(3) Hughbanks' third ground for relief alleges that his constitutional right to a public trial was violated when the court informed courtroom spectators that the door to the courtroom would be locked while the court charged the jury during the guilt and mitigation phases of the proceedings. The court makes the following **Conclusions of Law:**

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) This claim could have been raised at trial and/or direct appeal and is barred by res judicata. State v. Perry, supra.

(4) Hughbanks' fourth ground for relief alleges that the jury verdict forms, coupled with a jury instruction that the jury could consider one of the life sentencing options without unanimously rejecting a death sentence violated his rights under the Eighth Amendment. The court makes the following Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) This claim could have been raised at trial and/or direct appeal and is barred by res judicata. State v. Perry, supra.

(5) Hughbanks' fifth ground for relief alleges that the prosecution suppressed favorable evidence that impeached its theory of the case. Specifically, Hughbanks argues that the prosecution was in possession

of certain reports that contradicted the facts and the theory of the case as presented by the prosecution. As such, Hughbanks contends that these reports included exculpatory information that the prosecution should have disclosed to the defense under Brady v. Maryland. The court makes the following Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) Similar issues were raised in Hughbanks' first petition for post-conviction relief. State v. Hughbanks, 1st Dist. No. C-010372, 2003-Ohio-187 at ¶'s 56-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App 3d 709, 880 N. E. 2d 143, 2007-Ohio-6217, ¶ 10.

(c) The information contained in these reports was not exculpatory and the failure to disclose such information was not "material" in that it could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict, United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also

State v. Davis, 116 Ohio St. 3d 404. 880 N.E. 2d 31, 2008-Ohio-2 at ¶'s 338-339.

(6) Hughbanks' sixth ground for relief is again predicated on the failure of the prosecutor to disclose certain evidence. This time, Hughbanks argues that the prosecution suppressed information from reports that impeached the testimony of Leonard Leeman and Detective Pat Kemper. Specifically, Hughbanks contends that the prosecution left the impression with Leonard Leeman that his mother's jewelry had been stolen when, in fact, prosecutors knew that only Leonard Leeman's father's wallet had been stolen. Hughbanks argues that Detective Kemper testified at trial that criminalists did not recover evidence at the Leeman house that could identify the assailant. But, according to Hughbanks, reports and later deposition testimony of the investigative officers established that fingerprints and a palm print were recovered near the bedroom window of the Leeman's home. These prints were used by police to eliminate other suspects. The court makes the following **Conclusions of Law:**

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) Similar issues were raised in Hughbanks' first petition for post-conviction relief. State v. Hughbanks, 1st Dist, No. C-010372, 2003-Ohio-187 at ¶'s 56-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E.2d 143, 2007-Ohio-6217, ¶ 10.

(c) The prosecution questioned Leonard Leeman only about the location of his mother's jewelry, not whether it was missing or stolen (T.p. 852-853). Accordingly, the prosecution did not leave the impression that Mrs. Leeman's jewelry was stolen. Accordingly, the prosecution did not suppress exculpatory information that impeached Leonard Leeman's testimony about his mother's jewelry.

(d) The failure to disclose the recovery of fingerprints at the Leeman home was not exculpatory because police could not identify who the fingerprints belonged to and only used them to eliminate suspects.

(e) Any alleged failure to disclose information impeaching the testimony of Leonard Leeman or Detective Pat Kemper or the recovery of fingerprint evidence was not "material" in that it could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict. United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also State v. Davis, 116 Ohio St. 3d 404, 880 N.E. 2d 31, 2008-Ohio-2 at ¶'s 338-339.

(7) Hughbanks' seventh ground for relief alleges that prosecutors were obligated to provide Hughbanks with information that Mr. and Mrs. Leeman's son, Burt Leeman, was a suspect in their murders. The court

makes the following Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) A defendant does not have the right to the names or information of those persons who the State at one time may have considered to be suspects. State v. Ayers, 8th Dist. No. 79134, 2002-Ohio-4773, at ¶ 26, citing State v. Spirko (1991), 59 Ohio St. 3d 352, 372; 26 N.E. 2d 1208. See also, State of Ohio ex rel. Steckman v. Jackson (1994), 70 Ohio St. 3d 420.

