No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

Davel Chinn,

Applicant-Petitioner,

v.

Warden, Chillicothe Correctional Institution,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Sixth Circuit

APPENDIX

No execution date is presently scheduled.

Office of the Ohio Public Defender
by:

Rachel Troutman (0076741)
Lead and Trial Counsel
Supervising Attorney, Death Penalty Dept.
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)
rachel.troutman@opd.ohio.gov

Deborah L. Williams
Federal Public Defender
by:

Erin Gallagher Barnhart (0079681)
Co-Counsel
Assistant Federal Public Defender
Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit
10 W. Broad Street, Suite 1020
Columbus, Ohio 43215
(614) 469-4125
(614) 469-2999 (Fax)
erin_barnhart@fd.org

Counsel for Petitioner Davel Chinn

24 F.4th 1096
United States Court of Appeals, Sixth Circuit.

Davel CHINN, Petitioner-Appellant,
v.
WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION, Respondent-Appellee.

No. 20-3982
|
Argued: October 27, 2021
|
Decided and Filed: February 4, 2022

Synopsis

Background: Following affirmance of his convictions for aggravated murder, kidnapping, abduction, and aggravated robbery and his death sentence, 85 Ohio St.3d 548, 709 N.E.2d 1166, state inmate filed petition for writ of habeas corpus. The United States District Court for the Southern District of Ohio, Sarah D. Morrison, J., denied petition, and petitioner appealed.

Holdings: The Court of Appeals, Siler, Senior Circuit Judge, held that:

determination that prosecution's failure to disclose exculpatory impeachment evidence did not violate *Brady* was not unreasonable, and

petitioner was not actually prejudiced by admission of receptionist's testimony concerning his visit to law office.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***1099** Appeal from the United States District Court for the Southern District of Ohio at Dayton. No. 3:02-cv-00512—Sarah Daggett Morrison, District Judge.

Attorneys and Law Firms

ARGUED: Erin Gallagher Barnhart, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Columbus, Ohio, for Appellant. Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. ON BRIEF: Rachel Troutman, Melissa Jackson, OFFICE OF THE OHIO PUBLIC DEFENDER, Columbus, Ohio, for Appellant. Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Before: SILER, KETHLEDGE, and THAPAR, Circuit Judges.

OPINION

SILER, Circuit Judge.

Davel Chinn, an Ohio prisoner sentenced to death, appeals the district court's judgment denying his petition for writ of habeas corpus filed under 28 U.S.C. § 2254.

I.

On the evening of January 30, 1989, Chinn finished a midterm exam at Cambridge Technical Institute in Dayton, Ohio. Later that evening, fifteen-year-old Marvin Washington was in downtown Dayton, where he claims he saw Chinn, whom he had met a year earlier and only knew by the nickname, "Tony." According to Washington, he and Tony proceeded to drink beer and walk around the downtown area until around 11:00 p.m., when Tony showed him a .22 caliber revolver and suggested they look for someone to rob. Eventually, they happened upon Brian Jones and Gary Welborn, who were parked in a lot and chatting through their driver's side windows. While Washington snuck up to Jones's car, Tony approached Welborn's window and pressed his revolver against Welborn's head. Tony demanded their money, and after he emptied both of their wallets, he and Washington decided to steal their cars. Although Welborn made a quick escape, Washington was able to force Jones into the passenger's seat of Jones's Chevrolet Cavalier. Tony climbed into the back seat and held a gun to Jones's neck, while Washington drove them away.

At some point during the drive, Tony told Washington to pull the car over. Tony and Jones then got out and walked to the rear of the car. At the same time, Stacy Dyer was parked in her driveway when she saw the silhouette of a person exiting a parked Chevrolet Cavalier. Dyer saw two people walk to the rear of the car, at which point she heard a gunshot and a scream. She then saw a person run through her yard and collapse and the car speed away. Washington explained what had happened: once Tony and Jones walked to the rear of the car, Tony shot Jones in the arm, and Washington and he drove away. While they were driving, Tony told Washington that he shot Jones because Jones did not have enough money and could have identified them.

Meanwhile, Dyer ran inside her home to tell her family what had happened. While her sister called the police, Dyer went outside to check on the person collapsed in her yard. Paramedics eventually arrived to find Jones unconscious, and he was pronounced dead upon arrival at the hospital. Later that night, around 12:30 or 1:00 a.m., Washington drove Tony to meet an acquaintance of his in Dayton, named Christopher ***1100** Ward. Ward recalled that Washington arrived in a black Chevrolet Cavalier and introduced the passenger as "Tony." Washington and Ward spoke for about half-an-hour before Washington and Tony left. Later that night, Washington met with Ward again, but without Tony, and told him how Tony had shot someone earlier in the evening.

The autopsy report showed that Jones died as a result of a gunshot to his arm, which perforated his main pulmonary artery. The investigation also recovered a .22 caliber bullet near Jones's heart, which a firearms expert determined was fired from a revolver at close range. A few days after the incident, on February 5, police arrested Washington upon information obtained from Ward. Washington confessed and named "Tony" as the killer but could not provide Tony's last name or address. Washington helped police prepare a composite sketch, which a local newspaper printed on February 22.

The next day, Shirley Cox was at her husband's law office, where she worked as a receptionist. Two men walked into the office, and one identified himself as "Tony Chinn." The man named Tony insisted on seeing Cox's husband, but Cox explained that he was unavailable, and the men eventually left. Later that night, while Cox was home reading her newspaper, she gasped to her husband: "My God, I don't believe this." Cox had just seen the composite sketch in the newspaper and recognized the image as the same man who had come to the office earlier. The next day, Cox followed the instructions in the newspaper and called the police.

After speaking with Cox, police obtained a photograph of Chinn and on February 24, presented it to Washington and Ward in a photo array of five other men. Washington identified Chinn as the man who shot Jones, and Ward identified Chinn as the man Washington introduced to him on the night of the murder. Later that day, police arrested Chinn. A few days later, police conducted a lineup for Washington, Ward, Cox, Dyer, and Welborn to identify the suspect. Out of the five, Ward, Cox, and Washington were able to identify Chinn. Washington initially indicated "Tony" was not in the lineup. After leaving the room, however, Washington explained to police that he recognized Chinn but that he was afraid to identify him because he believed that Chinn could see him.

For his part, Chinn presented an alibi. His classmate and instructor testified that Chinn was present for the midterm on the night of the murder, and his classmate testified that Chinn rode home on a bus with her. Chinn's mother testified that he was at home by 9:30 p.m. and stayed home the entire evening of the murder. Some witnesses also considered the shooter to be taller than Chinn.

In August 1989, an Ohio jury convicted Chinn of aggravated murder, kidnapping, abduction, and three counts of aggravated robbery. The jury recommended the death penalty, and the trial court adopted the recommendation. After multiple appeals, the Ohio Court of Appeals affirmed the sentence, and the Ohio Supreme Court affirmed the sentence and convictions. Chinn filed a state petition for post-conviction relief in 1996, which the trial court dismissed as premature. In 1997, Chinn filed another state petition, and after the trial court denied his claims, the Ohio Court of Appeals affirmed on all but two claims. On remand, the trial court conducted an evidentiary hearing and again dismissed the two claims; this time the Ohio Court of Appeals affirmed. The Ohio Supreme Court denied further review.

In 2002, Chinn filed a § 2254 petition that raised nineteen claims for post-conviction relief. The district court eventually ***1101** denied Chinn's petition and issued a certificate

of appealability (COA) on three claims: (1) whether the prosecution suppressed evidence in violation of *Brady*; (2) whether the trial court improperly admitted irrelevant and prejudicial testimony; and (3) whether Chinn was denied his right to present mitigating evidence to the sentencer on remand and was sentenced to death without a valid recommendation from a jury. Chinn moved to alter or amend the judgment regarding his *Brady* claim, and the court denied the motion on August 18, 2020. Chinn appealed, and moved to expand the COA which we denied on February 11, 2021. Chinn does not address the third issue for which he received a COA, and, therefore, has waived consideration before us. *See Hodges v. Colson*, 727 F.3d 517, 526 (6th Cir. 2013).

II.

This habeas petition is governed by 28 U.S.C. § 2254(d) (AEDPA). It instructs that federal courts shall not grant a habeas petition filed by a state prisoner with respect to any claim adjudicated on the merits by a state court, absent applicability of either of two specific exceptions. The first exception is when a state court issues "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court[.]" 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The second exception applies when a state court decision "was based on an unreasonable determination of the facts" in light of the record before it. § 2254(d)(2).

"AEDPA's requirements reflect a 'presumption that state courts know and follow the law[,]' " *Woods v. Donald*, 575 U.S. 312, 316, 135 S.Ct. 1372, 191 L.Ed.2d 464 (2015) (per curiam) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam)), and its "highly deferential standard for evaluating state-court rulings ... demands that state-court decisions be given the benefit of the doubt," *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (quoting *Woodford*, 537 U.S. at 24, 123 S.Ct. 357). The Supreme Court has repeatedly held it is not enough to show the state court was wrong. *See, e.g.*, *Renico v. Lett*, 559 U.S. 766, 773, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." (citation omitted)); *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."). Rather, AEDPA forecloses relief unless the petitioner can show the state court was *so* wrong that the error was "well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Shoop v. Hill*, —— U.S. ——, 139 S. Ct. 504, 506, 202 L.Ed.2d 461 (2019) (per curiam) (citation omitted). Thus, when we review a state court decision under § 2254(d), we must ask whether it is "beyond the realm of possibility that a fairminded jurist could" agree with the state court. *Woods v. Etherton*, 578 U.S. 113, 118, 136 S.Ct. 1149, 194 L.Ed.2d 333 (2016) (per curiam).

"If this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). By requiring that federal courts give deference to state courts, AEDPA appreciates "principles of comity, finality, and federalism." ***1102** *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003) (citation omitted). Sensitivity is critical. Federal habeas review of state court convictions is one of our most intrusive exercises of power over our state-court counterparts. *Harrington*, 562 U.S. at 103, 131 S.Ct. 770. It "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (citation omitted). Thus, under § 2254(d), federal habeas review is a safeguard against "extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102–03, 131 S.Ct. 770 (cleaned up).

We review the district court's factual findings for clear error and its legal conclusions de novo. *Railey v. Webb*, 540 F.3d 393, 397 (6th Cir. 2008). The state court's factual findings enjoy a presumption of correctness and will only be disturbed upon clear and convincing evidence to the contrary. *Id.*

III.

A. *Brady* Violation

Chinn's central claim is that the prosecution withheld exculpatory impeachment evidence regarding Washington's identification testimony at trial. This evidence came to light after Chinn's conviction, when an investigator with the Office of the Ohio Public Defender requested Washington's records from the juvenile court. The records included reports that showed Washington suffered from mental disabilities, which raised questions about his ability to accurately identify Chinn as "Tony." After these records were discovered, Chinn brought an ineffective assistance of counsel and *Brady* claim in his state petition for post-conviction relief. The Ohio trial court dismissed the petition, but the Ohio Court of Appeals remanded for an evidentiary hearing to determine whether, considering the withheld records, Chinn's trial counsel was ineffective for failing to call expert witnesses on eyewitness identification and the effects of "mental retardation." The trial court also considered whether withholding these records constituted a *Brady* violation. It dismissed Chinn's petition, and the Court of Appeals affirmed.

Under *Brady v. Maryland*, "suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Supreme Court has stated that "[t]here are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The defendant has the burden of proving a *Brady* violation. *Id.*

The only issue before the Ohio Court of Appeals, and therefore before us, is whether prejudice ensued. Prejudice depends on whether the suppressed evidence is material. *See id.* Evidence is "material," if it creates a "reasonable probability of a different result," *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (cleaned up), such that its suppression "undermines confidence in the outcome of the trial," *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). We have held that *Strickland*'s "reasonably-likely" prejudice standard is the same as *Brady*'s prejudice ***1103** standard. *See Montgomery v. Bobby*, 654 F.3d 668, 679 n.4 (6th Cir. 2011) (en banc). And in *Harrington*, the Supreme Court explained that the difference between *Strickland*'s "reasonably likely" standard and a "more-probable-than-not standard is slight and matters only in the rarest case." 562 U.S. at 111–12, 131 S.Ct. 770 (cleaned up). Thus, "reasonable probability" for *Brady*'s purposes is effectively the same as a more-probable-than-not standard. The *Brady* question now is whether it is more probable than not that the withheld evidence would have created a different result. The caveat is that there is a "slight" difference between more-probable-than-not and "reasonable probability" and judges can decide for themselves how slight is "slight" enough. *Id.* In determining whether a reasonable probability exists, we must consider the undisclosed evidence collectively. *See England v. Hart*, 970 F.3d 698, 717 (6th Cir. 2020), *cert. denied*, —— U.S. ——, 141 S. Ct. 1691, 209 L. Ed. 2d 467 (2021). Yet we still evaluate "the tendency and force of the undisclosed evidence item by item." *Kyles*, 514 U.S. at 436 n.10, 115 S.Ct. 1555.

The Supreme Court has also told us that we must examine Chinn's claim through the dual lens of AEDPA and *Brady*. The two standards work "in tandem." *Harrington*, 562 U.S. at 105, 131 S.Ct. 770. So, we do not ask whether the new evidence creates "a reasonable probability of a different result." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. Instead, we ask whether any fairminded judge could agree with the state court's *Brady* assessment. Furthermore, "so long as the state courts reach a *decision* that reasonably applies Supreme Court precedent—however deficient some of the court's reasoning might be—we must deny the writ." *Davis v. Carpenter*, 798 F.3d 468, 475 (6th Cir. 2015).

During the state evidentiary hearing, Chinn called Dr. Caroline Everington, Ph.D., to provide an opinion on the import of the newly disclosed records. Dr. Everington explained that the records showed that Washington had a congenital cranial abnormality, which caused neuropsychological impairments, and that Washington had moderate range "mental retardation." These records showed that Washington had an IQ of either 54 or 48, which placed him in the lowest one-to-two percent of the population. Furthermore, Dr. Everington noted that the records indicated Washington could become easily distracted and swayed by others, he exhibited some recognition and memory problems, and he had poor vision but refused to wear glasses. In her professional opinion, Dr. Everington believed that Washington had significant deficiencies in his memory at the time of the murder and that his memory would have

been questionable. Furthermore, Chinn called Dr. Solomon M. Fulero, Ph.D., J.D., who testified that persons with Washington's disabilities are more likely to exhibit signs of "suggestibility, [a] desire to please authority, or desires to mask or hide mental retardation." Dr. Fulero explained that eyewitnesses who suffer from intellectual disabilities are less likely to identify people accurately.

Despite this evidence, the trial court found the juvenile records were immaterial, and the Ohio Court of Appeals affirmed. Chinn argues the Ohio Court of Appeals unreasonably applied *Brady* and failed to properly consider the exculpatory evidence in conjunction with the defense's evidence at trial. In light of the deferential standards with which we must judge the state court's decision, the Ohio Court of Appeals reasonably applied *Brady*. Other witnesses at the evidentiary hearing controverted Chinn's evidence and, considering the evidence at trial that supported ***1104** Washington's version of events, the Court of Appeals reasonably concluded there was not a reasonable probability the outcome would have been different had the juvenile records been disclosed.

For example, Lieutenant David Lantz, the chief investigator of the murder, testified at the hearing about how he had interviewed Washington soon after the crime. In Lantz's opinion, Washington understood his questions and gave an internally consistent story. In opposition to Dr. Everington, Lantz believed that Washington's trial testimony was consistent with his original story, and ultimately, nothing about his interactions with Washington led him to believe that Washington had been unable to give a truthful account. Furthermore, Dr. Thomas O. Martin, a clinical psychologist, testified that little can be known by looking solely at a person's IQ scores, and that they do not give information about a person's level of adaptive functioning. For instance, Dr. Martin explained that a person with moderate "mental retardation" would not be expected to drive a car, write checks, read books, make change with money, or hold down unsupervised jobs. Yet, Washington could drive, had a job, and graduated valedictorian of his high school class. Similarly, although the juvenile records showed that he exhibited some recognition and memory problems, Washington had no trouble identifying people while he was at the juvenile detention facility.

Notably, because Washington was murdered before the evidentiary hearing, Dr. Everington never met him. By contrast, Barbara DeVoss, a social worker at Washington's juvenile facility, had. She testified that, after she read Washington's personal report, her first thought was "I have got a blooming idiot. What can I do but get him directed to a sheltered workshop[?]" But DeVoss explained how she changed her mind after meeting Washington, how she was "very pleasantly surprised" by her interactions with him, and that she "didn't think that [Washington] had as a low an IQ as was stated in the report ...."

Likewise, evidence at trial illustrated Washington's ability to remember events. He was able to identify Chinn in the courtroom and describe Chinn's outfit on the night of the murder. Washington remembered with precision details about the night of the murder, like the address of where a bus dropped him off, where he walked, and when he met Chinn. Other witnesses also supported Washington's version of events. For example, not only did Washington remember the color and make of Tony's gun, but he recalled that Tony shot Jones only once in the arm, which Dyer and the autopsy report corroborated. Similarly, Washington's version of the robbery was corroborated by Welborn's story, and Washington accurately remembered the model of car Jones drove—even that it had a digital clock and dome light. Ward's testimony also supported Washington's story. Although Ward never saw who shot Jones, Ward met "Tony" the night of the murder—whom he identified as Chinn—in a car that matched the one Washington and Tony stole from Jones, around the same time the murder occurred. Furthermore, the jury heard testimony that Washington had met Chinn prior to the night of the murder and had spent several hours with the shooter on that evening, both of which are strong indicators of a reliable identification.

Chinn argues that regardless of any disputes at the evidentiary hearing, "material impeaching Washington's credibility was evident from the records without expert testimony." But the jury had heard impeachment testimony that Washington could not read or write. And although the records indicated Washington may have ***1105** blacked out, he had already testified that he was drinking the night of the murder. Similarly, Chinn's counsel also had attempted to impeach Washington by questioning him about his failure to initially identify Chinn at the lineup. In the end, while the withheld records would have showed the jury that Washington suffered

from a degree of mental disability, the undisclosed evidence would have been cumulative, and hence immaterial. *See Hall v. Mays*, 7 F.4th 433, 447 (6th Cir. 2021).

We acknowledge the serious nature of the state's failure to disclose Washington's juvenile records. But the Supreme Court has admonished habeas courts not to "treat[ ] the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review" and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 562 U.S. at 102, 131 S.Ct. 770. When assessing whether a state court's application of federal law is unreasonable, "the range of reasonable judgment can depend in part on the nature of the relevant rule that the state court must apply." *Renico*, 559 U.S. at 776, 130 S.Ct. 1855 (cleaned up). As such, "the more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations." *Id.* (cleaned up). Just as in *Strickland*, the *Brady* materiality standard is a general one, and "so the range of reasonable applications is substantial." *Harrington*, 562 U.S. at 105, 131 S.Ct. 770 (citation omitted). Under such a standard, "a state court's decision can't be 'contrary to' federal law for purposes of AEDPA review if the Supreme Court has never issued a holding that confronts the specific question presented by the case." *Cassano v. Shoop*, 10 F.4th 695, 704 (6th Cir. 2021) (Thapar, J., dissenting) (cleaned up). After all, "if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not 'clearly established at the time of the state-court decision.' " *White v. Woodall*, 572 U.S. 415, 426, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014) (citation omitted).

As for Supreme Court precedent, Chinn relies on *Wearry v. Cain*, 577 U.S. 385, 388, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016), in which Wearry was convicted of capital murder and sentenced to death. For Supreme Court precedent to be "clearly established," it must have been decided prior to the state-court decision at issue. *Hill*, 139 S. Ct. at 506–07. *Wearry* was not. But we may consider later decisions as "illustrative of the proper application" of existing law so long as the later decision does not announce a new rule. *Wiggins v. Smith*, 539 U.S. 510, 521–22, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Like Chinn, Wearry was accused of carjacking and killing his victim. *Wearry*, 577 U.S. at 387, 136 S.Ct. 1002. Like Washington, the state's key witness, "Scott," had accompanied the defendant during the events leading up to and including the murder. *Id.* Furthermore, during the evening, while they were driving the victim's car, Wearry and Scott stopped to meet another acquaintance, "Brown," who testified at trial about seeing them together in the car—like Ward did here. *Id.* After his conviction, Wearry discovered the state had withheld exculpatory evidence that undermined Scott's story at trial. *See id.* at 389, 136 S.Ct. 1002. Chinn likens his case to *Wearry* because in that case the state relied heavily on the credibility of one witness—Scott—weighed against the defendant's alibi. Chinn argues the Court recognized that Scott's credibility had already taken blows at trial—like Washington's—yet ***1106** did not consider the additional exculpatory evidence immaterial.

But there are key differences between Chinn's case and *Wearry*, and Chinn fails to identify a logical extension of *Wearry*'s holding to his facts. In *Wearry*, the *Brady* evidence included three categories of information. *Id.* at 389–91, 136 S.Ct. 1002. First, undisclosed police records showed that while Scott was imprisoned for an unrelated offense, he told another inmate that he wanted to "make sure Wearry gets the needle. ..." *Id.* at 389, 136 S.Ct. 1002 (cleaned up). Furthermore, Scott had orchestrated a meeting between an inmate and the police, for the inmate to make up a story in Scott's favor about witnessing the murder. *Id.* at 389–90, 136 S.Ct. 1002. Second, Brown, who testified about seeing Scott and Wearry in the victim's car, had twice sought a deal with the state before testifying to reduce his prison sentence—contrary to the prosecution's consistent assurances to the jury. *See id.* at 390, 136 S.Ct. 1002. Third, although Scott had testified that another person ran into the street to stop the victim's car and shoved the victim into the cargo space, undisclosed medical records showed that this person had recently undergone serious knee surgery. *Id.*

Importantly, *Wearry* did not deal with evidence that might have affected the key witness's accuracy—only his veracity. The difference is that despite the juvenile records that call into question the accuracy of Washington's testimony, evidence at Chinn's trial could, and did, support Washington's version of events. And "a reviewing court [must] consider the totality of the evidence—and not merely exculpatory facts in isolation—when evaluating a claim of error for its prejudicial effect." *Montgomery*, 654 F.3d at 679. Similarly, the exculpatory evidence did not undermine Ward's credibility—as it had Brown's—or render Washington's story about the robbery

unlikely—as it had Scott's story about the carjacking. To put a fine point on it: neither *Wearry* nor any case from the Supreme Court controls with sufficient granularity. Under AEDPA, we must ask whether there is any Supreme Court precedent that would compel every fairminded jurist to hold that the State committed a *Brady* error here. As there is none, fairminded jurists could debate whether the "clearly established rule" does or does not apply to the "set of facts" at hand. *White*, 572 U.S. at 427, 134 S.Ct. 1697. "If such disagreement is possible, then the petitioner's claim must be denied." *Sexton v. Beaudreaux*, —— U.S. ——, 138 S. Ct. 2555, 2558, 201 L.Ed.2d 986 (2018) (per curiam).

Chinn also devotes considerable effort to challenging the factual findings of the Ohio Court of Appeals. The Ohio Court of Appeals' factual determinations are presumed correct, unless Chinn can rebut this presumption by clear and convincing evidence. *See* § 2254(e)(1); *Railey*, 540 F.3d at 397. While Chinn challenges different factual conclusions of the state court, his arguments merely reflect disagreements with the inferences reached by that court, rather than showing by clear and convincing evidence that those factual findings were erroneous. As we have made clear, in the absence of clear and convincing evidence, we have no power on federal habeas review to revisit the state court's factual findings. *See, e.g.*, *Matthews v. Ishee*, 486 F.3d 883, 895 (6th Cir. 2007) ("Under AEDPA, we are bound by [the state court's] finding unless [the petitioner] can rebut it with clear and convincing evidence to the contrary."). Chinn's argument is, therefore, without merit.

B. Prejudicial Testimony

Chinn's second claim is that the Ohio trial court erred by admitting irrelevant ***1107** and prejudicial testimony at trial concerning Chinn's visit to the law office of Cox's husband. Chinn argues that Cox could have simply testified about speaking with a man named Tony, who resembled the man depicted in Washington's composite sketch, without ever mentioning that her encounter with Chinn occurred in a law office, where Chinn persistently requested to see an attorney. Every reviewing court has thus far agreed, and the Warden does not dispute these conclusions. Instead, the question is whether the admission of Cox's testimony was harmless error.

In determining whether any state court error was harmless, we may not grant habeas relief unless the state court's error resulted in actual prejudice to the defendant. *Davis v. Ayala*, 576 U.S. 257, 267, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *O'Neal v. Balcarcel*, 933 F.3d 618, 624 (6th Cir. 2019). We must be "in grave doubt about whether the trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Reiner v. Woods*, 955 F.3d 549, 555 (6th Cir. 2020) (citation omitted); *see also O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). "[G]rave doubt ... mean[s] that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435, 115 S.Ct. 992 (cleaned up).

Ultimately, Chinn has not met his burden of showing actual prejudice. *Davis*, 576 U.S. at 267, 135 S.Ct. 2187; *Cooper v. Chapman*, 970 F.3d 720, 732 (6th Cir. 2020). Cox's testimony was relevant to establish her identification of Chinn from Washington's composite sketch in the newspaper. While the law firm setting permitted an inference that Chinn was seeking legal help, Cox's testimony did not address the nature of Chinn's inquires nor the field of law practiced by Cox's husband. Furthermore, as Chinn recognizes, the central evidence against him was Washington's testimony and, once the jury believed Washington, a guilty verdict was "inevitable." *See State v. Chinn*, 85 Ohio St.3d 548, 561, 709 N.E.2d 1166, 1178 (1999). In light of the evidence at trial, the Ohio court's error in admitting Cox's testimony did not result in actual prejudice to Chinn.

PETITION DENIED.

All Citations

24 F.4th 1096

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

DAVEL CHINN,

Petitioner, : Case No. 3:02-cv-512

- vs - District Judge Sarah D. Morrison
Magistrate Judge Michael R. Merz

CHARLOTTE JENKINS, Warden,
Chillicothe Correctional Institution,

:

Respondent.

DECISION AND ORDER

This capital habeas corpus case is before the Court on Petitioner's Objections (ECF No. 214) to the Magistrate Judge's Report and Recommendations (ECF No. 213) recommending denial of Petitioner's Motion to Amend the Judgment (ECF No. 210). Respondent has replied to the Objections (Response, ECF No. 215).

When a party objects to a Magistrate Judge's Report on a dispositive motion, the District Judge is required by Fed.R.Civ.P. 72(b)(3) to review *de novo* any portion of the Report to which specific objection has been made. Having reviewed the Report employing that standard, the Court rules on the Objections as set forth in this Decision.

First Objection: Materiality Standard for a *Brady* Claim

The Motion to Amend criticized the Court's decision on the merits for failing to evaluate the materiality of claimed *Brady* material by applying *Smith v. Cain*, 565 U.S. 73, 76 (2012), and *Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016)) (Motion, ECF No. 210, PageID 10495-96). The Magistrate Judge concluded this omission was not a manifest error of law because *Smith* and *Wearry* were both handed down many years after the Ohio Second District Court of Appeals decided the *Brady* claim (Report, ECF No. 213, PageID 10548, citing *State v. Chinn*, No. 18535, 2001 Ohio App. LEXIS 3127 (Ohio App. 2nd Dist. Jul. 31, 2001).

In his Objections, Chinn argues that *Smith* and *Wearry* do not create new law different from the clearly established Supreme Court law in 2001. Rather, they are said to be merely "'illustrative of the proper application' of the governing legal principle of *Brady v. Maryland*." (Objections, ECF No. 214, PageID 10552.) According to the Objections, when the Supreme Court has clearly established a general principle of law, then a habeas court in determining whether a state court has reasonably applied that principle, must consider Supreme Court precedent applying that principle that is handed down between the original decision and the habeas decision. In other words, the reasonableness of a state court decision under 28 U.S.C. § 2254(d)(1) must be measured against Supreme Court precedent of which the state court could not possible have had notice so long as the new Supreme Court decisions are "applications" of the principle and not extensions of the principle or creations of new rules.

How could a conscientious state court judge perform this task? She or he would have to thoughtfully consider existing Supreme Court precedent when deciding a case.

Beyond that, the judge would have to be prescient, to correctly predict what direction the Supreme Court will take with the general principle. That, of course, is a notoriously difficult task, even for those who make study of the Court their life work. Chinn's position seems to be that those judges who guess wrong are not entitled to deference under § 2254(d)(1).

Fortunately, the Court does not have to attempt to resolve this dilemma to decide the instant Motion. Although the Court did not discuss either *Smith* or *Wearry* in its decision, it applied the correct *Brady* materiality standard. Three times in deciding Ground One, the Court announced the standard it was applying:

> "Evidence is material only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed."

(ECF No. 206, PageID 10381-82, citing *LaMar v. Houk*, 798 F.3d 405, 415 (6th Cir. 2015)[1].

> "This Court finds that the additional impeachment information, had counsel even chosen to use it, would not have so conclusively undermined Washington's testimony at the trial that it would have created a reasonable probability that the result of the trial would have been different."

(ECF No. 206, PageID 10384).

> "Although the juvenile records may have been helpful to counsel, the Court cannot conclude that there was a reasonable probability that had they been disclosed, the result of the proceedings would have been different."

(ECF No. 206, PageID 10385).

In *Smith, supra,* the Supreme Court reiterated the *Brady* materiality standard

[1] *LaMar* is a capital habeas case litigated originally in this Court.

as follows: "We have explained that "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." 565 U.S. at 75, citing *Cone v. Bell*, 556 U.S. 449, 469-470 (2009). Applying *Smith* to this case, Petitioner argues "Chinn should not lose merely if "the jury *could* have" been unmoved by the suppressed evidence; only if it is convinced "that [the jury] *would* have" discounted that evidence may the Court find the withheld evidence to be immaterial." The Court agrees and that is the standard the Court applied.

To put it explicitly, the Court is not convinced that if the undisclosed evidence had been disclosed there is a reasonable probability that the jury would have rejected the credibility of Washington's testimony. As the Court's Opinion notes, there is sufficient other evidence of Chinn's guilt (including particularly the corroborating identifications by Ward and Cox) and evidence supporting Washington's credibility that there is not a reasonable probability that the trial would have had a different outcome if this evidence had been disclosed.

The Court notes that the evidence in *Smith* was much weaker. Larry Boatner was the sole witness at trial who identified Smith as one of three gunmen. Boatner had no prior relationship with Smith and his occasion for observing Smith was brief and traumatic: five of Boatner's friends were shot to death. "No other witnesses and no physical evidence implicated Smith in the crime." 565 U.S. at 74. While no physical evidence linked Chinn to the crime,[2] there were corroborating identification

[2] The crime in suit occurred in January 1989, long before forensic use of DNA became common. The very first use of DNA to obtain a criminal conviction had only happened two years earlier in England. The record is devoid of any mention of collecting DNA samples in this case, much less of what they would have shown.

witnesses (Ward, Shirley Ann Cox). The suppressed evidence in Smith's case included statements by Boatner that directly contradicted his trial testimony, unlike anything in the unproduced evidence here.

Wearry, like *Smith*, is a capital case from Louisiana where the Supreme Court was reviewing directly the decision of the Louisiana post-conviction court. The opinion is a *per curiam* GVR[3] decision. The suppressed evidence included serious impeachment evidence against two State witnesses and medical records which strongly undermined another witness's testimony. The Court declined to decide the ineffective assistance of trial counsel claim that was presented, but recounted the evidence presented in post-conviction which strongly supported Wearry's alibi. The Court gives no hint of modifying the *Brady* standard, but faults the Louisiana court for "improperly evaluat[ing] the materiality of each piece of evidence in isolation rather than cumulatively." 136 S. Ct. at 1007, citing *Kyles v. Whitley*, 514 U.S. 419, 441 (1995). In this case both the Ohio Second District Court of Appeals and this Court have evaluated the materiality of the suppressed evidence cumulatively, not piece-by-piece.

In sum, Petitioner has not convinced the Court it has committed a manifest error of law in evaluating the materiality of the asserted *Brady* material. That is, assuming *Smith* and *Wearry* are applicable to this case, their holdings do not warrant amendment of the judgment.

At the end of his first objection, Chinn attempts to insert a new claim, to wit,

[3] I.e., a decision in which the Supreme Court summarily **g**rants a writ of certiorari, **v**acates the judgment below, and **r**emands the case.

that "the state court's factual determinations were unreasonable under 28 U.S.C. s. 2254(d)(2)." (ECF No. 214, PageID 10554). Chinn did not raise this claim in his Motion to Amend. That is, he did not assert this Court committed a manifest error of law when it did not decide that issue in his favor in the Opinion. The Court declines to consider that argument. Allowing a litigant to introduce a new claim of manifest error of law in objections to a Magistrate Judge's Report on a Fed.R.Civ.P. 59(e) motion would defeat the very strict time limit on making claims under that rule.

Second Objection: It Would Not Be Improper to Grant Relief on the Basis of the Manifest Injustice of the Conviction

Chinn objects to the Magistrate Judge's conclusion that he is not entitled to relief because his conviction is manifestly unjust (Objections, ECF No. 214, PageID 10554, et seq.) He notes that the Magistrate Judge did not discuss the manifest injustice portion of his Motion except for a "broadside" against the delays in handling capital cases in the American system of criminal justice. *Id.* at PageID 10555.

Chinn says he has not been responsible for the delays in handling his case. *Id.* Without attempting to assess responsibility for delay among the participants, the Court notes that the case became ripe on objections to the Magistrate Judge's reports and recommendations on November 5, 2013. A very considerable amount of effort has been expended since that date on Chinn's efforts to insert lethal injection invalidity claims and claims under *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016), into this case (See ECF Nos. 95-204). As to the lethal injection invalidity claims, Chinn has been litigating those claims in the proper § 1983 forum since 2011. *In re Ohio Lethal Injection Protocol Litig.,* Case No. 2:11-cv-1016.

Chinn claims to be actually innocent. *Id.* at PageID 10556. In support he cites no new evidence of actual innocence in his own case, but relies on social science commentary projecting the percentages of actually innocent persons convicted capitally, Gross, O'Brien, Hu, & Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death,* 111 Proceeding of the National Academy of Sciences 7230 (2014) (full-scale study of all death sentences from 1973 through 2004 estimating that 4.1% of those sentenced to death are actually innocent); and Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction* Rate, 97 J. Crim. L. & C. 761 (2007) (examination of DNA exonerations in death penalty cases for murder-rapes between 1982 and 1989 suggesting an analogous rate of between 3.3% and 5%). Notably the authors do not suggest ways in which their research can be applied to determine if a particular inmate is actually innocent. They also take no account of the likely geographical dispersion of such cases, but the limitation of capital convictions to a very small number of counties in the United States is well known. Montgomery County, Ohio, has not historically been a source of many capital convictions; the most prominent in the last thirty years have been for multiple killings (Marvallous Keene (5), Samuel Moreland (5), Antonio Franklin (3), Larry Gapen (3)).

Chinn has not suggested how the "manifest injustice" prong of Rule 59(e) jurisprudence applies here except to argue he is innocent. Whether or not he is innocent, the Court is not persuaded that its decision on the *Brady* claim will perpetuate a "manifest injustice." Chinn has received very careful judicial attention to his *Brady* claim, including two remands from the Ohio Second District Court of Appeals. The Court has agreed with the Magistrate Judge that its resolution of that claim is debatable among

jurists of reason, so the claim will receive further review by the Sixth Circuit. But allowing the claim to go to the circuit court in its present posture does Chinn no injustice.

Conclusion

Petitioner's Objections (ECF No. 214) are overruled and the Motion to Alter or Amend the Judgment (ECF No. 210) is **DENIED**.

August 18, 2020.

/s/ Sarah D. Morrison
Sarah D. Morrison
United States District Judge

2020 WL 4251032
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Western Division, at Dayton.

Davel CHINN, Petitioner,
v.
Charlotte JENKINS, Warden, Chillicothe Correctional Institution, Respondent.

Case No. 3:02-cv-512
|
Signed 07/24/2020

Attorneys and Law Firms

Rachel Troutman, Melissa J. Jackson, Erin Gallagher Barnhart, Federal Public Defender for the Southern District of Ohio, Columbus, OH, for Petitioner.

Brenda Stacie Leikala, Ohio Attorney General's Office, Holly E. LeClair Welch, Matthew A. Kanai, Office of the Ohio Attorney General Criminal Justice Section, Matthew C. Hellman, Office of Victim Services, Columbus, OH, for Respondent.

REPORT AND RECOMMENDATIONS

Michael R. Merz, United States Magistrate Judge

***1** This capital habeas corpus case is before the Court on Petitioner's Motion to Amend the Judgment (ECF No. 210). Respondent opposes the Motion (Memo. in Opp., ECF No. 211) and Petitioner has filed a Reply Memorandum in support (ECF No. 212).

As a post-judgment motion, the Motion to Amend is deemed referred under 28 U.S.C. § 636(b)(3) for a report and recommendation. Ultimate decision of the Motion is reserved to District Judge Morrison.

Authority vs. Propriety

Petitioner's Motion begins with a discussion of the authority of the Court to amend its judgment, focusing on the recent Supreme Court decision in *Banister v. Davis* (Motion, ECF No. 210, PageID 10493, citing —— U.S. ——, 140 S.Ct. 1698 (2020)). There, the Supreme Court held: "The Rule enables a district court to 'rectify its own mistakes in the period immediately following' its decision." *Banister*, 140 S.Ct.at 1703, quoting *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 450, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982); accord: *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 270-71, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). The Supreme Court noted the historical derivation of the rule: "Rule 59(e) derives from a common-law court's plenary power to revise its judgment during a single term of court, before anyone could appeal," and it is a "one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention, before taking a single appeal." *Banister*, 140 S. Ct. at 1709, 1710.

Banister was a habeas case, and the question on which certiorari was granted was whether a Rule 59(e) motion constituted a second or successive habeas petition subject to the strictures of 28 U.S.C. § 2244(b). *Banister*, 140 S. Ct. at 1702. [1] Because Banister's motion was held by the Court not to be a second or successive habeas petition, it stopped the running of the time for appeal, with the thirty-day limit beginning again when the Rule 59(e) motion was decided. *Banister* noted that Rule 59(e) practice in habeas cases was traditional long before the AEDPA. 140 S.Ct. at 1706, citing *Browder*, 434 U.S. at 258, 271, 98 S.Ct. 556.

But the *Banister* Court did nothing to broaden the scope of matters to be considered on a 59(e) motion, noting:

> [A] prisoner may invoke the rule only to request "reconsideration of matters properly encompassed" in the challenged judgment. *White*, 455 U.S. at 451, 102 S.Ct. 1162, 71 L.Ed.2d 325. And "reconsideration" means just that: Courts will not entertain arguments that could have been but were not raised before the just-issued decision.

140 S. Ct. at 1708. Chinn contests this conclusion, arguing "[w]hen addressing Rule 59 just this term, the Supreme Court

did not adopt the stringent standard proposed by the old cases the Warden cites." (Reply, ECF No. 212, PageID 10508). But the Supreme Court had before it the question of the **authority** of a District Court to deal with a Rule 59(e) motion in a habeas case [2], rather than the **propriety** of its granting relief within that authority.

***2** Thus, *Banister* confirms the authority of a district court to entertain a Rule 59(e) motion in a habeas case, but reaffirms rather than broadening the scope of matters to be considered on such a motion. The proper scope of a Rule 59(e) motion is as set forth in the United States Court of Appeals for the Sixth Circuit precedent cited below, whether the standard be regarded by Chinn as "stringent" or not.

Respondent does not question the authority of the Court to amend the judgment, but argues Petitioner has not shown he is entitled to relief under traditional application of the Rule, which *Banister* did not change (Response, ECF No. 211, PageID 10504-06). Indeed, it is undisputed on what matters a district court may consider on a Rule 59(e) motion: "To grant a motion filed pursuant to Rule 59(e) ..., 'there must be '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.' " *Betts v. Costco Wholesale Corp.,* 558 F.3d 461, 474 (6th Cir. 2009), quoting *Henderson v. Walled Lake Consol. Sch.,* 469 F.3d 479, 496 (6th Cir. 2006).

> Motions to alter or amend judgment may be granted if there is a clear error of law, *see Sault Ste. Marie Tribe*, 146 F.3d at 374, newly discovered evidence, *see id.*, an intervening change in controlling constitutional law, *Collison v. International Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n.3 (1st Cir. 1993); *School District No. 1J v. ACANDS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), or to prevent manifest injustice. *Davis*, 912 F.2d at 133; *Collison*, 34 F.3d at 236; *Hayes*, 8 F.3d at 90-91 n.3. *See also North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

Gencorp, Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999), accord*, Nolfi v. Ohio Ky. Oil Corp.,* 675 F.3d 538, 551-52 (6th Cir. 2011), quoting *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.,* 616 F.3d 612, 615 (6th Cir. 2010).

Petitioner claims the judgment embodies a clear error of law in that it applied the incorrect standard for assessing the materiality of evidence suppressed in violation of *Brady v. Maryland* (Motion, ECF No. 210, PageID 10594-95, citing 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). The District Court's decision is reported at *Chinn v. Warden, Chillicothe Corr. Inst.*, No. 3:02-cv-512, 2020 WL 2781522, 2020 U.S. Dist. LEXIS 94062 (S.D. Ohio Jul. 24, 2020) (Morrison, J.). The conclusions which Petitioner states contain a "clear error of law" are in the following paragraph:

> This Court finds that the additional impeachment information, had counsel even chosen to use it, would not have so conclusively undermined Washington's testimony at the trial that it would have created a reasonable probability that the result of the trial would have been different. A *Brady* violation will not result in a new trial for a criminal defendant unless a court concludes that the improperly withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Here, it is not apparent whether or to what extent trial counsel would have used the juvenile records. Additionally, the jury was made aware of discrepancies in Washington's account, but still found him to be a credible witness. The jury was made aware that Washington sometimes had difficulty remembering details accurately such as Petitioner's number in the lineup, Petitioner's height, which hand Petitioner held the gun, and how he had initially met Petitioner. Additionally, there was testimony that Washington could not read and write in cursive. Although the juvenile records may have been helpful to counsel, the Court cannot conclude that there was a reasonable probability that had they been disclosed, the result of the proceedings would have been different.

***3** *Chinn,* 2020 WL 4251032 at *3, 2020 U.S. Dist. LEXIS 94062 at *37-38. Petitioner claims this is clear error because "Chinn should not lose merely if 'the jury *could* have' been unmoved by the suppressed evidence; only if it is convinced 'that [the jury] *would* have' discounted that evidence may the Court find the withheld evidence to be immaterial." (Motion, ECF No. 210, PageID 10495 (emphasis in original), quoting *Smith v. Cain*, 565 U.S. 73, 76, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); citing *Wearry v. Cain*, —— U.S. ——, 136 S.Ct. 1002, 1007, 194 L.Ed.2d 78 (2016)). Petitioner criticizes the Court's decision for failure to discuss these cases and apply them. *Id.* at PageID 10495-96

The flaw in this argument is that neither *Smith* nor *Wearry* is applicable to this case. Because the state courts decided Chinn's *Brady* claim on the merits, this Court's task in habeas was to decide if the state court's decision was contrary to or an objectively unreasonable application of clearly established Supreme Court precedent. The relevant state court decision is that of the Ohio Second District Court of Appeals. *State v. Chinn*, No. 18535, 2001 WL 788402, 2001 Ohio App. LEXIS 3127 (Ohio App. 2nd Dist. Jul. 31, 2001). *Smith* was not decided until almost eleven years later and *Wearry* another five years after that. State court decisions on the merits of federal constitutional questions are to be measured by Supreme Court precedent existing *at the time of the state court decision.* Clearly established law means the law that existed at the time of the last state court adjudication on the merits. *Williams (Terry) v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). *Smith* and *Wearry* were not clearly established federal law at the time the Second District rejected Chinn's *Brady* claim. Therefore, it was not a clear error of law to fail to apply them to evaluating Chinn's *Brady* claim, even assuming they adopt a more liberal materiality standard than the Second District applied.