(8) Hughbanks alleges in his eighth ground for relief that prosecutors were obligated to provide Hughbanks with information that other individuals may have been involved in the Leeman murders. The court makes the following Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) A defendant does not have the right to the names or information of those persons who the State at one time may have considered to be suspects. State v. Ayers, 8th Dist. No. 79134, 2002-Ohio-4773, at ¶ 26, citing State v. Spirko (1991), 59 Ohio St. 3d 352, 372; 26 N.E. 2d 1208. See also, State of Ohio ex rel. Steckman v. Jackson (1994), 70 Ohio St. 3d 420.

(9) In his ninth ground for relief, Hughbanks claims that the prosecutors suppressed evidence that tests of fingerprints found at the Leeman home did not match Hughbanks. The court makes the following Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) Hughbanks already raised issues with respect to the recovery of fingerprints in the Leeman home in his first post-conviction petition. Hughbanks, supra at ¶'s 59-61. As such, as the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E. 2d 143, 2007-Ohio-6217, ¶ 10.

(c) Any alleged failure to disclose fingerprint test results was not "material" in that it could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict. United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also State v. Davis, 116 Ohio St. 3d 404, 880 N.E. 2d 31, 2008-Ohio-2 at ¶'s 338-339.

(10) In his tenth ground for relief, Hughbanks contends that the prosecutor suppressed, in violation of Brady, statements of several witnesses who described to police other individuals they saw near the Leeman home at the time of the murders that did not match Hughbanks' physical characteristics. The court makes the following Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) This claim is similar to claims Hughbanks made in his first petition for post-conviction relief. Hughbanks, supra at ¶'s 59-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E. 2d 143, 2007-Ohio-6217, ¶ 10.

(c) There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois (1972), 408 U.S. 786, 795; 92 S. Ct. 2562; United States v. Mullins (6th Cir. 1994), 22 F. 3d 1365, 1372. Information gathered from witnesses about persons seen near the Leeman home near or around the time of their murders merely amounted to information gathered as part of the investigation and was not Brady material.

(d) Any alleged failure to disclose investigative information gathered from witness reports was not "material" in that such information could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict. United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also State v. Davis, 116 Ohio St. 3d 404, 880 N.E. 2d 31, 2008-Ohio-2 at ¶'s 338-339.

11. Hughbanks argues in his eleventh ground for relief that the cumulative effect of the allegedly suppressed exculpatory evidence entitles him to post-conviction relief. The court makes the following **Conclusions of Law:**

(a) This court does not have the jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) None of Hughbanks' claims for relief warrant post-conviction relief. Accordingly, there is no cumulative effect which would entitle him to a post-conviction relief. State v. Mills, 1st Dist. No. C-930817, 1995 WL 109127; State v. Gau, 11th Dist. No. 2004-L-020, 2005-Ohio-4906.

12. Hughbanks' twelfth ground for relief alleges that the prosecution committed misconduct by knowingly using false testimony and making false statements to the jury. The court makes the following **Conclusions of Law:**

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) Hughbanks has failed to establish that prosecutors knowingly used false testimony or made false statements to the jury.

(c) Hughbanks made a similar allegation in his first petition for post-conviction relief. Hughbanks, supra at ¶'s 56-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v.

Akemon, 173 Ohio App 3d 709, 880 N.E. 2d 143, 2007-Ohio-6217, page 10.

13. Hughbanks' thirteenth ground for relief alleges ineffective assistance of counsel. Hughbanks contends that defense counsel was deficient during the trial phase for failing to present certain evidence, deficient for failing to challenge the constitution of the grand jury, and deficient at the motion to suppress hearing. The court makes the following **Conclusions of Law:**

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A)

(b) Hughbanks made similar allegations of ineffective counsel in his first post-conviction petition. Hughbanks, supra at ¶ 61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E. 2d 143, 2007-Ohio-6217, ¶ 10.

(c) Hughbanks has failed to show that trial counsel violated an essential duty that resulted in prejudice. Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052.

14. Hughbanks' fourteenth ground for relief alleges that trial counsel conducted ineffective cross-examination of many state witnesses The court makes the following **Conclusion of Law:**

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) This claim could have been raised at trial and/or appeal and is barred by res judicata. State v. Perry, supra.

(c) Hughbanks has failed to show that trial counsel violated an essential duty that resulted in prejudice. Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052.

For all the foregoing Findings and Fact and Conclusions of Law, the court hereby denies the Defendant's post-conviction petition for relief, and all requests for discovery contained therein. The Defendant's request for an evidentiary hearing is therefore denied. The court hereby grants the State of Ohio's Motion and dismisses Defendant's post-conviction petition.

Melba D. Marsh
Judge, Court of Common Pleas

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