Without purporting to do so, Petitioner essentially asks this Court, in the person of one of its newest judges, for a *de novo* consideration of his *Brady* claim: "Chinn **implores** this Court to review the suppressed evidence and consider the following information contained within." (Motion, ECF No. 210, PageID 10497 (emphasis added)). While the Court has authority to reconsider, the costs of doing so must be remembered. As Chief Judge Marbley has written in a published opinion, reconsideration consumes scarce judicial resources. *Meekison v. Ohio Dep't of Rehabilitation & Correction*, 181 F.R.D. 571, 572 (S.D. Ohio 1998).

Very considerable judicial resources have already been devoted to this case. The murder of which Petitioner was convicted occurred January 30, 1989. The "adult" bookstore behind which the victim was kidnapped before being executed was demolished so long ago that most Daytonians do not remember it. The Common Pleas Judge who tried the case, William McMillan, has long since retired. The distinguished panel of Second District Judges who decided the *Brady* claim – Frederick Young, William Wolff, and James Brogan – have also long since retired; indeed, Judge Wolff's successor will retire at the end of 2020. This habeas case was filed here in 2002. Like the Chancellors who presided *seriatim* over *Jaryndyce v. Jaryndyce* [3] , Judge Morrison inherited this case upon assuming office (ECF No. 199) and promptly decided it. But even if she denies the Rule 59(e) Motion, the case will not be over because this Court has granted a certificate of appealability on the *Brady claim. Chinn*, 2020 WL 4251032 at *3, 2020 U.S. Dist. LEXIS 94062 at *212-13. Should the Sixth Circuit take the usual amount of time it does to consider capital cases without an imminent execution date, it is unlikely the undersigned will still be on the bench should it order a remand. In contrast, all three of the attorneys who signed the Motion were admitted to practice more than ten years after the crime in suit.

***4** Our American legal system's current manner of handling capital cases, with its permission for continual demands for reconsideration, erodes public confidence in the judiciary, both by keeping cases from finality for decades and then producing middle-of-the-night Supreme Court decisions. See *Gomez v. U.S.D.Ct., N.D. Cal.,* 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992), *superseded on other grounds by* the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214; *Barr v. Purkey,* 2020 WL 4006809, 2020 U.S. LEXIS 3576 (Jul. 16, 2020). This Court should not encourage repeated demands for reconsideration by reconsidering Chinn's *Brady* claim *de novo.*

Conclusion

It is respectfully recommended that the Motion to Alter or Amend the judgment (ECF No. 210) be denied. Because reasonable jurists would not disagree with this conclusion, it

is also recommended that Petitioner be denied a certificate of appealability on the issues raised on the Motion.

All Citations

Slip Copy, 2020 WL 4251032

Footnotes

1 "We granted certiorari to resolve a Circuit split about whether a Rule 59(e) motion to alter or amend a habeas court's judgment counts as a second or successive habeas application. 588 U. S. ——, 139 S.Ct. 2742, 204 L.Ed.2d 1130 (2019). We hold it does not, and reverse." *Banister*, 140 S. Ct. at 1705.

2 Had the Supreme Court adopted the Fifth Circuit's position that Bannister's 59(e) motion was a second or successive petition, the District Court would have lacked jurisdiction to consider it. *Burton v. Stewart*, 549 U.S. 147, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007); *Franklin v. Jenkins*, 839 F.3d 465 (6th Cir. 2016).

3 CHARLES DICKENS, BLEAK HOUSE (1852-53).

2020 WL 2781522
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Eastern Division.

Davel CHINN, Petitioner,

v.

WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION, Respondent.

Case No. 3:02-cv-512
|
Signed 05/29/2020

Attorneys and Law Firms

Rachel Troutman, Melissa J. Jackson, Erin Gallagher Barnhart, Federal Public Defender for the Southern District of Ohio, Columbus, OH, for Petitioner.

Brenda Stacie Leikala, Holly E. LeClair Welch, Matthew A. Kanai, Matthew C. Hellman, Office of the Ohio Attorney General Criminal Justice Section, Columbus, OH, for Respondent.

OPINION AND ORDER

SARAH D. MORRISON, United States District Judge

***1** Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is before the Court upon the Magistrate Judge's Report and Recommendations (R&R) (ECF No. 60), in which the Magistrate Judge recommended denying relief on all of Petitioner's habeas claims, Petitioner's objections to the R&R (ECF No. 63), and the Warden's response (ECF No. 66.) This matter is also before the Court upon the Magistrate Judge's Supplemental Report and Recommendations (Supplemental R&R) (ECF No. 86), in which the Magistrate Judge addressed a limited number of Petitioner's objections and reiterated his recommendation that the habeas corpus petition be dismissed with prejudice. Petitioner filed objections to the Supplemental R&R (ECF No. 91), and the Warden filed a response (ECF No. 94.)

Additionally, this matter is before the Court upon Petitioner's attempts to amend his Petition to add lethal injection and *Hurst* claims, the Magistrate Judge's Decision and Orders and Supplemental Memorandum denying those amendments (ECF Nos. 186, 190, 196, 201, 205), and the ensuing objections by Petitioner (ECF Nos. 187, 193, 197, 202.)

As required by 28 U.S.C. § 636(b) and Federal Rules of Civil Procedure Rule 72(b), the Undersigned has made a de novo review of the record in this case. Upon said review, the Court finds all of Petitioner's objections to the various R&R's and the Decision and Orders of the Magistrate Judge to be without merit. For the following reasons, Petitioner's Objections (ECF Nos. 63, 91, 187, 193, 197, 202) are **OVERRULED**. The R&R, Supplemental R&R, and the decisions regarding amendments (ECF Nos. 186, 190, 196, 201 and 205) are **ADOPTED** and **AFFIRMED**. The Petition is **DENIED** and this action is **DISMISSED**.

I. Factual Background and Procedural History

In 1989, and after a trial by jury in Montgomery County, Ohio, Petitioner Davel Chinn was convicted of Aggravated Murder, in violation of R.C. 2903.01(B), for purposely causing the death of Brian Jones in the course of a kidnapping and robbery. Petitioner was sentenced to death pursuant to R.C. 2929.02, *et seq.* The Magistrate Judge set forth the facts and procedural history of this case in the original Report and Recommendations, in which the Magistrate Judge quoted the Ohio Supreme Court's summarization of the facts of this case:

> On the evening of January 30, 1989, Davel "Tony" Chinn, appellant, completed a midterm examination at Cambridge Technical Institute in Dayton. Later that night, fifteen-year-old Marvin Washington saw appellant near Courthouse Square in downtown Dayton. Washington, who had known appellant for approximately one year, knew him only by the name of "Tony." Washington and appellant spent part of the night drinking beer and loitering around the downtown area. At some point, appellant showed Washington a .22 caliber nickel-plated revolver and suggested that they look for someone to rob. At approximately 11:00p.m., Washington went into an adult bookstore on South Ludlow Street and was ejected from the store because of his age. Thereafter, Washington and appellant loitered in the area of South Ludlow Street looking for someone to rob.

***2** Meanwhile, Gary Welborn and Brian Jones had pulled their cars into a parking lot at the corner of South Ludlow Street and Court Street and had parked side-by-side in opposite directions to converse with each other through their driver's side windows. Appellant and Washington spotted the two men and decided to rob them.

Washington approached Jones's vehicle from the rear, and appellant approached Welborn's car from the rear. Appellant pulled out a small silver revolver, pressed it against the side of Welborn's head, and demanded money. Welborn saw Washington's face, but he was unable to see the face of the gunman. Welborn handed his wallet to Washington, and Jones handed his wallet to the gunman. According to Welborn, "the guy with the gun said we'd better have at least a hundred dollars between us or he'd kill us both." After emptying the victims' wallets of money, the two assailants began discussing which car they wanted to steal. Following a brief discussion, they decided to steal both cars. Washington got into the driver's side of Jones's car and forced Jones into the passenger's seat. Appellant instructed Welborn to remain still. As appellant began walking toward the back of Welborn's vehicle, Welborn seized the opportunity to escape. At trial, Welborn testified, "The guy, he comes around. He starts walking around my car, telling me not to touch my keys. He still has the gun pointed at me. I watch him in my rearview mirror and sideview mirror. As soon as he gets behind my car, I duck down. I thought he was going to kill me now or later anyway so I ducked down in my car seat, threw it in drive, and took up off [sic] Ludlow the wrong way, straight to the police station." Welborn arrived at the station at approximately 11:30 p.m., and reported the incident to police.

After Welborn had escaped, appellant got into the back seat of Jones's car and held the revolver to Jones's neck while Washington drove the car away from Dayton and toward an area in Jefferson Township. At some point, appellant instructed Washington to turn the vehicle around and to pull over to the side of the road. Washington complied with appellant's instructions. After Washington had stopped the car, he leaned forward in the driver's seat so that appellant could exit the two-door vehicle from the driver's side. According to Washington, appellant got out of the car and walked around to the passenger's side. Appellant then got Jones out of the car and shot him. Appellant and Washington drove away from the scene in Jones's automobile. While fleeing from the scene, appellant told Washington that he shot Jones because Jones could have identified them and because Jones "didn't have enough money." Appellant told Washington that he had shot Jones in the arm.

Stacy Ann Dyer lived at 5500 Germantown Pike in Jefferson Township. Dyer witnessed the shooting but did not see the gunman's face. Dyer testified that on January 30, 1989, at approximately 11:30 p.m., she had just arrived home and parked in her driveway facing the street. At that time, Dyer saw a black two-door Chevrolet Cavalier pull off to the side of the road on Germantown Pike. Dyer observed a man get out of the driver's side of the vehicle and walk over to the passenger's side. She also saw the silhouette of a person exiting the vehicle from the passenger's side. The two people then walked to the back of the car. At that moment, Dyer heard a gunshot and a scream. The victim ran through Dyer's yard and fell to the ground in her neighbor's yard. Dyer then saw the black car speed away from the scene. Dyer ran inside her house and informed her father and her sister what had happened. Dyer's sister called police, and Dyer and her father went outside to check on the victim. They found the victim, Brian Jones, on his knees with his face to the ground. Dyer asked the victim whether he was injured, but Jones did not respond. When police and paramedics arrived at the scene, Jones was still breathing but was unconscious. He never regained consciousness and was pronounced dead on arrival at the hospital.

***3** Dr. David M. Smith performed the autopsy. Smith found that Jones had died as a result of a massive acute hemorrhage due to a gunshot wound to his arm and chest. Smith found that the projectile had entered through Jones's left arm, had proceeded directly into Jones's chest, and had perforated the main pulmonary artery. Smith recovered the .22 caliber lead projectile from an area near the base of Jones's heart. Carl H. Haemmerle, an expert in firearms, examined the .22 caliber projectile and determined that it had been fired from a revolver. He also examined the sweatshirt that Jones had been wearing at the time of the shooting. Evidence revealed that the muzzle of the weapon had been in direct contact with the garment at the time the shot was fired.

Following the shooting, Washington and appellant drove in Jones' car to 5214 Lome Avenue in Dayton. There, Washington introduced appellant to Christopher "Bay" Ward. Ward testified that, on January 31, 1989, at approximately 12:30 or 1:00 a.m., Washington had pulled up to 5213 Lome Avenue in the black Chevrolet Cavalier and had introduced Ward to a man named "Tony," who was seated in the front passenger's seat. Ward spoke to Washington for approximately thirty to forty-five minutes until Washington and the man he was with drove away. Later that night, Washington returned to Lome Avenue and told Ward that "Tony" had shot someone in Jefferson Township.

On February 5, 1989, police arrested Washington based on information they had received from Ward. Washington confessed to police and named Tony as the killer. However, Washington was unable to give police the suspect's last name and address. On February 7, Washington helped police prepare a composite sketch of Tony. Later, after police had nearly exhausted all leads in their search for Tony, the composite sketch was released to the news media. On Wednesday, February 22, 1989, a Dayton area newspaper printed the composite sketch along with an article indicating that the suspect's name was Tony.

Shirley Ann Cox worked as a receptionist in her husband's law office. On Thursday, February 23, two men walked into the office. One of the men identified himself as Tony Chinn and requested to see Cox's husband. Cox informed the man that her husband was not available. That night, while Cox was reading the previous day's newspaper, she saw the composite sketch of the suspected killer. She said to her husband, "My God, I don't believe this." "This Tony Chinn that was in [the office] this morning is in the paper." On Friday, February 24, Cox called police to inform them that she had seen the suspect and that his name was Tony Chinn.

After speaking to Cox, police obtained a photograph of appellant and placed it in a photo array with the pictures of five other men. On February 24, police showed the photo array to Washington and to Ward. Washington positively identified appellant as the killer. Additionally, Ward identified appellant as the man he had seen in the passenger's seat of the victim's car-the man Washington had referred to as "Tony." That same day, on February 24, police arrested appellant in connection with murder.

On February 27, police conducted a lineup. Washington, Ward, Cox, Dyer, and Welborn all viewed the lineup. Dyer and Welborn could not identify appellant. Welborn attempted to make a selection based on the voices of the subjects but chose someone other than appellant. Ward and Cox were able to positively identify appellant. Washington initially indicated that the killer was not in the lineup. However, after leaving the room where the lineup was conducted, Washington summoned Detective David Lantz into an interview room and told him that number seven in the lineup (appellant) was the killer. Washington explained to the detective that he had previously indicated that appellant was not in the lineup out of fear that appellant was able to see him through the screen in the room where the lineup was conducted.

***4** In March 1989, appellant was indicted by the Montgomery County Grand Jury for the aggravated murder of Jones. Count One of the indictment charged appellant with purposely causing the death of Jones during the commission of an aggravated robbery. Count One of the indictment also carried three death penalty specifications: one alleging that the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense (R.C. 2929.04(A)(3)), a second alleging that the offense was committed during the course of aggravated robbery (R.C. 2929.04(A)(7)), a third alleging that the offense was committed during the course of kidnapping (R.C. 2929.04(A)(7)). Appellant was also indicted on three counts of aggravated robbery (Counts Two, Four, and Five), one count of kidnapping (Count Three), and one count of abduction (Count Six). Each count of the indictment also carried a firearm specification. Additionally, Counts Two through Six each carried a specification alleging that appellant had previously been convicted of robbery.

In August 1989, the matter proceeded to trial by jury on all counts and specifications alleged in the indictment, with the exception of the specifications premised on appellant's prior robbery conviction, which were tried to the court. The defense presented several witnesses in the guilt phase of appellant's trial. Through these witnesses the defense attempted to establish that appellant had gone directly

> home from school on the evening of January 30, 1989, and that he was at home, where he lived with his mother and his brother, at the time of the crimes in question. Following deliberations, the jury returned verdicts of guilt on all of the matters that were tried to the jury. Appellant presented several witnesses in mitigation and gave an unsworn statement in which he denied any involvement in the crimes. Following the mitigation hearing, the jury returned its verdict recommending that appellant be sentenced to death for the aggravated murder of Jones. The trial court accepted the jury's recommendation and imposed the sentence of death. The trial court also found appellant guilty of the prior conviction specifications that were tried to the court without a jury.

State v. Chinn, 85 Ohio St.3d 548, 553, 709 N.E.2d 1166 (1999).

On November 4, 2002, after exhausting his state court remedies, Petitioner filed the instant Petition for a Writ of Habeas Corpus, raising twenty grounds for relief. (Petition, ECF No. 3.) Previously, and on Respondent's motion, United States District Judge Edmund A. Sargus dismissed claims 5(C), 7, 11, 14, 17, and 19 as procedurally defaulted, and claim 9(D) and part of 9(H) on the merits. (Opinion and Order, ECF No. 30.) On October 14, 2011, the Magistrate Judge issued an R&R, recommending that the remaining claims in the Petition be "dismissed with prejudice but that Petitioner be granted a certificate of appealability on Claims One, Three, Five A, and Thirteen." (Original R&R, ECF No. 60, PAGID 923.) Petitioner filed objections challenging the Magistrate Judge's recommendation that the remaining claims be dismissed, as well as the Magistrate Judge's recommendation that a certificate of appealability only issue as to four of his claims. (Objections, ECF No. 63.) The Warden filed no objections on the certificate of appealability issues.

On June 28, 2013, the Magistrate Judge filed a Supplemental R&R after considering Petitioner's Objections (ECF No. 63), and Respondent's Response (ECF No. 66.) In the Supplemental R&R, the Magistrate Judge found Petitioner's objections to be without merit, and again recommended the Petition be dismissed with prejudice and that Petitioner be granted a certificate of appealability only on Grounds One, Three, Five(A) and Thirteen. (ECF No. 86, at 60.) Petitioner has filed Objections to the Supplemental R&R. (ECF No. 91.)

After the initial objections became ripe for review, Petitioner made several attempts to amend his petition to add claims for relief challenging Ohio's lethal injection protocol. Those proposed claims have been the subject of years of litigation in this Court and will be addressed in the final section of this Opinion and Order.

II. Standards of Review

***5** This Court reviews *de novo* those portions of the Report and Recommendations to which the parties objected. *See*, *e.g.*, *Lardie v. Birkett*, 221 F. Supp. 2d 806, 807 (E.D. Mich. 2002). In that regard, Fed. R. Civ. P. 72(b)(3) provides:

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3). Further, although "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings," *Thomas v. Arn*, 474 U.S. 140, 150 (1985), this Court has reviewed the Report and Recommendations *de novo*. *See, e.g.*, *Delgado v. Brown*, 782 F.2d 79, 82 (7th Cir. 1986).

Because this is a habeas corpus case, provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") that became effective prior to the filing of the instant petition, apply to this case. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA limits the circumstances under which a federal court may grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in a state court proceeding. Specifically, the AEDPA directs us not to grant a writ unless the state court adjudication "resulted in

a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Section 2254(d)(1) circumscribes a federal court's review of claimed legal errors, while § 2254(d)(2) places restrictions on a federal court's review of claimed factual errors.

Under § 2254(d)(1), "[a] state court's adjudication of a claim is 'contrary to' clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts." *Stojetz v. Ishee*, 892 F.3d 175, 192-93 (6th Cir. 2018) (quoting *Van Tran v. Colson*, 764 F.3d 594, 604 (6th Cir. 2014)). A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court identifies the correct legal principle from the decisions of the Supreme Court but unreasonably applies that principle to the facts of the petitioner's case. *Id.* (citing *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007)). A federal habeas court may not find a state adjudication to be "unreasonable" simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams v. Coyle*, 260 F.3d 684, 699 (6th Cir. 2001). Rather, for purposes of 2254(d)(1), "clearly established federal law includes only the holdings of the Supreme Court, excluding any dicta; and, an application of these holdings is 'unreasonable' only if the petitioner shows that the state court's ruling 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.' " *Stojetz*, 892 F.3d at 192-193 (quoting *White v. Woodall*, 572 U.S. 415 (2014)).

***6** Further, § 2254(d)(2) prohibits a federal court from granting an application for habeas relief on a claim that the state courts adjudicated on the merits unless the state court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In this regard, § 2254(e)(1) provides that the findings of fact of a state court are presumed to be correct and that a petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. Lastly, our review is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170 (2011).

A state prisoner who seeks a writ of habeas corpus in federal court does not have an automatic right to appeal a district court's adverse decision unless the court issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c). When a claim has been denied on the merits, a COA may be issued only if the petitioner "has made a substantial showing of the denial of a constitutional right." *Id.* To make such a showing, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Recently, the Sixth Circuit vacated a COA and dismissed an appeal, on the basis that a district court did not appropriately apply the correct standard for granting a COA. *Moody v. Unites States*, 958 F.3d 485, 2020 WL 2190766 (6th Cir. 2020). In *Moody*, the Sixth Circuit cautioned that "a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect," and "[t]o put it simply, a claim does not merit a certificate unless *every independent reason to deny the claim is reasonably debatable*." *Id.* at *1 (emphasis in original). With respect to a claim that a state court has previously rejected on the merits pursuant to 28 U.S.C. § 2254(d), the Sixth Circuit advised that "[f]or that claim to warrant appeal, there must be a substantial argument that the state court's decision was not just wrong but *objectively unreasonable* under the stringent requirements of § 2254(d) (commonly knows an 'AEDPA' deference." *Id.* at *2 (emphasis in original)).

Keeping these standards of review in mind, the Court has carefully reviewed the R&R, together with the Supplemental R&R issued by the Magistrate Judge. With respect to the merits of Petitioner's claims, this Court hereby **ADOPTS** the Magistrate Judge's R&R, ECF No. 60, as well as the Supplemental R&R, ECF No. 86. Additionally, and with respect to Petitioner's motion for leave to amend his Petition to add lethal injection and *Hurst* claims, the Court hereby **ADOPTS** the Magistrate Judge's Decision and Order (ECF No. 186), and the Supplemental Memoranda (ECF Nos. 190, 196, 201, 205).

While reaching the same conclusions contained in the above referenced R&R's, the Court adds the following summary and analysis.

III. Petitioner's Claims

First Claim for Relief:

> Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments were violated when the State of Ohio failed to provide the defense with exculpatory and favorable evidence prior to trial. U.S. Const. Amends. V, VI, XIV.
>
> (ECF No. 3, at 8, PAGEID 667.)

Petitioner argues his conviction must be reversed because the State failed to disclose impeachment evidence about its star witness – and Petitioner's accomplice – Marvin Washington. Washington, who was 15 years old at the time of the crime, testified that he helped Petitioner rob and murder Jones. Petitioner denied participating in the crime, claimed not to know Washington, and asserted an alibi defense.

***7** In his First Claim for Relief, Petitioner alleges the State failed to disclose juvenile records indicating that Washington suffered moderate intellectual disability [1] with neuropsychological deficits, had poor eyesight and refused to wear corrective lenses, had a poor memory and limited ability to process information, and had a history of chemical abuse and "black-out" episodes, all of which might have impacted his credibility as a witness. (Petition, ECF No. 3, at 9, PAGEID 668.) According to Petitioner, "[a]s the result of Marvin's deficits, he was susceptible to influence by authority figures and he had problems processing and recalling events. The State's case against Chinn was not overwhelming and so this impeaching evidence would have put the case in a new light." (Traverse, ECF No. 27, at 10.)

In response, the Warden-Respondent argues the Second District Court of Appeals considered this claim on the merits and correctly applied prevailing legal standards. (Return of Writ, ECF No. 24, at 22.) According to Respondent, the state courts thoroughly reviewed the claim, reviewed trial records, ordered an evidentiary hearing, and concluded that the impeachment evidence was not as strong as Petitioner suggests. (*Id.*)

As noted by the Magistrate Judge, the Ohio Court of Appeals for the Second Appellate District decided this claim on the merits, in post-conviction, applying *Brady v. Maryland*, 373 US 83 (1963). *See State v. Chinn*, No. 18535, 2001 WL 788402, *12 (Ohio App. 2nd Dist. July 13, 2011). Because the state courts decided this claim on the merits, this Court's review is limited, pursuant to 28 U.S.C. § 2254(d), to a determination of whether the state court decision was contrary to or an unreasonable application of federal law as determined by the United States Supreme Court, or based on an unreasonable determination of the facts in light of the evidence before the court.

In his state post-conviction proceedings, Petitioner presented two factually overlapping claims regarding Marvin Washington's testimony. In addition to the instant *Brady* claim, Petitioner also alleged that his trial counsel provided ineffective assistance, because they "should have presented an expert to testify about eyewitness identification and an expert to testify that Washington had suffered from mental retardation and that such retardation had affected his ability to remember and testify about the evening of the crime." *Chinn*, 2001 WL 788402, *2. As the Magistrate Judge noted, the state court's decisions regarding the two claims are "intertwined." (ECF No. 60, at 32.)

In connection with Petitioner's ineffective assistance of trial counsel claim, the court of appeals discussed the issue of Washington's possible intellectual disability:

> Considering all of this evidence, we cannot conclude that there is a reasonable probability that the result of the trial would have been different had Chinn's counsel called experts to testify about eyewitness identification and Washington's mental retardation. The only eyewitness identification factor that was relevant in the case was Washington's alleged mental retardation and *the effects of that retardation were disputed.* Although Everington could have testified as to her beliefs about Washington, such testimony was contradicted by the testimonies of Monta, Lantz, and Martin.
>
> Further, we have carefully reviewed Washington's testimony at Chinn's trial. His testimony is remarkably

coherent and consistent. We do not agree with Everington's testimony that, during Chinn's trial, Washington had been unable to recall important facts from the night of the crime, had not understood questions, and had given inconsistent and inappropriate answers. Although Washington was unable to give times for many of the events during the evening, he testified that he had not been wearing a watch. While Washington was unable to remember some facts about the evening of the crime, such as with which hand Chinn had held the gun, Washington did remember other very specific facts, such as what he had worn on the night of the crime, the general type of clothing that Chinn had worn, that Jones' car had had a digital clock, and that Chinn had been drinking a sixteen ounce "[b]ig mouth Micky" when he had first seen him. Further, although Washington admitted during his testimony that he could not read or write in cursive, we do not believe that such abilities were required for Washington to accurately identify Chinn.

***8** Washington picked Chinn from a photo spread, after not picking suspects from earlier photo spreads that had not contained Chinn's photograph. Thus, although mentally retarded people might be eager to please authorities, assuming Washington was mentally retarded, he must not have been eager enough to please authorities to immediately pick a suspect from the first photo spread or to immediately identify Chinn during the police lineup. Finally, although mentally retarded people might generally have a decreased accuracy rate in making later identifications, such decreased accuracy rate does not mean Washington's identification of Chinn was wrong. In fact, Washington's familiarity with Chinn prior to the night of the crime likely increased his accuracy rate in identifying him. As Martin testified, a person's level of adaptive functioning is not apparent from his IQ scores. The witnesses who came in contact with Washington prior to Chinn's trial thought that, while Washington might not have been especially bright, he would have passed "muster" and that his story was consistent and plausible.

Considering all of the evidence on the record, we cannot conclude that there is a reasonable probability that had Chinn's counsel called experts on eyewitness identification and mental retardation, the result of the trial would have been different. Thus, we will not conclude that the trial court erred in concluding that Chinn's counsel was not ineffective for failing to call experts on eyewitness identification and mental retardation.

Chinn, 2001 WL 788402, *9-10 (emphasis added). The court of appeals concluded counsel were not ineffective for failing to call an expert to testify about Washington's intellectual functioning, because the effects of his disability were disputed, Washington testified in a "coherent and consistent" manner, and because when considering all of the record evidence, the result of the trial would not have been different. *Id.*

In analyzing Petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), the court of appeals held:

> Chinn argues that the prosecutor's failure to disclose psychological reports, social history reports, neuropsychological reports, and juvenile court personnel evaluations from Washington's juvenile court records constituted a *Brady* violation. Assuming *arguendo,* that Chinn did not waive his argument regarding a *Brady* violation by failing to raise it in his original petition for post-conviction relief, we will address this argument.
>
> The Supreme Court has held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-1197; see *State v. Treesh* (2001), 90 Ohio St.3d 460, 475, 739 N.E.2d 749, 767. "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus, following *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375.
>
> We cannot conclude that the non-disclosed records were evidence that was material to Chinn's guilt or punishment because we do not believe that there is a reasonable probability that, had the records been disclosed to the defense, the result of the trial would have been different. Chinn's own attorney, Monta, testified at the post-

> conviction relief hearing that had he had Washington's juvenile records prior to the trial, he "may very well" have had an expert examine Washington to see if his testimony could be impeached. Monta did not say definitively that he would have consulted an expert had he had the records. Further, Monta stated that the case was not centered solely on Washington's identification of Chinn, as other witnesses that testified had identified Chinn as well. Further, as we indicated above, Everington's testimony was contradicted by the testimonies of Martin and Lantz. Thus, because we cannot conclude that the non-disclosed records were material to Chinn's guilt, there was no *Brady* violation.
>
> ***9** The fourth assignment of error is overruled.

Chinn, 2001 WL 788402, *12.

The Magistrate Judge recommended denying Petitioner's claim as without merit, finding Petitioner failed to establish the evidence at issue was material, or that Petitioner suffered prejudice as a result of its omission. (ECF No. 60, at 36-37.) Applying the standard set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), the Magistrate Judge concluded as follows:

> In order to establish a *Brady* violation, the omitted evidence must be material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner has established the first prong of a *Brady* violation; the omitted records could have been used for impeachment purposes. However the Petitioner has not established that the evidence was material to the outcome of his trial, nor is he able to demonstrate prejudice resulting from the omission of this evidence. When determining whether the withheld information was material and therefore prejudicial, habeas courts consider it in light of the evidence available for trial that supports the petitioner's conviction. *See Towns v. Smith*, 395 F.3d 251, 260 (6th Cir. 2005); *Clinkscale v. Carter*, 375 F.3d 430, 445 (6th Cir. 2004). From the time of his interview to the time of his trial testimony, Washington's version of events remained consistent, coherent, and plausible. When making his subsequent identifications of Chinn, Washington identified him from a second photo spread after stating that the defendant was not present in the first spread. He later identified Chinn after a line-up. There was a corroboration of events and identification by other witnesses. Additionally, there was testimony as to Washington's high level of adaptive functioning. Finally, defense counsel himself testified that he might have used the information contained within the records for impeachment purposes, but he did not feel Washington would have met the criteria for mental retardation. (Trial Tr. Vol. VI at 129-134.) The juvenile records were not material to guilt, nor is there a reasonable probability that had they been disclosed, the result of the proceeding would have been different. The decision of the state court was therefore neither contrary to, nor an unreasonable application of U.S. Supreme Court law. The First Claim for Relief under *Brady* should be dismissed with prejudice.

(ECF No. 60, at 40.) The Magistrate Judge further recommended that a certificate of appealability be issued on this claim. (*Id.* at 43.)

In his objections, Petitioner argues this Court should accept the Magistrate Judge's finding that the State omitted records that could have been used for impeachment, but reject the Magistrate Judge's ultimate recommendation that the evidence was immaterial and no prejudice resulted. According to Petitioner:

> Davel Chinn objects to the determination by the Magistrate Judge that his First Ground for Relief does not warrant

> habeas relief. The State failed to disclose material impeaching evidence about its key witness, Marvin Washington. Washington's suppressed juvenile records contained a wealth of information that was material to Washington's general capacity to be a credible witness. For example, the records identified Washington as having a congenital cranial defect that caused him to 'distort and confuse new information.' (ROW 2/10/00 Hrng. Tr. 84.) And the records indicated that 'Marvin is easily swayed by others.' (*Id.* at 82.) This impeaching evidence undermines confidence in the verdict because it undermines confidence in the State's pivotal witness, Marvin Washington.

***10** (Objections, ECF No. 63, at 12-13.) Petitioner faults the Magistrate Judge for not "actually listing the evidence," and instead providing an explanation of why the jury might still have believed Washington. (*Id.* at 13.) The Magistrate Judge, Petitioner argues, found that Washington's version of events "remained consistent, coherent, and plausible, but did not recognize that Washington's eagerness to please, ability to be swayed by others, and poor memory might cause him to go along with the police theory implicating Chinn." (*Id.* at 14.) Petitioner contends that Washington's "remarkably coherent and consistent" trial testimony "was so different from his day-to-day abilities that a juror might conclude that he had some assistance with 'remembering' the details." (*Id.*) Petitioner continues, arguing that Washington "may have been consistent, but he was consistently wrong about many facts." (*Id.*) Specifically, Washington was confused regarding how and when he may have met Petitioner, and according to Petitioner, Washington may have confused Petitioner with someone else named "Tony." (*Id.* at 14-15.) Washington also incorrectly recalled that he identified Petitioner as "number 7" in the line-up and photo spread, when in fact, he had identified Petitioner as "number 2." (*Id.* at 15.)

The crux of Petitioner's argument is that the impeachment evidence at issue could have called into question the credibility of Washington's identification of Petitioner as Washington's own accomplice. Petitioner argues "the plausibility of Washington's version of events of the night in question is not actually the issue. Washington was with the killer the night that Brian Jones was shot, so he did know how the night progressed. But one area where the 'plausibility' fell apart was when Chinn failed to fit the physical description of the man with Washington." (*Id.* at 15.) Petitioner asserts the case against him was weak, and Washington's questionable identification of Petitioner as his accomplice is "shaky at best." According to Petitioner:

> No physical evidence linked Chinn to the crime. The stolen car did not contain any fingerprints or other physical evidence to connect Chinn with the crime. Police found no evidence in Mr. Chinn's house, even though they made a "very thorough search" of "every room." Furthermore, there is a discrepancy in height between Chinn and the "Tony" who was with Washington that night. Welborn observed the two men as they walked up to his car. Welborn testified that the man with Washington was taller than Washington by three inches. Washington also testified that "Tony" was taller than him, and he ruled out any special "elevator shoes or anything." But the evidence at trial established that there was very little difference in height between Chinn and Washington: Chinn stands 5'5½" and Washington was 5'5" or 5'6" when this crime occurred.

(*Id.* at 17.) Finally, Petitioner notes that he presented evidence of an alibi in the form of testimony from his mother.

In the Supplemental R&R, the Magistrate Judge reiterated his initial finding that Petitioner's *Brady* claim is without merit. The Magistrate Judge determined that much of the information Petitioner claims was relevant was in fact before the jury and trial judge:

> Chinn cites to various discrepancies within Washington's testimony, to wit; that he had difficulty remembering details accurately, specifically as to Chinn's number in the photo array and police lineup and that he had met Chinn through Henry Walker and Stephanie Woods. He also notes discrepancies in various reports as to the height of the man with Washington and Jones, all of which place the shooter closer to the height of the victim (about 5'10) whereas

> Chinn is only about 5'6. Finally, he reiterates that he had an alibi on the night of the murder.
>
> The evidence cited above by Chinn was before the jurors and trial judge.

(ECF No. 86, at 7-8.) Additionally, the Magistrate Judge noted the record contained information that corroborated Washington's testimony and the identification of Petitioner as his accomplice. Specifically, this corroboration included the testimony of Christopher Ward, who spoke with Washington and "Tony" for about 30 to 45 minutes on the night of the murder, as well as Stacy Dyer, whose description of the actual shooting corroborated the testimony of Washington. (*Id.* at 8.) In Petitioner's objections to the Magistrate Judge's Supplemental R&R, Petitioner argues that the Magistrate Judge relied too much on the strength of the state's case, and "gave virtually no weight to the strength of the defense evidence that was introduced at Chinn's trial." (ECF No. 91, at 3.)

***11** In *Brady*, the Supreme Court held that the state has a duty to disclose exculpatory evidence to the defense under the Due Process Clause. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "With regard to the first element, the Supreme Court has held that the duty to turn over favorable evidence encompasses impeachment evidence as well as exculpatory evidence." *Eakes v. Sexton*, 592 Fed. Appx. 422, 427 (6th Cir. 2014) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Evidence is material only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *LaMar v. Houk*, 798 F.3d 405, 415 (6th Cir. 2015). A violation is established by showing that the favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *VanHook v. Bobby,* 661 F.3d 264, 267 (6th Cir. 2011) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). "The materiality of *Brady* evidence depends almost entirely on the value of the undisclosed evidence relative to the other evidence produced by the state." *Eakes v. Sexton*, 592 Fed. Appx. 422, 427 (6th Cir. 2014) (citing *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004)). That is, the materiality analysis necessarily involves weighing the value of the undisclosed evidence against other evidence produced by the state. *Bethel v. Bobby*, 2:10-CV-391, 2018 WL 1516778, at *2 (S.D. Ohio Mar. 28, 2018). "Where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *United States v. Ramer*, 883 F.3d 659, 672 (6th Cir. 2018) (quoting *Bales v. Bell*, 788 F.3d 568, 574 (6th Cir. 2015)).

This Court has reviewed the state court record, including the relevant documentation (Apx. Vol. XV, at 78-163; 131-6, PAGEID 5415-6500), as well as the R&R's of the Magistrate Judge, and finds that while the impeachment evidence touted by Petitioner may have proven useful during the cross examination of Marvin Washington, Petitioner cannot make an affirmative showing of prejudice to support a successful *Brady* claim in habeas corpus. As the starting point, the Court finds that the Ohio Second District Court of Appeals correctly identified the relevant and controlling legal standard to apply: *Brady v. Maryland*, 373 U.S. 83 (1963). The state appellate court gave careful consideration to the claim and applied that legal standard in a reasonable way. In order to ensure Petitioner's claims concerning Washington's testimony were fully vetted, the appellate court remanded the case to the trial court for an evidentiary hearing. Although the remand pertained to Petitioner's allegations of ineffective assistance of trial counsel for failing to call expert witnesses as to eyewitness identification and the impact of Washington's intellectual functioning on his testimony, that claim is closely connected to the alleged *Brady* violation. *State v. Chinn*, No. C.A. 16764, 2000 WL 1458784, *4 (Ohio App. 2nd Dist. Aug. 21, 1998) ("[W]e conclude that the trial court should have conducted an evidentiary hearing to determine more fully the nature of the testimony of these two witnesses, as well as the strategical reasoning of trial counsel for not presenting this expert testimony.") On its second review, the state appellate court concluded that the evidence of Washington's moderate intellectual functioning was not as strong as Petitioner had suggested, and the court characterized Washington's testimony as "remarkably coherent and consistent." *State v. Chinn*, No. 18535, 2001 WL 788402, * 9 (Ohio App. 2nd Dist. July 13, 2001). This constitutes a factual finding under 28 U.S.C. § 2254(e), and it is entitled to a presumption of

correctness. *Bowling v. Parker*, 344 F.3d 487, 497 (6th Cir. 2003) ("The presumption of correctness also attaches to the factual findings of a state appellate court based on the state trial record."). Petitioner has not provided any evidence, much less the clear and convincing evidence required by § 2254(e), to rebut the appellate court's finding.

This Court has reviewed the record of the February 10, 2000, post-conviction hearing. (Trial Tr. Vol. VI, at 1-208; ECF No. 132-7, PAGEID 9456-9521; ECF No. 132-8, PAGEID 9522-9663.) Petitioner's lead trial counsel, Michael Monta, was called as a witness. As the state appellate court noted, Attorney Monta testified that he did not receive records of Washington's psychological reports, social history, or juvenile court evaluations, and that such information would have been helpful in his defense of Petitioner. Specifically, Monta testified that he could have used that information in determining how to cross-examine Washington, and to inquire about Washington's previous blackouts and his ability to remember events and people. (Trial Tr. Vol. VI, at 128-131; ECF No. 132-8, PAGEID 9583-9586); *Chinn*, 2011 WL 788402, at *5. However, Monta also testified that he had a chance to meet with Washington and Washington's attorney prior to trial, and that he perceived Washington to be "young, uneducated, not especially bright," but that Washington also "seemed to understand what the situation was and what he was doing there." (Trial Tr. Vol. VI, at 133; ECF No. 132-8, PAGEID 9588.) Monta testified "I'm not a psychologist but I've seen some psychology reports in my time; and I thought he probably would have passed that muster any way." (Trial Tr. Vol. VI, at 134; ECF No. 132-8, PAGEID 9589.)

***12** This Court finds that the additional impeachment information, had counsel even chosen to use it, would not have so conclusively undermined Washington's testimony at the trial that it would have created a reasonable probability that the result of the trial would have been different. A *Brady* violation will not result in a new trial for a criminal defendant unless a court concludes that the improperly withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Here, it is not apparent whether or to what extent trial counsel would have used the juvenile records. Additionally, the jury was made aware of discrepancies in Washington's account, but still found him to be a credible witness. The jury was made aware that Washington sometimes had difficulty remembering details accurately such as Petitioner's number in the lineup, Petitioner's height, which hand Petitioner held the gun, and how he had initially met Petitioner. Additionally, there was testimony that Washington could not read and write in cursive. Although the juvenile records may have been helpful to counsel, the Court cannot conclude that there was a reasonable probability that had they been disclosed, the result of the proceedings would have been different. Accordingly, the Court agrees with and adopts the Magistrate Judge's R&R, as well as the Supplemental R&R, and finds that Petitioner's First Claim for Relief is without merit.

The Magistrate Judge has recommended that the Court grant a certificate of appealability as to this claim. To warrant a COA, a petitioner must make a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c)(2*); see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir. 1997). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 28 U.S.C. § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court is cognizant of this "gatekeeping process for federal habeas appeals" recently discussed in *Moody v. U.S.*, 958 F.3d 485, 2020 WL 2190766, at *1–2 (6th Cir. 2020) However, the Court agrees with the Magistrate Judge's recommendation that a COA should issue as to this claim. This case was as much about Marvin Washington as it was Davel Chinn. As such, any claim concerning the impeachment of Washington as a witness is deserving of further review on appeal, and fair-minded jurists could find the Court's resolution of this claim debatable or wrong. The Court hereby grants Petitioner a COA as to his First Claim for Relief.

Second Claim for Relief:

Petitioner's due process right to a fair trial and fair penalty phase was violated by the cumulative effect of

> prosecutorial misconduct. U.S. const. amend. XIV.

In his Second Claim for Relief, Petitioner raises a litany of allegations of prosecutorial misconduct during both phases of his trial. The Magistrate Judge summarized the gist of Petitioner's claim as follows:

> Specifically, he argues that because the case against him was not strong, the prosecutor re[sorted] to improper tactics to get a conviction. (Traverse, Doc. No. 27, PAGEID 302.) Examples of the alleged misconduct include; improperly vouching for witnesses, comments as to the alibi witness, relying on hearsay evidence, informing the jurors that the defendant had requested an instruction on a lesser included offense, misleading the jury by claiming to have additional knowledge, and making statements to appeal to the jurors' emotions. (Traverse, Doc. No. 27, PAGEID 302-319.)

(ECF No. 60, at 43-44.)

Petitioner presented his claims of prosecutorial misconduct on direct appeal to the Ohio Second District Court of Appeals, as well as the Ohio Supreme Court. In denying his claim for relief, the Second District Court of Appeals held:

> Chinn argues that the following acts of the prosecutor during the guilt phase of the trial constitute reversible error: (1) that he vouched for police (T. 573); (2) stated that Washington and Ward are telling the truth (T. 578); (3) attributed Washington's rationale for misidentifying Chinn at the lineup to Det. Lantz rather than Washington himself; and (4) said that "victims have rights, too" (T. 583). Chinn's failure to object to any of these statements waived objection, and we see no plain error. *Broom* and *Awan, supra.*

***13** Chinn did object to the following statements by the prosecutor during closing argument.

Mr. Heck: "... Then you're also going to hear about involuntary manslaughter. I'm not going to get into it because in order for you to find involuntary manslaughter, you must find it was not a purposeful killing. I think that's absolutely ridiculous but that's the next thing. Well, if you find that he was there, and if you find the ID was fine, which it was, well then just say, "I didn't really mean to kill him. I really didn't mean to. I meant to hurt him a little bit."

Mr. Monta: I object, your Honor. This wasn't argued.

The Court: Overruled, because the Court is going to give that instruction.

Mr. Monta: I'm objecting to this comment, not the instructions.

Mr. Heck: Well, *they asked for it,* your Honor.

Mr. Monta: I object to that, your Honor.

The Court: Overruled.

(T. 580-581) (Emphasis added.)

Chinn's first objection was without merit. In presenting its argument the State may go beyond the scope of a defendant's closing argument. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24-25. Therefore, because the involuntary manslaughter instruction was to be given by the court the State was not required to wait until Chinn mentioned it before discussing it.

The prosecutor's comment that "they asked for it", however, is far more objectionable. No instruction should be identified with a particular party. *Columbus v. Bee* (1979), 67 Ohio App.2d 65, 80. Therefore, it was clearly improper to inform the jury that Chinn had requested the lesser included offense instruction. However, the error was harmless since we find that Chinn would yet have been found guilty absent the prosecutor's comment. *Smith, supra.*

The prosecutor also commented to the jury on the fact that Chinn's brother, who was named on a witness list, did

not testify to substantiate the alibi defense offered through Chinn's mother.

Do I think she's a liar? I'm not going to say that. I think she did what any mother we would expect to do, but it's incredible. You don't sit there when your son's charged, and she knew about it. She read it in the paper. So, she told you two days later and sit there and do nothing and come into the trial and say, "he's at home with his brother all night. I heard them." You must test that. You must test if you believe that. And the other things I want you to ask. Where is Darryl, if he's at home with his brother.

MR. MONTA: I object, Rule 16 before any comment on the Witness list.

THE COURT: Overruled.

MR. HECK: He was at home, they said, with his brother, but his brother didn't say that. Only mother says that. You can believe every Defendant's witness with the exception of his mother, and still find the Defendant very clearly guilty, beyond any doubt whatsoever.

(T. 576-577).

Crim.R. 16(C)(3) provides that "the fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial." The Supreme Court has interpreted this to mean that once a person's name is placed upon a witness list there is an absolute bar upon mentioning his absence at trial. *State v. Hannah* (1978), 54 Ohio St.2d 84, 90.

....

***14** We continue to hold to the view that the better interpretation is that the State is prohibited from mentioning the absence of a witness *in conjunction with* the fact that he was named on a witness list. However, this element, though apparently contained in the rule itself, is not required by *Hannah.* Courts have found no *Hannah* violation in previous cases because there was no evidence that the witness in question was actually named on a witness list. *See,* e.g., *Walton, Ingle,* and case cited therewith *supra.*

In this case Chinn's brother was named on a witness list. Therefore, the court should have ordered the comment of the prosecutor stricken. It was error to fail to do so. However, because we find that Chinn would yet have been found guilty even absent this comment, the error was harmless.

State v. Chinn, No. 11835, 1991 WL 289178, *6-7 (Ohio App. 2nd Dist. Dec. 27, 1991).

On further appeal, the Ohio Supreme Court held:

> Appellant raises claims of prosecutorial misconduct, but many of appellant's arguments have been waived by his failure to object at trial. We have carefully reviewed the record in its entirely and have considered all of appellant's claims of prosecutorial misconduct. We have found no instance of prosecutorial misconduct that would rise to the level of reversible error. The instances of alleged misconduct, taken singly or together, did not substantially prejudice appellant or deny him a fair and reliable sentencing determination.

State v. Chinn, 85 Ohio St.3d 548, 559, 709 N.E.2d 1166, 1177 (1999).

In the Original R&R, the Magistrate Judge gave careful consideration to each of Petitioner's arguments and recommended that this Court deny Petitioner's claim in its entirety as without merit. The Magistrate Judge began by setting forth both the court of appeals and the Ohio Supreme Court's analysis and decisions rejecting Petitioner's allegations of prosecutorial misconduct. The Magistrate Judge then proceeded to set forth the case law governing claims of prosecutorial misconduct raised in habeas corpus, including a reminder that claims of prosecutorial misconduct are reviewed deferentially on habeas review. Finally, the Magistrate Judge concluded the state courts decided Petitioner's allegations of prosecutorial misconduct on the merits, and the decision of the state courts was neither contrary to nor an objectively unreasonable application of United States Supreme Court precedent. (ECF No. 60, at 66.)

The Magistrate Judge recommended against granting a COA as to Petitioner's allegations of prosecutorial misconduct.

With respect to the allegations of guilt phase prosecutorial misconduct, the Magistrate Judge concluded the state did not improperly vouch for its witnesses, "but rather referr[ed] to what he believed to be the strength of the State's evidence, illustrating corroboration between witnesses and a lack of a motive to lie." (*Id.* at 51-52.) Additionally, the Magistrate Judge determined the prosecutor's reference to evidence not in the record was brief and isolated and cured by an instruction from the trial court that closing arguments are not evidence; the state's reminder to the jury that Petitioner's brother did not come forward to testify as an alibi witness was a fair comment on the weakness of Petitioner's alibi defense; the prosecutor's statement that "victims have rights too" could fairly be characterized as asking the jury to follow the law; and prosecutors did not exceed the limits imposed by the trial court with respect to the testimony of state's witness Shirley Cox. (*Id.* at 50-57.) As to the prosecutor's comments on the lesser included offense of involuntary manslaughter, the Magistrate Judge concluded it was improper for the state to argue "well, they asked for it," effectively identifying Petitioner as the party who requested the instruction. However, the Magistrate Judge concluded the comment itself was brief and isolated, did not appear to be deliberate, and it was unlikely the jury would have been misled or prejudiced by the comment. (*Id.* at 56.)

***15** The Magistrate Judge carefully considered all of Petitioner's claims of penalty phase prosecutorial misconduct and found them to also lack merit. First, the Magistrate Judge rejected Petitioner's argument that the state deprived him of a fair sentencing proceeding by urging the jury to consider evidence beyond the statutory aggravating circumstances, such as the facts and circumstances of the crime. Additionally, the Magistrate Judge concluded the state had some leeway to refer to the facts and circumstances of the crime to dispel the mitigating circumstances; the trial court's instruction at the penalty phase informed the jury what aggravating circumstances they could properly consider; any error in the weighing of aggravating and mitigating factors was cured by the Ohio Supreme Court's independent reweighing; and the consideration of non-statutory aggravating circumstances, even if contrary to state law, does not violate the United States Constitution. (*Id.* at 57-66.)

Regarding Petitioner's argument that the state improperly encouraged the jury to consider both the "principal offender" and "prior calculation and design" components of the Ohio Revised Code § 2929.04(A)(7) specification, the Magistrate Judge determined that any confusion was corrected by the trial court's instructions to the jury which listed the § 2929.04(A)(7) components disjunctively. (*Id.* at 60-62.) Furthermore, the Magistrate Judge determined it was not improper to urge the jury to give justice to the victim and punish Petitioner, because "[w]hen considered in context of the entire closing, this was a comment on the case, on crime in general, and on the fact that guilty people should be punished." (*Id.* at 63.) Finally, the Magistrate Judge rejected Petitioner's argument that his rights were violated when the prosecutor disparaged his mitigating evidence by arguing he was not an underprivileged youth, (*Id.* at 62-63); found that it was not improper to admonish the jury that it should not consider sympathy and mercy, (*Id.*, at 64-65); and concluded it was not improper to comment on the unsworn nature of Petitioner's statement, (*Id.* at 65.)

In his objections to the R&R, Petitioner repeats the instances of alleged misconduct and restates prior arguments set forth in the Petition and Traverse. Petitioner puts renewed emphasis on his allegation that the prosecutor vouched for his witnesses, and in his objection to the Supplemental R&R, complains the Magistrate Judge failed to give weight to the cumulative effect of the prosecutorial misconduct in the culpability phase of his trial. Specifically, Petitioner argues "[a]ll of these remarks encouraged the jury to consider matters beyond the scope of the evidence before it and attempted to circumvent the presumption of innocence in favor of a presumption of guilt that Chinn would have to overcome." (ECF No. 91, at 7-8.)

It is well settled that "[t]o grant habeas relief based on prosecutorial misconduct that does not violate a specific guarantee under the bill of Rights, the misconduct must be so egregious as to deny the Petitioner due process." *Lorraine v. Coyle*, 291 F.3d 416, 439 (6th Cir. 2002) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974)). A reviewing court must first determine whether prosecutorial misconduct occurred, and if so, whether the misconduct was prejudicial. In so doing, the reviewing court should consider the challenged remarks within the context of the entire trial to determine whether any improper remarks were prejudicial. *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008). It

bears reminding, with respect to prosecutorial misconduct claims, that the "[p]etitioner's burden on habeas review is quite a substantial one." *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000). Even misconduct that was improper or universally condemned does not warrant habeas corpus relief unless the misconduct was so flagrant and egregious as to deny the petitioner a fundamentally fair trial. *Donnelly*, 416 U.S. at 643-54. Finally, prosecutorial misconduct during the penalty phase of a capital trial may be "cured by appellate reweighing." *LaMar v. Houk*, 798 F.3d 405, 431 (6th Cir. 2015) (finding that "all the alleged prosecutorial misconduct during the penalty phase was cured when the Ohio Supreme Court independently reweighed aggravation and mitigation") (citing *Lundgren v. Mitchell*, 440 F.3d 754, 783 (6th Cir. 2006)); *Trimble v. Bobby*, 804 F.3d 767, 783 (6th Cir. 2015) ("While we independently believe that any prosecutorial misconduct did not tip the scales against Trimble during the penalty phase, the Ohio Supreme Court's decision to reweigh the aggravating and mitigating factors definitively cures any potential error from the alleged prosecutorial misconduct.").

***16** Here, the Court has carefully reviewed the Original R&R, ECF No. 60, the Supplemental R&R, ECF No. 86, and Petitioner's objections to both, ECF Nos. 63 and 91, and the Court agrees Petitioner's claim is without merit. To that point, this Court agrees with the Magistrate Judge's resolution of Petitioner's allegations of prosecutorial misconduct, and specifically adopts the Magistrate Judge's analysis of Petitioner's Second Claim for Relief. A prosecutor is entitled, as the Magistrate Judge noted, to argue the record, highlight inconsistencies or inadequacies in the defense, and to make and argue reasonable inferences from the evidence. Moreover, prosecutors are entitled to rely on the trial court's evidentiary rulings, and comment on the evidence admitted at trial. *See Simmons v. Woods*, No. 16-2546, 2018 WL 618476, *3 (6th Cir. Jan. 30, 2018) ("Because the state appellate court deemed the testimony admissible, the prosecutor could not have acted improperly in eliciting it.") (citing *Cristini v. McKee*, 562 F.3d 888, 900 (6th Cir. 2008)). The Court has considered each alleged instance of improper argument individually and cumulatively, both within the context of closing arguments, as well as within the broader context of the trial in its entirety, and the Court agrees that no prosecutorial remarks were so egregious as to deprive Petitioner of a fundamentally fair trial. The Court also agrees with the Magistrate Judge that the state court's decisions rejecting Petitioner's claim did not contravene or unreasonably apply clearly established federal law.

For the foregoing reasons, the Court **OVERRULES** Petitioner's objections (ECF No. 63, at 21-27; ECF No. 91, at 6-9), **ADOPTS** the Magistrate Judge's R&R (ECF No. 60, at 43-66; ECF No. 86, at 9-13), and hereby **DENIES** Petitioner's Second Claim for Relief. Further, the Court cannot plausibly conclude that reasonable jurists would find debatable or wrong the assessment of Petitioner's prosecutorial misconduct claim. Petitioner's Second Claim for Relief is not deserving of further review on appeal.

Third Claim for Relief:

> Petitioner's due process right to a fair trial was violated by the introduction of the irrelevant and prejudicial testimony of State's witness Shirley Cox. U.S. Const. amend. XIV.

In his Third Claim for Relief, Petitioner argues that he was denied a constitutionally fair trial by the admission of witness Shirley Cox's testimony. The record reveals that Mrs. Cox worked at the Dayton law office of her husband, Bobby Joe Cox. On the morning of February 23, 1989, Petitioner went to that office and spoke to Mrs. Cox for approximately fifteen minutes, and identified himself as "Tony Chinn." Subsequently, Mrs. Cox saw a newspaper article that contained a police composite sketch of the alleged shooter in the Jones murder. Mrs. Cox contacted the Dayton Police Department and provided information regarding her meeting with Petitioner. Petitioner argues that the testimony of Mrs. Cox bolstered the state's identity evidence and allowed the jury to infer that Petitioner was guilty because he was seeking legal counsel. (Traverse, ECF No. 27, at 45.) Both the Second District Court of Appeals and the Ohio Supreme Court found it improper that Mrs. Cox was permitted to testify as to where she met Petitioner, however both courts ultimately concluded the error was harmless. *See State v. Chinn*, No. 11835, 1991 WL 289178, *14-16 (Ohio App. 2nd Dist. Dec. 27, 1991); *State v. Chinn*, 85 Ohio St.3d 548, 560-561 (1999).

The Magistrate Judge quoted the entirety of Mrs. Cox's testimony in the Original R&R, ECF No. 60, at 69-75:

Q. [by assistant prosecutor]: Would you state your full name for the Court, please?

A. Shirley Ann Cox.

Q. Your last name is spelled?

A. C-O-X.

Q. You are married; is that right?

A. Yes. I am married to Bobby Cox.

Q. Are you employed?

A. Yes. I am for my husband, Bobby Cox.

Q. What do you do for him?

A. I'm sort of a receptionist, and I do all the billing and I work in his law office.

Q. Where is that law office located?

A. It's located in the Hulman Building on the third floor.

Q. Now, I'm going to ask you, Mrs. Cox, if you would, to refer your attention to Thursday, February the 23rd of 1989, at about 9:30 in the morning. I'd like you to tell the Jury where you were?

A. I was in the law office, at the front of the desk. I work at the front of glass doors in my husband's law office in the Hulman Building.

[Defense counsel]: Your honor, our continuing objection on the subject we noted before.

***17 The Court:** The Court has considered and overruled the objection.

[Defense counsel]: Thank you, Judge.

Q. I'm going to ask you if someone came into the office at about 9:30?

A. Uhm, it was not 9:30. It was closer to about a quarter to nine. I had only been there 15 minutes.

Q. About 8:45?

A. Right. I had opened the one door so we could have furniture moved in that day. A person came in through the opened door.

Q. What do you mean, person? A male or female.

A. It was two males.

Q. Two males. And were they White or Black?

A. They were Black.

Q. I'm going to ask you not to relate any conversations but, if you would, during the conversations did one of the men indicate his name to you?

A. Yes. The person kept saying his name was Tony and he wanted to see my husband.

Q. Did he ever indicate his last name?

A. Yes. After I told him that I could not let him see him, he said his name was Chinn and he needed to see him. Tony Chinn.

[Defense counsel]: Excuse me. Can we approach the Bench? Just a second?

The Court: All right.

(A sidebar conference is held on the record.)

[Defense counsel]: Mrs. Cox is continually indicating and this is what we're objecting to. He's there to see a lawyer. He's in a law office. We feel, based on our objection before, that this should not be allowed and stricken.

The Court: Since the purpose is not disclosed, the Court has already considered this matter and finds that objection should be overruled.

(Side Bar conference concludes.)

Q. Mrs. Cox, I ask you to look around the Courtroom and tell the Jury if you see this individual in the Courtroom today?

A. Yes, I do.

Q. Would you point him out for us, please?

A. He's the person on the left, the Black man in the black V-neck sweater.

[Assistant prosecutor]: Indicating the Defendant for purposes of the record, your Honor.

Q. How, Mrs. Cox, without going into any detail, I'm going to ask, for whatever reasons, just whether your attention was directed and did you observe continuously this Defendant on February the 23rd of 1989?

A. Yes, I did.

Q. Approximately how long?

A. Approximately ten to fifteen minutes.

Q. Now, as a result of that, did you have occasion to discuss this with your husband later that day?

A. Yes, I did the minute he came in the door.

Q. Following that discussion, did you call anyone?

A. Yes, I did. I called Tony Spells, the Dayton Police Department.

Q. Did you have occasion then to be at home later that evening?

A. Yes, I did.

Q. I'm going to ask what, if anything, occurred that evening?

A. Approximately that same evening, I always read the day before's papers. I mean, I never read the same day. I always read the day before because we're always one day behind. I was reading — I was reading Wednesday night's paper. I just looked up at my husband. He was watching T.V. I said, "My God, I don't believe this." He said, "What?" "This Tony Chinn that was in here this morning is in the paper."

Q. Now, I'll hand you —

[Defense counsel]: I object to that conclusion, your Honor. Not necessarily that she didn't say that, but that the Jury would reach that conclusion.

The Court: Overruled.

***18 Q.** I'll hand you what has been marked as State's exhibit 21 for identification purposes, and ask you to tell the Jury what that is?

A. That is the torn-out article of the page that I was reading on Thursday night, and when I looked at the picture, I just knew it had to be the same person that was in the office that morning.

Q. I'm going to ask you, the picture composite that's in that exhibit 21, is that the same — that is also on the Defendant's exhibit L; same two?

A. Right, That's just blown-up from this paper.

Q. Without going into any details, does that composite and article that's below it, concerning homicide that occurred on January the 30th of 1989, in the 5000 block of Germantown Pike, Jefferson Township?

A. Yes, it is.

Q. Now, as a result of this article that you saw and read in the paper, and your conversations with your husband, what, if anything, did you do?

A. Friday morning I had made a trip to Cincinnati with another lawyer, and his wife, and my husband, for a seminar, and, at the Frisch's in Kentucky, I called Detective Lantz of the Dayton Police Department, because the newspaper says that's who to call.

Q. Were you able to talk to Detective Lantz right away?

A. No, I wasn't. He ended up giving me some Sergeant that was in charge. I just told him what all I wanted to tell Detective Lantz. He said Detective Lantz would get a hold of me later in the day.

Q. Because of your being in Cincinnati, did you have occasion to call Detective Lantz later?

A. Right. Apparently, Detective Lantz called my office — my husband's office and my office, at about 1:30, and the secretary told me when I called her.

[Defense counsel]: We'll just stipulate she made phone calls. [The assistant prosecutor] need not introduce phone records here.

[Assistant prosecutor]: That's fine. We can stipulate that. That you did.

Q. You have the long distance records that you did, in fact, make from Cincinnati, calling Detective Lantz; is that right?

A. Right.

Q. I believe you called him on several occasions; is that correct?

A. Right. I called him that morning, which I didn't get him. Then, I talked to him from the hotel approximately around 2:00 — 2:30 — 3:00.

Q. Again, without getting into all the conversation you had with him, I'll just ask if the reason you called Detective Lantz — did you tell him the person who was in your office is the person you saw in the paper?

A. Right. I told him the reason I was calling in —

Q. Did you give Detective Lantz the full name of the person, though?

A. Yes, I did.

Q. In any newspaper article, there is not the full name?

A. There is no name other than it said he may go by the name of Tony.

Q. That was it?

A. Right.

Q. And you gave Detective Lantz his full name?

A. Right

[Assistant prosecutor]: I have no further questions. Thank you very much. You [sic] witness.

Q. [by defense counsel]: Good morning, Mrs. Cox.

A. Good morning.

Q. Your office is downtown?

A. Yes, it's in the Hulman Building.

Q. Just so I'm straight with this. Defendant's exhibit L is what you said was a blow up of the composite?

A. That is the picture that was in the paper from Wednesday night.

Q. That is what you relied on then to make your phone call?

***19 A.** Yes, I did.

[Defense counsel]: I don't have any other questions.

[Assistant prosecutor]: No further questions.

(ECF No. 60, at 69-75; Trial Tr. Vol. IV at 375-83; ECF No. 132-5, PAGEID 9078-9086.)

Although not the final state court to review this claim, the Second District Court of Appeals provided the following insight regarding the testimony of Shirley Cox:

> Mrs. Cox's testimony was also of probative value to show that Chinn possessed a guilty mind concerning the drawing and the crime with which it was connected. This inference arises naturally and inevitably from proof that shortly after the picture appeared in the newspaper Chinn sought to consult with a lawyer. The trial court did not permit the state to argue the inference to the jury. The Court also excluded testimony by Mrs. Cox that Chinn told her that he wanted to see Attorney Cox "on heavy stuff." (T. 349). The prosecutor conceded in arguments to the court that: "His comments show culpability. His comments show guilt, his comments show that." (T. 357). Exclusion of evidence of Chinn's statement ameliorated, somewhat, the prejudicial character of the evidence, but the fundamental unfairness remained.
>
> It is a necessary and cherished aspect of our adversarial system of justice that one who is or may be accused of a crime has an unrestricted right to take counsel from an attorney concerning the matter. As this right is diminished, whether through direct restriction or indirect impositions of penalty for doing so, the functioning of the adversarial system is impaired. Therefore, and as a general rule, the fact that an accused has consulted with an attorney should not

be offered as proof that he is guilty of a crime with which he is accused. To do so employs a matter of no relevance to the charge to impose a penalty for the exercise of a fundamental right.

Our task is to determine whether the trial court abused its discretion in admitting evidence that Chinn attempted to consult with an attorney. As abuse of discretion connotes more than just an error of law. It exists where the court's attitude, evidenced by its decision, was unreasonable, arbitrary, or unconscionable. *Worthington v. Worthington*, (1986), 21 Ohio St.3d. 73.

After a careful review of the record we cannot find an abuse of discretion. The trial court gave a complete hearing, out of the jury's presence, to the various objections of Appellant. The court excluded evidence of Appellant's "heavy stuff" statement to Mrs. Cox and prohibited the state from arguing that Chinn's attempt to consult with an attorney is indicative of guilt. The court gave no limiting instruction pursuant to Evid.R. 105, but the Appellant did not request one. Though the evidence was unfairly prejudicial, that unfairness does not clearly jeopardize the fundamental fairness of the proceeding or the reliability of the verdict. While the trial court should have excluded evidence that Chinn attempted to consult a lawyer, we cannot find that its decision is unreasonable, arbitrary, or unconscionable.

***20** *State v. Chinn*. No. 11835, 1991 WL 289178, *15-16 (Ohio App. 2nd Dist. Dec. 27, 1991).

Petitioner appealed the denial of this claim to the Ohio Supreme Court, which also rejected the claim on the merits:

In his sixth proposition of law, appellant contends that the trial court erred by allowing Shirley Ann Cox to testify at trial concerning appellant's visit to her husband's law office. Appellant claims that Cox's testimony was irrelevant and was unfairly prejudicial. We agree with appellant's assertions that the trial court should not have permitted Cox to testify that her encounter with appellant occurred in a law office. However, we also agree with the court of appeals' finding in 1991 that although the evidence was "unfairly prejudicial, that unfairness does not clearly jeopardize the fundamental fairness of the proceeding or the reliability of the verdict." *Chinn*, Montgomery App. No. 11835, unreported, at 38. Appellant protests that the court of appeals' holding on this issue "fails to take into account the fundamental weakness of the State's case against Chinn." However, appellant's arguments plainly mischaracterize the strength of the evidence against him which, in our view, cannot seriously be labeled as "weak." Rather, the state's case against appellant was substantial and compelling.

Appellant also suggests that Cox's testimony concerning her identification of appellant as the person depicted in the composite drawing should have been excluded because Cox did not witness the crimes and her testimony may have misled or confused the jury. However, the jury was not misled or confused by Cox's testimony. The jury was well aware that Cox did not witness the killing. Her testimony was relevant to the fact that she had seen a man who identified himself as Tony Chinn and that she subsequently saw a composite sketch of the suspected killer and recognized the resemblance between the composite and Chinn. While this testimony was largely irrelevant to the question of appellant's guilt, the testimony was relevant to inform the jury of the events that led to appellant's apprehension and arrest. Cox's testimony also corroborated Washington's testimony that appellant (whose real name is Davel Von Tress Chinn) went by the name of Tony Chinn. The evidence was not confusing or misleading in any way.

We conclude that while it might have been better for the trial court to have excluded Cox's testimony altogether, or at least any reference to the fact that she had seen appellant in a law office, the trial court's decision to allow Cox's testimony was harmless beyond a reasonable doubt. Cox's testimony was not a major factor in this case. Indeed, her testimony comprises less than eight full pages of the printed transcript. The state's case against appellant hinged on the testimony of Marvin Washington. If the jury accepted Washington's testimony, the jury was certain to convict appellant, but if the jury did not believe Washington, it was certain to acquit appellant of all charges. Had the jury disregarded Washington's account of the crimes, Cox's testimony would have made no difference. However, the jury believed Washington and, therefore, the verdicts of guilt were inevitable. Cox's testimony had little or no impact on the outcome.

***21** *Chinn*, 85 Ohio St.3d 548, 560-561, 709 N.E.2d 1166, 1178 (1999).

In denying Petitioner's Third Claim for Relief, the Magistrate Judge determined that the Ohio Supreme Court's decision, which weighed the other evidence of Petitioner's guilt to find the error was harmless, was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent, specifically *Chapman v. California*, 386 U.S. 18 (1967). (ECF No. 60, at 79; ECF No. 86, at 14-15.) Like the Ohio Supreme Court, the Magistrate Judge determined that because the State's case against Petitioner hinged primarily on Marvin Washington's testimony, Mrs. Cox's testimony was largely irrelevant to the question of Petitioner's guilt, and was harmless error. (ECF No. 60, at 75.)

In his objections to the Original R&R and the Supplemental R&R, Petitioner argues that the Magistrate Judge applied the wrong harmless error standard. (ECF No. 91, at 9.) Petitioner notes the Ohio Supreme Court found that the introduction of Mrs. Cox's testimony constituted error, but that the error was harmless beyond a reasonable doubt. *Chinn*, 85 Ohio St.3d at 561. In the Original R&R, the Magistrate Judge concluded that the Ohio Supreme Court's application of the harmless error standard in *Chapman v. California*, 386 U.S. 18 (1967), was not objectively unreasonable. (ECF No. 60, at 79, as amended ECF No. 86, at 15.) Petitioner argues, in both sets of objections, that "[t]he issue is not whether the Ohio Supreme Court's application of *Chapman* was objectively unreasonable. If a state court has acknowledged that a constitutional violation took place but found that it was harmless, the federal courts must make a *de novo* determination of whether the error had a substantial and injurious effect on the verdict under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)." (ECF No. 91, at 10.)

The Sixth Circuit recently summarized the varying stages of harmless error review:

> Depending on the procedural state of a criminal defendant's challenge to his conviction, different harmless-error tests apply. *Davis v. Ayala*, 576 U.S. 257 (2015). On direct appeal in state courts, the harmless formulation of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), governs and constitutional error is harmless only if the court can "declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24, 87 S.Ct. 824. Yet, the harmless-error standard demands more of a habeas petitioner when a federal court reviews the conviction in a collateral proceeding. In federal habeas proceedings, the *Brecht* standard governs and the federal court will not grant habeas relief unless the state error "resulted in 'actual prejudice.' " *Ayala*, 135 S.Ct. at 2197 (quoting *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710). This means that in order to grant habeas relief, the court must have at least "grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict." " *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (quoting *Brecht*, 507 U.S. at 627, 112 S.Ct. 1710). "Grave doubt" about whether the error was harmless means that "the matter is so evenly balanced that the court feels itself in virtual equipoise as to the harmlessness of the error." *Id.* at 435, 115 S.Ct. 992.

***22** *O'Neal v. Balcarcel*, 933 F.3d 618,624 (6th Cir. 2019). Moreover, the Court confirmed that "in the Sixth Circuit on habeas review we always apply *Brecht* and need not also apply AEDPA/*Chapman*." *Id.* at 625. *See also Reiner v. Woods*, 955 F.3d 549, 557 (6th Cir. 2020) (quoting *Balcarcel*); *Sparks v. Dunaway*, 2020 WL 1816059, *9 (E.D. Ky. Apr. 9, 2020) ("The Sixth Circuit recently confirmed that, in this Circuit, a § 2254 court's role is not to apply the AEDPA 'contrary to' / 'clearly unreasonable' lens to the *Chapman* question; instead, the habeas harmlessness inquiry simply proceeds under *Brecht* (and need not separately apply the *Chapman*/AEDPA analysis)."). In this case, rather than apply an incorrect legal standard as Petitioner argues, the Magistrate Judge examined both standards, recognizing that "[b]ecause the Ohio Supreme Court's finding of harmless beyond a reasonable doubt would have satisfied the *Chapman* standard, *a fortiori* it satisfies *Brecht*." (ECF No. 60, at 79.) Under *Brecht*, the actual prejudice standard is met only if the habeas court has "grave doubt" as to whether the trial court's error had the requisite negative effect or influence on the verdict.

Like the courts that have reviewed this claim before it, this Court finds troubling the testimony of Shirley Cox. To be sure, Mrs. Cox's testimony concerning her interaction with Petitioner and her ability to subsequently connect him to the composite from the newspaper was relevant to explain to the jury the series of events that ultimately led to the identification of Petitioner as "Tony." What is concerning, however, is that Mrs. Cox was permitted to testify that she met Petitioner after he came to her husband's law office seeking to speak with Attorney Cox. Although most of the specific

details surrounding Mrs. Cox's interaction with Petitioner were omitted from her testimony, the fact that Petitioner sought to speak with an attorney, and was perhaps persistent in his attempt to do so, was made known to the jury. Mrs. Cox testified that Petitioner "kept saying his name was Tony and he wanted to see my husband," and "[a]fter I told him that I could not let him see him, he said his name was Chinn and he needed to see him." (Trial Tr. Vol. IV, at 377; ECF No. 132-5, PAGEID 9080.)

It is apparent from the transcript of the proceedings that the trial court held extensive discussions with the parties in chambers, prior to Mrs. Cox's testimony, in order to set firm parameters regarding this witness. A review of those discussions reveals that the trial court severely limited the scope and nature of Mrs. Cox's testimony. *See* Tr. Trans. Vol. 111, at 347 through Tr. Trans. Vol. IV, at 375; ECF No. 132-5, PAGEID 9049-9078. In chambers, Mrs. Cox relayed highly prejudicial details of her interaction with Petitioner, and the trial court took necessary steps to ensure the prosecutor stayed clear of those details during her questioning. Nonetheless, the trial court still permitted Mrs. Cox to identify a law firm as the source of her interaction with Petitioner. As the Magistrate Judge noted, "[h]ad she testified that she was a receptionist for her husband's business and met Chinn in that way, without mentioning that her husband was an attorney, the testimony would have been completely unobjectionable." (ECF No. 60, at 78.)

Ultimately, whether the trial court should have handled the Cox testimony differently is not the question before this Court on habeas corpus review. The question for this Court is whether it has grave doubt as to whether the trial court's error had a substantial and injurious effect or influence on the verdict. The answer to that question is no. Although the jury may have been permitted to infer that Petitioner was seeking legal advice, the jury did not learn why, specifically, that Petitioner wanted to consult with Attorney Cox, or anything about the nature of Attorney Cox's practice of law. Moreover, although trial counsel objected to this entire line of questioning, counsel did not request a limiting instruction.

***23** Finally, the Court agrees with the conclusion of the Magistrate Judge that because the Ohio courts found error in the admission of the Cox testimony, a COA should issue as to this claim for relief. The right to consult counsel is one of our most basic rights, and the Court finds reasonable jurists could find debatable whether the testimony concerning Petitioner seeking counsel had an injurious effect on the verdict.

Fourth Claim for Relief:

> Petitioner's right to confront a material witness against him was violated when the trial court restricted his cross-examination of Christopher Ward. U.S. Const. amends. VI, XIV.

In his Fourth Claim for Relief, Petitioner argues that the trial court denied his Sixth Amendment right to confront witnesses by limiting his cross-examination of state's witness Christopher Ward. (Petition, ECF No. 3, at 17-18; Traverse, ECF No. 27, at 51-54.) Ward was an important witness for the State, as he identified Petitioner as being with Marvin Washington on the night of the murder. The statement at issue concerned whether Ward had told Major McKeever with the Jefferson Township Police Department, that he "did not pay any attention to the other man in the car whose name was Tony." (ECF No. 27, at 51.) Trial counsel's basis for the question was Major McKeever's police report.

On direct appeal, the Ohio Supreme Court denied Petitioner's claim, finding Petitioner could not demonstrate prejudice:

> At trial, Christopher Ward testified that on January 31, 1989, at approximately 12:30 or 1:00 a.m., Washington had pulled up to 5213 Lome Avenue in the black Chevrolet Cavalier and introduced Ward to "Tony," who was seated in the front passenger's seat. Ward testified that he shook Tony's hand and then spoke to Washington for approximately thirty to forty-five minutes until Washington and Tony drove away. Ward identified appellant as the man that Washington had introduced as Tony. During cross-examination, defense counsel sought to cast doubt on Ward's identification of appellant. During questioning, the following exchange took place:
>
> Q. Do you remember telling McKeever—
>
> MR. HECK: I'm going to object now even though he didn't get to finish what he's going to quote.

THE COURT: Let me see counsel at side Bench.

* * *

THE COURT: Let's make a record. First of all, let's have your complete question.

MR. MONTA: Okay. The question which we would like to ask this witness was if he gave an oral statement to Major McKeever, Major Ronald McKeever, with the Jefferson Township Police on the 5th of February, 1989, and *did he say to Major McKeever he did not pay any attention to the other man in the car whose name was Tony.*

MR. HECK: I object. If he wants to cross-examine him on an alleged inconsistency in the statements, written statements, that's fine. But, my reading of the written statements there is not that inconsistency. He is trying to cross-examine this witness on either a made-up statement or on something that's in the police report, which they have, and I object.

THE COURT: First of all, under Rule 16, the police report is not available. Secondly, the copy of the statement given to the Court made by this witness on the 5th of February, and McKeever as the officer signing it, has nothing to do with this question. It does not contain any reference to the question before the Court; therefore, the question has to be solely caused by this police report, and so the Court will sustain the objection.

***24** MR. MONTA: May I just add, your Honor, the question which would be asked is one in which the defense is attempting to test the credibility of what the witness has said and answer will either be consistent with or impeach that testimony.

THE COURT: Police reports are inherently inaccurate and that is the very reason why under criminal rule 16 they are not to be made available and not to be used on cross-examination of any witnesses. On that basis, the Court sustains the objection. (Emphasis added.)

The court of appeals in its 1991 decision in this matter found that the trial court had erred by denying defense counsel the opportunity to cross-examine Ward on the alleged prior inconsistent statement, finding that "[w]hether evidence is discoverable under Crim.R. 16 has no bearing on its [admissibility]," since such evidence could be relevant, and all relevant evidence is generally admissible. *Chinn,* Montgomery App. No. 11835, unreported, at 73. The court of appeals found that the question defense counsel propounded "did not concern a police report, but a prior statement of the witness to a police officer," and that "Ward's statements to Officer McKeever concerning 'Tony' were certainly relevant to his identification of Appellant." *Id.* Therefore, the court of appeals determined, "To the extent that [Ward's statements to McKeever] might contradict Ward's trial testimony they were proper grounds for impeachment." *Id.* Additionally, the court of appeals stated, "Appellant was prohibited by Evid.R. 613(B) from introducing evidence of the inconsistent statement in extrinsic form, that is, by way of McKeever's testimony or his written report, unless Ward was first afforded an opportunity to explain and deny the same. The trial court's ruling foreclosed that opportunity. The error was prejudicial if the prior statement could reasonably cause the jury to reject Ward's testimony." *Id.* at 73–74. However, on the issue of prejudice, the court of appeals determined that "the error was not so prejudicial as to require reversal." *Id.* at 74.

Upon a review of the record, we find that the error, if any, in the trial court's decision not to permit defense counsel to cross-examine Ward on the alleged prior inconsistent statement did not unfairly prejudice appellant. After the trial court had sustained the objection to the question propounded by defense counsel, the defense questioned Ward whether he had ever "talked to McKeever about the description of the man on the passenger's side" of Jones' automobile. Ward responded, "I don't remember at all." Later, during the cross-examination of Major McKeever, defense counsel was permitted to question McKeever concerning the statements that Ward had allegedly made on February 5, 1989:

Q. Now, you also did some investigation in this case; did you not?

A. Yes, sir.

Q. And before you interviewed Marvin Washington, did you not interview a person by the name of Christopher Ward?

A. Yes, sir. I did.

Q. In fact, you interviewed him first; is that correct?

A. That's correct.

Q. On the same day, the 5th of February?

A. I can't recall the day. I probably would have to see my report.

* * *

Q. This starts at page 12, which was provided to us. Is that your statement?

A. Yes, that's mine.

***25** Q. All right.

A. That was on the same day.

Q. And was Mr. Ward able to give you a description of the person that he said he saw, the other person, not Marvin Washington?

A. Very—he indicated to me that he—well, he did see the driver.

Q. Right.

A. And shook hands with him, but he was more interested in the car they were driving, the dashboard.

Q. Didn't he indicate to you that he didn't pay any attention to the other person?

A. Yes, sir, meaning that he spoke to the gentleman but he was more interested in the dashboard of that particular automobile.

Q. More interested in the dashboard and didn't pay any attention to the other person?

A. Correct.

During redirect examination, the prosecutor questioned McKeever concerning the police report. The prosecution asked McKeever, "I'm going to ask you, they [the defense] asked you about the statement and what Christopher Ward told you. They asked you this on cross-examination, about the second person, the passenger, this Tony in the car, and I believe Mr. Monta asked about paying attention to him. Was that your conclusion or is it his words?" McKeever responded, "That was my conclusion." The prosecution also asked, "Did Mr. Ward tell you at all times that he could identify the passenger in that car?" McKeever responded, "Several times." The prosecution then asked, "Did he also tell you that he saw the passenger and shook hands, in fact, with the passenger in the victim's car along with Marvin Washington?" McKeever replied, "That's correct."

The record is clear that defense counsel had an opportunity to impeach Ward's trial testimony during cross-examination of McKeever by questioning McKeever concerning Ward's alleged prior inconsistent statement that he "didn't pay any attention" to the man who was with Washington in the victim's car. The record is equally clear that Ward never made any such statement to McKeever. Rather, the statement at issue was McKeever's own statement and was the product of McKeever's own conclusions. In actuality, Ward specifically told McKeever that he had seen "Tony" and that he could positively identify him. Ward did positively identify appellant, and he did so on three separate occasions, *i.e.*, once from a photo array, once at the lineup, and again at trial. Therefore, the alleged inconsistent statement, even if Ward had made it, was not inconsistent with any of Ward's trial testimony. We think it obvious that the trial court's decision not to allow defense counsel to cross-examine Ward concerning the statement had no prejudicial impact whatsoever. The error, if any, was harmless beyond a reasonable doubt.

State v. Chinn, 85 Ohio St.3d 548, 570-573, 709 N.E.2d 1166 (1999).

The crux of Petitioner's claim is that he was prevented from cross-examining Ward regarding a prior inconsistent statement that was summarized in a police report. The notation indicated that "Ward said when Marvin came by his home there was another subject in the car, a black male but he did not pay any attention to him." (Traverse, ECF No. 27, at 52.) In the Original R&R, the Magistrate Judge set forth the controlling law for establishing a valid Confrontation Clause claim:

***26** The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. This right is

> incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 406 (1965). This right means more than "being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" *Id.* at 315-316 (emphasis in original). The Supreme Court noted that the trial judge maintains the ability to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of issues, the witness' safety, or interrogation that is repetitive or only marginally relevant and that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)

(ECF No. 60, at 84.) Applying that standard, the Magistrate Judge determined:

> There is no dispute that Ward testified at Petitioner's trial and was, in essence, "available" to testify and that Petitioner had the opportunity to cross-examine him. Petitioner has met his burden here that had counsel been able to cross-examine Ward on this inconsistency, a reasonable juror may have had a different impression of Ward's credibility. However, in turning to the other factors, even though the precise question was objected to and sustained, defense counsel was permitted to ask on cross-examination whether or not Ward recalled having a conversation with Officer McKeever in which he described the other man in the car with Washington. (Trial Tr. Vol. III at 177.) Ward responded that he could not remember. *Id.* Whether he would have remembered if confronted with McKeever's record of what he said is not known. However Officer McKeever testified that it was his own impression, rather than Ward's statement, that Ward had paid more attention to the dashboard of the car than the occupants. (Trial Tr. Vol. III at 339, 343.) The Court also notes that Ward maintained at all times that he could in fact identify the person he saw with Washington that night, that he had shook this man's hand, and spoke with Washington and "Tony" for at least half an hour. Additionally, the Court notes that Ward did in fact identify Petitioner on three separate occasions, from a photo spread, from a line-up, and an in court identification. (Trial Tr. Vol. III at 154, 159, 178-179, 182.) Petitioner has not shown prejudice arising from the inability to cross-examine this witness on this statement. The Fourth Ground for Relief should be denied on the merits and Petitioner should be denied any requested certificate of appealability.

(*Id.* at 85-86.)

Petitioner objects to the determination of the Magistrate Judge, arguing he was prejudiced by the inability to cross-examine Ward regarding the prior inconsistent statement. Petitioner argues the evidence of identity against Chinn was not great, and accordingly, the credibility of every State's witness was critical. According to Petitioner, "[i]n particular, Ward's testimony was important for the State because he was the only witness besides Marvin Washington who could positively identify Chinn as the man who sat in the victim's car that night. It was accordingly essential for Chinn to be able to assail Ward's credibility." (ECF No. 91, at 14.)

This Court has reviewed the state court record, and determines that Petitioner's objections to the Magistrate Judge's Report and Recommendations lack merit. Indeed, the better practice would have been to permit trial counsel to inquire further of Ward regarding whether he had made the prior inconsistent statement to Major McKeever. Any such statement on behalf of Ward would have been relevant to his identification of

Petitioner as the man with Washington that night. To the extent that statement would have contradicted Ward's trial testimony it was proper grounds for impeachment. Ultimately, however, the record reflects serious doubt as to whether Ward made any such statement, and the Ohio Supreme Court determined that he did not. Trial counsel was permitted on cross-examination to ask Ward if he recalled having a conversation with Major McKeever. Ward did not recall. (Trial Tr. Vol. III, at 177; ECF No. 132-4, PAGEID 8880.) But that was not the end of the inquiry. During cross-examination of Major McKeever, counsel was permitted to inquire again about this issue. Major McKeever testified it was his own impression, and not a statement by Ward, that Ward was more interested in the car than Chinn. (Trial Tr. Vol III, at 338-345; ECF No. 132-5, PAGEID 9040-9047.) Whether this was a statement or an impression of a law enforcement officer, the content made its way to the jury.

***27** As the Ohio Supreme Court noted, Ward maintained that he had seen "Tony" and could positively identify him, and he did – on three separate occasions. Ward testified that he got a look at Petitioner, reached in and shook his hand, spent about 30-45 minutes with him, described what he was wearing, and subsequently identified Petitioner from a photo array, a police lineup and at trial. (Trial Tr. Vol III, at 154-155, 169-170, 182; ECF No. 132-4, at PAGEID 8857-8859, 8872-8873, 8885.) The Court finds that regardless of whether the trial court erroneously limited Petitioner's cross-examination of Ward, Petitioner cannot establish prejudice.

Petitioner's Fourth Claim for Relief is without merit and the Court hereby **ADOPTS** the Magistrate Judge's R&R (ECF No. 60, at 79-86; ECF No. 86, at 16-19), and **OVERRULES** Petitioner's objections. Furthermore, this Court finds that reasonable jurists would not disagree with the Court's denial of relief on this claim and the Court declines to issue a COA.

Fifth Claim for Relief:

> Petitioner's right to confrontation was violated by the admission of prejudicial hearsay evidence at his trial. U.S. Const. amends. VI, XIV.
>
> A. The trial court erred when it allowed Detective Lantz to present hearsay evidence of state's witness Shirley Cox.
>
> B. The trial court erred when it allowed Detective Lantz to present hearsay evidence of state's witness Marvin Washington.
>
> C. The trial court erred when it allowed Christopher Ward to present hearsay evidence of state's witness Marvin Washington.

In his Fifth Claim for Relief, Petitioner argues the trial court violated his Confrontation Clause rights by allowing prejudicial hearsay evidence during Detective Lantz's testimony. (Petition, ECF No. 3, at 19; Traverse, ECF No. 27, at 55.) In a prior Opinion and Order, United States District Judge Edmund A. Sargus, to whom this case was previously assigned, dismissed sub-claim C as procedurally defaulted. (Opinion and Order, ECF No. 30, at 40-47.)

In sub-claim A, Petitioner argues that the trial court erred in allowing Detective Lantz to testify that Shirley Cox picked Petitioner out of a line-up. In sub-claim B, Petitioner asserts that the trial court erred in allowing Detective Lantz to testify regarding statements Marvin Washington made after he initially failed to identify Petitioner out of a line-up. Specifically, Detective Lantz testified that Washington was scared, and "[h]e said that this person had already killed one person and that, that was the reason he was afraid. He thought that person could see him through the screen where he was sitting." (Trial Tr. Vol. IV, 397-399; ECF No. 132-5, PAGEID 9100-9102.) The Ohio Supreme Court rejected both claims on the merits and the Magistrate Judge concluded that this was not an unreasonable application of Supreme Court precedent as it existed at the time of the state court's decision. (ECF No. 60, at 94.)

Because this Court's task is to determine if the state court's decision on these issues constituted an unreasonable application of clearly established federal law, the analysis begins with the state appellate court's treatment of this claim. With respect to sub-claims A and B, the Ohio Supreme Court held:

> In this proposition [Proposition of Law No. VI], appellant also contends that the trial court erred by permitting Detective David Lantz to testify at trial concerning Cox's identification of appellant at the February 27, 1989 lineup. At trial, the following exchange took place during the state's direct examination of Detective

Lantz:

Q: Was Mrs. Cox able to make an -

Mr. Monta [defense counsel]: Objection, your Honor. We need to approach on this.

***28** Mr. Monta: Your Honor, the prosecution had Mrs. Cox on the stand. They also had these documents which would indicate whether a person is seen in a line-up or not. They did not choose to go into that with Mrs. Cox, and as a result of no questioning on this subject with her, this * * * testimony is going to be hearsay.

The Court: Well, defense has also known that she had made the identification, which she could have been asked about. The fact that she was not asked by either party does not in any way prevent this witness to testify as to what he saw. I'll overrule the objection.

Q. Was Mrs. Cox able to [make an] identification at the line-up?

A: Yes she was.

Q: Whom did she indicate?

A. Again, number seven, the Defendant Davel Chinn

Appellant contends that Lantz's testimony constituted impermissible hearsay and resulted in substantial prejudice. We disagree. Lantz's statements concerning Cox's identification of appellant were not hearsay. Evid. R. 801 provides:

> (D) A statement is not hearsay if:
>
> (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification.

As the court of appeals ably recognized, "because Cox was 'subject to cross-examination' on the lineup, regardless of whether she was actually ever subjected to such examination, Det. Lantz's testimony was not hearsay." (Emphasis sic.) *Chinn*, Montgomery App. No. 11835, unreported, at 39. We agree that Lantz's testimony did not constitute hearsay under Evid. R. 801(D)(1)(c). Moreover, and in any event, we fail to see how that testimony was prejudicial to appellant.

Appellant also argues that the trial court erred by permitting Detective Lantz to testify at trial, over defense objection, concerning Washington's explanation for not immediately identifying appellant at the lineup. Appellant contends that Lantz's testimony was hearsay. However, even if the testimony at issue was hearsay, and we do not believe that it was (see Evid. R. 801 (D)(1)(b) and *Chinn*, Montgomery App. No. 11835, unreported, at 75-76), prejudice is lacking in that Washington had earlier testified as to the statement he made to Lantz.

State v. Chinn, 85 Ohio St.3d 548, 561-562, 709 N.E.2d 1166, 1178-1179 (1999).

The Ohio Supreme Court's decision refers to the decision of the Second District Court of Appeals on these claims, which held:

> For his seventh assignment of error, Chinn contends that:
>
> THE TRIAL COURT ERRED IN ALLOWING DETECTIVE LANTZ TO OFFER HEARSAY EVIDENCE OF STATE'S WITNESS SHIRLEY COX CONCERNING LINEUP IDENTIFICATION.
>
> Det. Lantz testified over Chinn's objection that Cox picked Chinn out of lineup. (T. 397). Because Cox did not testify concerning the matter, Chinn contends that it was improper to allow Det. Lantz to so testify.
>
> Chinn also contends that the statement was hearsay. We do not agree. Evid. R. 801 (D)(1)(c) states, in pertinent part, "A statement is not hearsay if ... the declarant testifies and is subject to cross-examination concerning the statement, and the statement is ... one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification." Because Cox was "subject to cross-examination" on the lineup, regardless of whether she was actually ever subjected to such examination, Det. Lantz's testimony was not hearsay.
>
> The seventh assignment of error will be overruled.

***29** *State v. Chinn*, No. 11835, 1991 WL 289178, *16 (Ohio App. 2nd Dist. 1991). With respect to Detective Lantz's

statement explaining Washington's lack of identification, the court of appeals held:

> THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY EVIDENCE DURING THE GUILT PHASE OF APPELLANT CHINN'S TRIAL, IN VIOLATION OF OHIO RULE OF EVIDENCE 802, THEREBY DEPRIVING APPELLANT CHINN OF THE RELIABILITY AND FAIRNESS REQUIRED IN A CAPITAL TRIAL BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 5, 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.
>
> Det. Lantz testified that Washington told him that he had deliberately misidentified Chinn at a lineup for fear that he could be seen by Chinn through the one-way glass. (T.398-399). Chinn contends that this was hearsay and should have been excluded.
>
> A statement is not hearsay if it is "consistent with [the declarant's] testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." Evid. R. 801(D)(1)(b). Appellant elicited from Washington on cross-examination that he had identified another person in the lineup. (T. 302-307). Thus, Chinn was implicitly, and later during closing argument explicitly, asserting that Washington fabricated the identification [sic] due to police coercion. Therefore, Det. Lantz's testimony was admissible under Evid. R. 801(D)(1)(b). Furthermore, due to the fact that Washington had previously testified to the same thing (T. 249), we see no unfair prejudice.

Id. at *32.

In the Original R&R, the Magistrate Judge set forth the standards governing Petitioner's Confrontation Clause claim. Specifically, the Magistrate Judge noted that *Crawford v. Washington*, 541 U.S. 36 (2004) did not apply, because *Crawford* was not decided until 2004 and does not apply retroactively on collateral review. (ECF No. 60, at 93) (citing *Whorton v. Bockting*, 549 U.S. 406 (2007)). The then governing law was *Ohio v. Roberts*, 448 U.S. 56 (1980), which "required as a matter of Confrontation Clause law that, as to an unavailable declarant, hearsay could be admitted if it (1) bears particularized guarantees of trustworthiness or (2) falls within a firmly-rooted hearsay exception. (ECF No. 86, at 20-21) (citing *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010)).

With regard to sub-claim A, the Ohio Supreme Court determined that the statement regarding Shirley Cox's identification did not constitute hearsay, because she was subject to cross-examination on the lineup, "regardless of whether she was actually ever *subjected* to such examination." *Chinn*, 85 Ohio St.3d at 562. (emphasis in original). In reviewing this determination, the Magistrate Judge agreed with the Ohio Supreme Court's conclusion, and further observed that Mrs. Cox was likely still available for cross-examination on the identification after Detective Lantz testified:

> Since the test under 28 U.S.C. § 2254(d) looks to the law at the time the state courts reached their decision, Chinn can show a Confrontation Clause violation only if he can show the Ohio Supreme Court decision was contrary to or an unreasonable application of Supreme Court law as it existed in 1999. This he has failed to do. So far as the record shows, Chinn's counsel made no effort to re-call Mrs. Cox in order to cross-examine her after Lantz testified. Even though Mrs. Cox had been excused as a witness after cross-examination, there is no showing she had become unavailable by the time Detective Lantz finished testifying. There is no showing Mrs. Cox could not have been found in the place where Mr. Chinn found her, in the Hulman Building on West Second Street in Dayton, less than two blocks from the Montgomery County Courthouse.

***30** (ECF No, 60, at 93-94.) The Magistrate Judge determined that "Lantz's testimony fits squarely within the definition of non-hearsay in Ohio R. Evid. 801 and no United States Supreme Court precedent holds that the admission of

such a state[ment] violates the Confrontation Clause." (ECF No. 86, at 21.)

In his objections, Petitioner argues the decision of the Ohio Supreme Court that the statement regarding Mrs. Cox's identification did not constitute hearsay was objectively unreasonable. According to Petitioner, "no competent defense attorney is going to deliberately introduce an inculpatory out-of-court identification on cross after the State itself failed to do so on direct." (ECF No. 63, at 42.) Additionally, Petitioner argued the Ohio Supreme Court's alternative ruling that any error was harmless was not entitled to deference, because the testimony "clearly had a substantial and injurious effect on the verdict." (*Id.*) Notably, however, Petitioner did not address or object to the Magistrate Judge's finding that Mrs. Cox did not become unavailable when she was excused, and could have been recalled by the defense after Lantz testified, if there was any reason to believe she would recant her identification.

With respect to the Cox identification, the Court finds the Ohio Supreme Court's determination that the statement was not hearsay is entitled to deference by this Court. Accordingly, the Court **OVERRULES** Petitioner's objections and **ADOPTS** the Magistrate Judge's conclusion that sub-claim A should be dismissed with prejudice. Although the Magistrate Judge recommended that a COA issue as to this sub-claim, this Court disagrees. Keeping in mind the Sixth Circuit's guidance in *Moody* that "a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect," 958 F.3d 485, 2020 WL 2190766, *1, the Court finds this sub-claim does not deserve further review on appeal. The Court denies Petitioner's request for a COA as to sub-claim A.

With respect to sub-claim B, Petitioner argues Detective Lantz improperly testified as to a conversation between himself and Marvin Washington after the lineup. In reviewing this claim, the Magistrate Judge determined:

> In Sub-claim B, Petitioner argues that Detective Lantz improperly testified as to a conversation between himself and Marvin Washington after the line-up. (Traverse, Doc. No. 27, PAGEID 332.) He indicated that after the line-up Washington approached him to tell him he could make an identification and that he had failed to do so during the line-up because he had been scared. *Id.* Both the court of appeals and the Ohio Supreme Court correctly held that this was not hearsay because it was excluded from the definition of hearsay by Ohio R. Evid. 801(D)(1)(b). Moreover, Washington himself testified to the exact same facts and circumstances during trial and was subject to cross-examination. *See* Trial Tr. Vol. III at 247-249, 301-307. There was thus no violation of the Confrontation Clause in permitting Detective Lantz to testify to the same conversation.

(ECF No. 60, at 94.) The Court agrees with the resolution of sub-claim B by the Magistrate Judge and finds that there is no merit to this claim for relief. Not only was this statement not hearsay, but there was absolutely no prejudice by its admission because Washington testified to the same exchange at trial and was subject to cross-examination by defense counsel. (Trial Tr. Vol. III at 247-249, 301-307; ECF No. 132-5, PAGEID 8949-8951, 9003-9009.) The Court will not grant a COA as to sub-claim B, because the Court does not believe reasonable jurists would disagree with the resolution of this sub-claim.

***31** For the foregoing reasons, the Court **OVERRULES** Petitioner's objections regarding his Fifth Claim for Relief. The Court **ADOPTS** the Original R&R, as well as the Supplemental R&R, and hereby dismisses this claim with prejudice. The Court will not grant Petitioner a COA on any part of this claim.

Sixth Claim for Relief:

> Petitioner's right to the effective assistance of counsel was violated by counsel's prejudicially deficient performance in failing to present expert testimony and in failing to cross-examine the State's key witness based on information

contained in the witness's juvenile records at Petitioner's capital trial.

A. Trial counsel failed to present the testimony of an expert on eyewitness identification at Petitioner Chinn's trial.

B. Trial counsel failed to obtain an expert to present evidence to the jury that Marvin Washington's mental retardation impacted his ability to testify as to the facts in this case. In addition, trial counsel failed to cross-examine Washington with information contained in his juvenile records.

In his Sixth Claim for Relief, Petitioner argues that he was denied the effective assistance of trial counsel because his counsel failed to present expert witnesses to challenge the eye witness identifications, and to present evidence that Marvin Washington was not a competent witness. (Petition, ECF No. 3, at 20); (Traverse, ECF No. 27, at 61.) This claim for relief overlaps with the *Brady* claim contained in Petitioner's First Claim for Relief. Petitioner argues that "[s]ome of the blame can be attributed to the State's failure to turn over exculpatory evidence and is therefore, State-induced." (Traverse, ECF 27, at 61.) Petitioner directs the Court's attention to the evidentiary hearing held in postconviction, and contends the expert testimony presented there "undermines any confidence that a reliable verdict was reached in this case." (*Id.*)

This Court recounted the state court decisions on the merits of this issue in its analysis of Petitioner's First Claim for Relief. Additionally, in the Original R&R, the Magistrate Judge quoted the state court's lengthy analysis and summation of all witnesses from the evidentiary hearing. (ECF No. 60, at 95-106.) After recounting that evidence, the Magistrate Judge determined that "the thorough decision of the state appellate court was neither contrary to, nor an unreasonable application of, relevant U.S. Supreme Court precedent." (ECF No. 60, at 110.) This Court agrees.

The Sixth Amendment guarantees the right to counsel in all criminal prosecutions. This right includes " 'the right to *effective* counsel—which imposes a baseline requirement of competence.' " *Johnson v. Genovese*, 924 F.3d 929, 933-38 (6th Cir. 2019) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)). Federal claims of ineffective assistance of counsel are subject to the highly deferential two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the Court must ask whether counsel was deficient in representing the defendant, and if so, whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687. To meet the first prong, a petitioner must establish that trial counsel's representation "fell below an objective standard of reasonableness," and must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that ... the challenged action 'might be considered sound trial strategy.' " *Id.* at 688–89. The "prejudice" component of the claim "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Prejudice under *Strickland* requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

***32** The standard for reviewing claims of ineffective assistance of counsel on habeas review is highly deferential. Because the court of appeals considered and denied the claim on the merits, this Court is required to give that adjudication of this issue deference under the AEDPA. In addition to the AEDPA deference:

> [B]ecause the underlying claim is an ineffective-assistance-of-counsel claim, we are also required to defer to the reasoned decisions of ... trial counsel. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). In practice, this amounts to a "doubly deferential standard of review that gives both the state court *and* the defense attorney the benefit of the doubt." *Burt v. Titlow*, 134 S.Ct. 10, 13, 187 L.E.2d 348 (2013) (citation omitted) (emphasis added). "Stated differently, AEDPA requires us to 'take a highly deferential look at counsel's performance through the deferential lens of 2254(d).' " *Kelly*, 846 F.3d at 832 (quoting *Pinholster*, 563 U.S. at 190, 131 S.Ct. 1388).

Hand v. Houk, 871 F.3d 390, 413 (6th Cir. 2017).

Applying that deferential standard, the Magistrate Judge concluded, and this Court hereby **ADOPTS** the following detailed analysis:

> After a review of the evidence, the Magistrate Judge concludes that the thorough decision of the state appellate court was neither contrary to, nor an unreasonable application of, relevant U.S. Supreme Court precedent. The expert that would have testified as to the various factors that impact reliability of an identification may have provided information to the jurors, but much of this evidence could be considered common sense or was not applicable in this case (e.g., cross-race identification, weapon focus, short opportunity to observe). (Trial Tr. Vol. VI at 29-33.) Neither Washington, Ward, nor Shirley Cox testified that they were in fear for their life or under duress/stress. Washington encountered Chinn at a location downtown. (Trial Tr. Vol. III at 228.) After recognizing Chinn, the two began to converse and at some point thereafter, but before the crime, Washington began to drink. *Id.* at 228-229. Washington did not testify that he himself had felt threatened prior to the robbery, kidnapping, and murder of Mr. Jones. At no point did Washington say that he felt threatened or that he was scared for his life. Nor was there a cross [cultural] identification at issue here. Likewise, Ward testified that he met Chinn when Washington and another man drove a car over to his house and he spent between 30-40 minutes talking with the two. (Trial Tr. Vol. III 154-156, 170.) While he does admit that he was more interested in the details of the car than the conversation, he introduced himself to "Tony" and shook his hand. *Id.* at 154-155, 169. Ward had not had any alcohol or drugs that night which would have affected his memory, and this identification was not cross-cultural. *Id.* at 168. Again, Ward did not express any threats or feelings of duress or fear. Given these facts, many if not all of the factors the expert in witness identification would have testified to are simply inapplicable in this case. Petitioner is unable to show prejudice from counsel's failure to call this witness.
>
> ***33** In considering the issue of ineffectiveness for failure to obtain an expert in mental retardation and challenge the testimony of Washington, this Court finds the decision by the state court to be thorough and reasonable. During the evidentiary hearing in post-conviction, multiple witnesses were presented as to this matter. The trial court was able to assess each expert's credibility during the hearing. This Court notes that while the experts for the defense presented a strong case for Petitioner regarding Washington, the State presented evidence very much to the contrary from someone that had worked with and interacted with Washington on a daily basis. The Court notes Washington's statement of the events remained consistent and coherent throughout the entire investigation and trial process. Additionally, while he was cooperative with authorities, he was not so "eager to please" as to pick a suspect out of the first photo array but rather stated that Chinn was not in the photos and made the identification during the second photo array, which did contain Petitioner's photo. Additionally, the Court finds plausibility in the testimony that a 15-year-old boy would have been intimidated and scared during a line-up and unsure as to whether or not a defendant would be able to see and identify him through a two way mirror. Immediately after the line-up, Washington asked to speak to Detective Lantz and made an identification. While mentally retarded people may have an increased risk of false positive identification, it does not seem that these factors were present here, assuming that Washington was mentally retarded. Petitioner has failed to show that but for counsel's failure to present these experts during trial there is a reasonable probability that the outcome of his trial would have been different. The decision of the state court was neither contrary to, nor an unreasonable application of law. The Sixth Claim for Relief should be dismissed with prejudice and Petitioner should be denied any requested certificate of appealability.

(ECF No. 60, at 110-111.) For the reasons expressed by the Magistrate Judge, and because Petitioner's objections consist of rehashing the same arguments he has previously made, this Court hereby **DENIES** Petitioner's Sixth Claim for Relief. Furthermore, the Court denies Petitioner a COA on this issue of ineffective assistance of trial counsel.

Seventh Claim for Relief

> Petitioner's right to trial by jury and due process were violated because the trial court failed to define "principal offender," an essential element of aggravating circumstances that made

> petitioner eligible for the death penalty. U.S. Const. amends. VI, XIV.

Petitioner's Seventh Claim for Relief was previously dismissed as procedurally defaulted. (Opinion and Order, ECF No. 30, at 47-52.)

Eighth Claim for Relief:

> Petitioner's due process right to a fair trial and his right to equal protection were violated because the State of Ohio failed to provide timely discovery and the State failed to disclose material evidence. U.S. Cont. amend. XIV.
>
> A. The state violated petitioner's right to due process and equal protection when it failed to provide discovery.
>
> B. The state failed to disclose material evidence to petitioner before trial.

In his Eighth Claim for Relief, Petitioner argues the State failed to disclose evidence about a third person who was with Washington and "Tony" prior to the robbery. This claim has two subparts. First, Petitioner argues he was denied the equal protection of law when the trial court refused to enforce the local rule of the Montgomery County Common Pleas Court providing for open file discovery in criminal cases. Secondly, Petitioner argues the State's failure to disclose the information about the third person prior to trial violated *Brady v. Maryland*, 373 U.S. 83 (1963).

With respect to his Equal Protection claim, Petitioner argues "[t]here was a specific local rule authorizing the discovery requested by Chinn. Unfortunately, the prosecutor refused to abide by it and the trial court arbitrarily refused to enforce it." (Traverse, ECF No. 27, at 81.) On direct appeal, the Ohio Supreme Court addressed the discovery issues, and concluded Petitioner had available to him much of the material he would have received from open file discovery:

> Appellant also asserts that the trial court erred when it failed to grant discovery in accordance with the Local Rules of the Court of Common Pleas of Montgomery County, General Division. Specifically, the trial court in this case ordered that discovery would proceed pursuant to Crim. R.16 as opposed to Loc. R. 3.01 and 3.03. While much could be said concerning Crim. R. 16 and the theory of "open file" discovery of the type authorized by local rules (see, e.g., *State v. Lambert* [1994], 69 Ohio St.3d 420, 428-429, 639 N.E.2d 83, 89-90), suffice it to say that our review of the record reveals that appellant suffered no prejudice in connection with the trial court's decision to adhere to Crim. R. 16 exclusively. The record is clear that appellant was in possession of much of the material that would have been available to him had the local rules been deemed applicable by the trial court. With respect to the materials that appellant allegedly did not have and to which he claimed entitlement under the local rules, appellant has utterly failed to demonstrate that he was prejudiced in any discernible way.
>
> ***34** *State v. Chinn*, 85 Ohio St.3d 548, 569, 709 N.E.2d 1166, 1184 (1999).

In the Original R&R, the Magistrate Judge noted that even assuming the State violated Ohio Criminal Rule 16, that claim is not cognizable in habeas corpus because "[t]here is no general constitutional right to discovery in a criminal case." (ECF No. 60, at 114) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)). With respect to Petitioner's Equal Protection argument, the Magistrate judge concluded that although it was cognizable, it lacked merit. Specifically, the Magistrate Judge reasoned that because there is no fundamental right to discovery in a criminal case, "the trial judge's action in denying Chinn application of the 'Case Management Plan' must be judged on rational basis scrutiny." (ECF No. 86, at 32) (quoting *Vacco v. Quill*, 521 U.S. 793, 799 (1997)). "The states cannot make distinctions which either burden a fundamental right, target

a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference." *Id.* (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005)). Applying that standard to Petitioner's case, the Magistrate Judge opined:

> Here the trial judge, a part of the court which adopted the Case Management Plan, articulated its purpose – to promote settlement of criminal cases. Noting that this case was headed for trial in any event, he found that applying the Case Management Plan would not further the state purpose for which it was adopted. That is surely a rational basis for declining to apply the local rule. Chinn has therefore not demonstrated an Equal Protection violation as to this part of his Eighth Ground for Relief.

(ECF No. 86, at 31-32.)

With respect to the *Brady* portion of Petitioner's claim, the Second District Court of Appeals, in what was the last reasoned state court decision on this issue, held as follows:

> It is well settled that the State cannot withhold evidence favorable to the defendant if the evidence is material to either guilt or punishment. *Brady v. Maryland* (1963), 373 U.S. 83. Furthermore, the State has a duty to volunteer exculpatory information to the defendant if it could create a reasonable doubt. *U.S. v. Agurs* (1976), 427 U.S. 97. Chinn argues that the State violated these duties in four instances.
>
> Welborn testified that prior to the robbery he saw a third man with "Tony" and Washington, but that the man drove away prior to the robbery. The man was not identified. (T. 124). Welborn testified that he gave this information to the prosecutor (T. 125), but the State did not share this information with Chinn. We are dismayed that the evidence was not produced. However, we see no reasonable probability that Chinn would have been acquitted if he had known this information. Therefore, there was no *Brady* violation. *U.S. v. Bagley* (1985), 473 U.S. 667.

State v. Chinn, No. 11835, 1991 WL 289178, * 26-27 (Ohio App. 2nd Dist, 1991).

***35** As discussed in the section of this Opinion and Order addressing Petitioner's First Claim for Relief, *Brady v. Maryland* held that the suppression of evidence favorable to the accused is a due process violation where the evidence is material to guilt or punishment. 373 U.S. 83, 87 (1963). Applying that standard to Petitioner's claim the Magistrate Judge concluded:

> The Sixth Circuit Court of Appeals has observed, that "*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to complete failure to disclose," continuing on to say the delay violates *Brady* only "when the delay itself causes prejudice." *LaMar v. Ishee*, 2010 U.S. Dist. LEXIS 139621, *30 (S.D. Ohio 2010); *citing O'Hara v. Brigano*, 499 F.3d 492, 502 (6th Cir. 2007), *quoting United States v. Bencs*, 28 F.3d 555, 560 (6th Cir. 1994) and *United States v. Patrick*, 965 F.2d 1390, 1400 (6th Cir. 1992), *judgment vacated and remanded on other grounds by Mohwish v. United States*, 507 U.S. 956 (1993). This case clearly deals with an incident of alleged delayed disclosure as opposed to a true *Brady* violation of failure to disclose completely. Therefore, in order to advance this claim, Petitioner must show that the delay itself caused him prejudice. *O'Hara v. Brigano*, 499 F.3d 492, 502 (6th Cir. 2007).
>
> Petitioner argues that this statement was favorable in nature because not only does it place another person at the scene of the crime, but it also corroborates Welborn's earlier statement to police that the other man involved was taller than Marvin Washington. (Traverse, Doc. No. 27, PAGEID 355); (Trial Tr. Vol. III at 127). The suppression of this statement until the time of trial effectively deprived him and his counsel of the opportunity to pursue an investigation and denied them possible trial strategies and defenses. (Traverse, Doc. No. 27, PAGEID 355.) Had counsel known of this alleged third person prior to trial, they could have investigated and found the mystery person who could have provided a description of "Tony." *Id.* Additionally, this person could have testified as to whether

or not Chinn was present, the strength of his alibi, and cast doubt on Washington's credibility. *Id.*

Petitioner has not established any prejudice from the delay. It is purely speculative that defense counsel would have been able to track down this unidentified third person and what he would have said. Furthermore, the State's key witness testified that when he met Chinn downtown Chinn was alone. (Trial Tr. Vol. III at 265.) At no point does Washington mention another person meeting up with them downtown. *Id.* Additionally, despite the information allegedly having been disclosed at trial, defense counsel was afforded the opportunity to fully cross-examine Welborn on this issue. Therefore, the issue of a possible third man meeting up with Washington and Chinn was before the jury.

(ECF No. 60, at 118-119.)

Gary Welborn was one of the victims in this case. During his direct examination at trial, Welborn made reference to the presence of a third man with Washington and Tony before the robbery. Specifically, in response to the State asking what happened next, Welborn replied "Then, there were three guys standing on the corner and they yelled something out. We ignored them. When we looked over, one of the three guys that was standing on the corner got in a car and left. There was just two of them left then." (Trial Tr. Vol. III, at 110, ECF No. 132-4, PAGEID 8813.) During cross-examination, the following exchange occurred:

***36** Q: So, shortly before that, you were in this area of Court and Ludlow; is that correct?

A: Yes.

Q: And you had indicated that you saw three men?

A: Yes.

Q: On the corner of what?

A: Court and Ludlow.

Q: Would that be up near that building?

A: Yeah.

Q: Was the lighting good in that area?

A: There was a lot of street lights around there. The parking lot has light through there.

Q: How long were those people there?

A: That I don't really know.

Q: Did you look at them for any length of time?

A: No.

Q: Were all three of them Black people?

A: As far as I could tell.

Q: You say one person left in a car?

A: Yes.

Q: Do you know that kind of car that was?

A: It was a newer Buick.

Q: Color?

A: Silver.

Q: Have you ever told this to anybody before, this part of the story about a third man?

A: Yes

Q: Who did you tell it to?

A: Matt Heck

Q: When did you do that?

A: When I first came down to the prosecutor's office.

Q: You didn't tell the police about that, though; did you?

A: Yes

(Trial Tr. Vol. III at 123-125, ECF No. 132-4, PAGEID 8826-8828.)

In his objections, Petitioner argues that if the defense had been made aware of the third person earlier, they might have been able to track him down and he might have impeached Washington. The Court finds this to be speculative at best. As the Magistrate Judge noted, "[w]ith the descriptions, the

third person had not been found nor had his statement been taken by the time of the post-conviction process, which took many years, in part because of a remand for an evidentiary hearing." (ECF No. 86, at 33.) Moreover, while the Second District Court of Appeals noted that it was "dismayed that the evidence was not produced," the court found "no reasonable possibility that Chinn would have been acquitted if he had known this information." *Chinn*, 1991 WL 289178, *27. That court found no prejudice from the delay in the disclosure of the information about the third person, and this Court cannot conclude that the Second District's decision is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Additionally, the Court cannot find that the state court's determination that there was no *Brady* violation is contrary to or an unreasonable application of clearly established Supreme Court precedent. Certainly the better course of action would have been to disclose the presence of a potential third person. Even so, Petitioner cannot establish that he was prejudiced by the delayed disclosure, and it is speculative to assume the third person would have been identified and would have helped the defense.

The Eighth Claim for Relief is hereby dismissed with prejudice, and the Court finds Petitioner is not entitled to a COA.

Ninth Claim for Relief:

> Petitioner's right to the effective assistance of counsel was violated by counsel's prejudicially deficient performance at both phases of petitioner's capital trial. U.S. Const. Amends. VI, XIV.

(Petition, ECF No. 3, at 35-36.)

In his Ninth Claim for Relief, Petitioner sets forth several allegations of ineffective assistance of trial counsel, many of which rehash other claims in the Petition. He complains that the errors of counsel, taken individually and together, denied him a fair trial. The Court notes that sub-claim 9(D) and a portion of 9(H) were previously dismissed as being without merit. [2] (Opinion and Order, ECF No. 30, at 54-55.)

***37** This Court discussed the standards governing claims of ineffective assistance of trial counsel in connection with Petitioner's Sixth Claim for Relief. In short, federal claims of ineffective assistance of counsel are subject to the highly deferential two-prong inquiry set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the Court must ask whether counsel was deficient in representing the defendant, and if so, whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687. "When a habeas petition arising under § 2254(d) is based upon a claim of ineffective assistance of counsel, relief is all the more difficult to come by." *Johnson v. Genovese*, 924 F.3d 929, 933-38 (6th Cir. 2019). That is because "[t]he standard for § 2254(d) relief and the test for ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), are each 'highly deferential.' " *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)). "[A]nd when the two apply in tandem, review is 'doubly' so." *Id.* (quoting *Richter*, 562 U.S. at 105). Stated differently, "this amounts to a 'doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt.' " *Hand v. Houk*, 871 F.3d 390, 413 (6th Cir. 2017) (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). With this standard in mind, the Court will briefly address each of Petitioner's allegations of ineffective assistance of counsel, all of which lack merit.

Sub-claim A: Failure to object to the trial court's penalty phase instruction on both the "principal offender" and "prior calculation and design" elements of the felony murder death specification.

In sub-claim 9(A), Petitioner argues that his trial counsel failed to object to the penalty phase jury instructions which permitted the jury to consider both the "principal offender" and the "prior calculation and design" components of the O.R.C. § 2929.04(A)(7) aggravating circumstance. Petitioner points to the Ohio Supreme Court's decision in *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987), which held that the elements of principal offender and prior calculation and design are mutually exclusive alternatives that are not to be charged or proven together. Petitioner argues that the trial court weighed both components as aggravating circumstances, which was cause for reversal and remand for

resentencing, and if the trial judge considered both, then the jury must have also considered both components. (ECF No. 63 at 63-64.)

On his first direct appeal, the Second District Court of Appeals considered this claim and remanded the case back to the trial court for resentencing:

> Since the jury found that appellee was the principal offender, the second aggravating circumstance referred to in the instructions was present. The first, however, was an incomplete statement of a portion of R.C. 2929.04(A)(7) not applicable to appellee. Prior calculation and design is an aggravating circumstance *only* in the case of an offender who did not personally kill the victim. Thus, the criteria set forth in R.C. 2929.04(A)(7) are constructed *in the alternative.* If the aggravated murder was committed during the course of one of the enumerated felonies, then the death penalty may be imposed only where the defendant was the principal offender (i.e., the actual killer), or where the defendant was not the principal offender, if he committed the murder with prior calculation and design. The language of the statute provides that *these are alternatives which are not to be charged and proven in the same cause.* Thus, if the defendant is found to be the principal offender, then the aggravating circumstance is established, and the question of whether the offense was committed with prior calculation and design is irrelevant with respect to the death sentence. *State v. Penix* (1987), 32 Ohio St.3d 369, 371. (Emphasis added). The aggravating circumstances that may be considered in imposing the death penalty are those specifically enumerated in R.C. 2929.04(A). *State v. Johnson* (1986), 24 Ohio St.3d 87. Use of both the "principal offender" and "prior calculation and design" culpability factors in an (A)(7) aggravating circumstance is contrary to the mandate of the statute that they apply only in the alternative, and taints the weighing process against mitigating factors that may apply. Thus, it impermissibly tips the scales in favor of death. *State v. Penix, supra.* This conclusion applies to an independent review by the trial court as well as to a jury deliberation, the case in *Penix*, because the trial court must also find that the aggravating circumstances were sufficient to outweigh the mitigating factors. R.C. 2929.03(D)(3).
>
> ***38** We conclude that the trial court erred by (1) failing to merge the three aggravating factors into one, viz., that Chinn was the principal offender in the aggravated murder committed while he was fleeing immediately after committing an aggravated robbery, per R.C. 2929.04(A)(7), and by (2) considering the additional, alternative culpability element of the aggravating circumstance that Chinn, clearly the principal offender, committed the murder with prior calculation and design, which it was not permitted to do. Each, and both together, tainted the weighing process required by R.C. 2929(D)(3) and impermissibly tipped the scales in favor of death.

State v. Chinn, No. 11835, 1991 WL 289178, *22-23 (Ohio App. 2nd Dist. Dec. 27, 1991). After a second, unrelated remand for resentencing, Petitioner's case made its way to the Ohio Supreme Court, which rejected this claim on the merits:

> Appellant also claims that the trial court erred by instructing the jury in the penalty phase on both the principal offender and the prior calculation and design aspects of R.C. 2929.04(A)(7). Appellant asserts that the jury should have been instructed that it could not consider whether appellant committed the murder with prior calculation and design if appellant was found to be the principal offender in the aggravated murder. However, we have held that "a trial court may instruct the jury on prior calculation and design and principal offender status disjunctively in the same specification." *State v. Burke* (1995), 73 Ohio St.3d 399, 405, 653 N.E.2d 242, 248. That is precisely what occurred in the case at bar.
>
> The court of appeals vacated the appellant's death sentence in 1991 because the trial court, in its original sentencing opinion, had determined that appellant was the principal offender *and* that he had committed the offense with prior calculation and design. *Chinn*, Montgomery App. No. 11835, unreported, at 52-57. Appellant claims that "because the trial court committed precisely this error, it is highly likely that the jury did also." However, appellant's argument is purely speculative and is not supported by the record. Moreover, contrary to appellant's arguments, it is clear to us that the jury unanimously determined that appellant was the principal offender in the aggravated murder of Jones. At trial, the state's evidence portrayed appellant as the principal offender. Conversely, appellant offered a defense of alibi. Thus, the main issue for the jury was one of identity, i.e., either appellant was the man who was with Marvin Washington on the night in

> question. Therefore, the evidence suggested that appellant was either the principal offender in the aggravated murder, or, if not the principal offender, that he committed no offense at all. The jury obviously accepted the state's theory of the case and, in doing so, found appellant to be the principal offender in the aggravated murder. Under these circumstances and because the jury was instructed on the principal offender and the prior calculation and design aspects of R.C. 2929.04(A)(7) in the disjunctive, there is no danger that the jury actually considered the prior calculation and design alternative of the R.C. 2929.04(A)(7) death penalty specifications during its sentencing deliberations.

State v. Chinn, 85 Ohio St.3d 548, 558-559, 709 N.E.2d 1166, 1176-1177 (1999).

The Magistrate Judge reviewed Petitioner's claim and determined it lacked merit. The Magistrate Judge noted that in *Penix*, the jury was not given the option of finding either that the defendant was the principal offender or if not the principal offender, committed the aggravated murder with prior calculation and design. In subsequent cases, the Ohio Supreme Court found no error where the elements were charged "disjunctively" in a single specification. *Ohio v. Cook*, 65 Ohio St.3d 516, 527, 605 N.E.2d 70 (1992). The Magistrate Judge concluded:

> ***39** The rationale is, if the instruction is given disjunctively then the jurors will not consider both. Nonetheless, a court errs if it does not instruct the jury that they must be unanimous in agreeing on which of the alternative the defendant is guilty. *See Ohio v. Burke,* 73 Ohio. St. 3d 399, 405, 653 N.E.2d 242 (1995). That error is harmless if the jury elsewhere indicates its unanimous verdict on either the prior calculation and design aspect or on the principal offender aspect. *Id.*; *see also Ohio v. Moore,* 81 Ohio St.3d 22, 40, 689 N.E.2d 1 (1998).
>
> In this case the instruction was given in disjunctive form. (Trial Tr. Vol. IV, at 730-732.) Additionally, this Court notes that while the initial finding by the trial court was incorrect in that it considered both factors, the case was remanded and corrected. Because this error was in fact corrected and considered by the state courts on direct appeal, Petitioner is not able to demonstrate prejudice from counsel's failure to object.

(ECF No. 60, at 126.)

The Court has reviewed the penalty phase instructions, and finds that the portion of the instruction at issue was given in disjunctive form. Specifically, the trial court instructed the jury that it must find "either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." (Trial Tr. Vol. IV, at 731; ECF No. 132-7, PAGEID 9434.) The jury was also instructed that their decision had to be unanimous. (Trial Tr. Vol. IV, at 732; ECF No. 132-7, PAGEID 9435.) Because the jury was instructed in disjunctive form, and the Ohio Supreme Court determined "it is clear to us that the jury unanimously determined that appellant was the principal offender in the aggravated murder of Jones," *Chinn*, 85 Ohio St.3d at 558, Petitioner cannot establish a claim of ineffective assistance of counsel for failing to request a more favorable instruction. Sub-claim 9(A) is without merit.

Sub-claim B: Failure to object to the trial court's failure to merge the kidnapping and aggravated robbery aggravating circumstances.

In sub-claim 9(B), Petitioner argues that trial counsel failed to object to duplicative aggravating circumstances. According to Petitioner, the O.R.C. § 2929.04(A)(7) kidnapping and O.R.C. 2929.04(A)(3) aggravating circumstances should have been merged into the O.R.C. § 2929.04(A)(7) aggravated robbery aggravating circumstance. Petitioner argues that because the trial court failed to merge those duplicative aggravators in the weighing process, this error must have also tainted the jury's weighing process, as the jury was exposed to the same error.

The Second District Court of Appeals found error in the trial court's failure to merge aggravating circumstances, but determined that Petitioner was not entitled to relief because he could not establish prejudice:

> It may be that the trial court performed an unannounced merger of two of the specifications. Its charge, quoted at pp. 23-25, *supra*, charges only the first specification, murder to escape apprehension, etc., and third specification, murder while committing kidnapping. Therefore, our analysis is limited to the need of merging only those.

> The kidnapping and the movement of the victim from downtown Dayton to a location on Germantown Pike had but two possible purposes: to remove Jones from the scene of the robbery and to remove Jones to where he could be killed, or both. In either or both cases the movement in the kidnapping was only incidental to, and not separate from those purposes, which are charged in the first specification. Therefore, the specifications charged should have been merged under the rules of *Logan* and *Jenkins* and the court erred in failing to do so.
>
> ***40** Our review of the record reveals that Chinn failed to object to the instruction. Therefore, he waives the error on appeal unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Underwood, supra.* We cannot find that but for the error the outcome of the trial court would clearly have been otherwise.

State v. Chinn, No. 11835, 1991 WL 289178, *13 (Ohio App. 2nd Dist. Dec. 27, 1991).

The Ohio Supreme Court merged the aggravating circumstances in its independent review and reweighing:

> For purposes of our independent review, however, we will consider only the single (merged) aggravating circumstance that was considered by the trial court on remand from the court of appeals and that was considered by the court of appeals in its own independent review of appellant's death sentence. Thus, we consider the R.C. 2929.04(A)(7) specification of the aggravating circumstance premised on aggravated robbery – i.e., that appellant shot and killed Brian Jones during the course of an aggravated robbery – which is clearly shown on the record before us.

State v. Chinn, 85 Ohio St.3d 548, 577, 709 N.E.2d 1166, 1189 (1999).

The Magistrate Judge determined that Petitioner was not entitled to relief on this sub-claim, because "[e]rrors by the sentencing court in weighing aggravating and mitigating factors can be cured by reweighing in the state appellate court." (ECF No. 60, at 127.) Looking to the state court decisions, the Magistrate Judge concluded that both courts merged the specifications in their weighing, and that the "[r]eweighing by the Ohio Supreme Court satisfies the requirements of *Clemons v. Mississippi*, 494 U.S. 738 (1990)." (*Id.*)

In his objections to the R&R, Petitioner acknowledges that in *Post v. Bradshaw*, 621 F.3d 406, 420 (6th Cir. 2010), the Sixth Circuit concluded that appellate reweighing could be used to cure violations of the right to effective assistance of counsel. Nonetheless, Petitioner argues that "*Post* is an incorrect statement of law and Chinn reserves the right to challenge it on appeal." (ECF No. 63, at 65.) *Post* is still good law and this Court must follow it. Moreover, the United States Supreme Court recently reaffirmed *Clemons* reweighing as a permissible remedy for both an improperly considered aggravating circumstance, as well as an ignored mitigating circumstance. *McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020) ("This Court stated that 'the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review.' ") (quoting *Clemons v. Mississippi*, 494 U.S. 738,741 (1990)). Here, it is apparent that on its independent review, the Ohio Supreme Court appropriately merged the aggravating circumstance and weighed it against the mitigation. Because this error was cured during the reweighing, Petitioner cannot show prejudice arising from trial counsel's failure to object. *See also Baston v. Bagley*, 420 F.3d 632, 638 (6th Cir. 2005) ("This reweighing by the Ohio Supreme Court satisfied the requirements of *Clemons* and cured the alleged sentencing errors. The court carefully reviewed all the aggravating and mitigating factors, and it is undisputed that the court considered the proper factors."). Sub-claim 9(B) is without merit.

Sub-claim C: Failure to object to jury instructions which could have led the jury to treat a firearm specification as an aggravating circumstance.

***41** In sub-claim 9(C), Petitioner contends that his trial counsel failed to object to an improper penalty phase jury instruction, which he argues allowed the jury to weigh all of the specifications that it had previously found as aggravating circumstances, including a firearm specification. On direct appeal, the Ohio Supreme Court rejected this claim on the merits:

> Additionally, during its deliberations in the penalty phase, the jury sent a note to the trial judge requesting a clarification of the aggravating circumstances and mitigating factors. The note stated, "We would like a summary of the elements that make up the mitigating and aggravating circumstances/factors. For example, character of [defendant], testimony of [defendant], etc." (Emphasis sic.) The trial court responded, "The aggravating circumstances are those that you have found in previous specifications and the mitigating factors are those which are relevant to the issue of whether the defendant should be sentenced to death, and they include, but are not limited to, the nature and circumstances of the offense and the history, character and background of the defendant." We find that the trial court's response to the jury's question clarified that there were only three aggravating circumstances the jury was to consider and weigh in the penalty phase, i.e., the three specifications of aggravating circumstances the jury had previously found appellant guilty of committing.
>
> Nevertheless, appellant claims that the trial court's response to the jury's question merely "added to the confusion." Specifically, appellant argues that "by telling the jury that the aggravating circumstances were the same as the specifications, the court instructed the jury to weigh a nonstatutory aggravating circumstance, the firearm specification, which was attached to each substantive count in the indictment." However, the record does not support appellant's arguments in this regard. The record clearly demonstrates that the trial court's statement that "the aggravating circumstances are those that you have found in previous specifications" referred only to the death penalty specifications for which the jury had previously found appellant guilty of committing. The firearm specifications were submitted to the jury only in the guilt phase and were not even identified as "specifications" on the verdict forms that were returned by the jury at the conclusion of the guilt phase. The only specifications that were identified as such on the verdict forms in the guilt phase of appellant's trial were the three death penalty specifications that had been submitted to the jury in connection with Count One of the indictment, i.e., the R.C. 2929.04 (A)(3) specification and the two R.C. 2929.04 (A)(7) specifications. For these reasons, it is clear that the trial court's response to the jury's question in the penalty phase did not invite the jury to consider the firearm specifications as nonstatutory aggravating circumstances.

State v. Chinn, 85 Ohio St.3d 548, 556-557, 709 N.E.2d 1166, 1175 (1999).

In the Original R&R, the Magistrate Judge concurred with the state court, finding the firearm charges were not identified to the jury as specifications. (ECF No. 60, at 129.) The Magistrate Judge determined "the only 'specifications' which the jury had found were the specifications that qualified Chinn for the death sentence. In other words, although the guilt phase verdicts had firearms findings, they were not labeled 'specifications.' Because there was no trial court error, there is no prejudice from counsel's failure to object." (ECF No. 86, at 36.)

***42** In his objections, Petitioner repeats his prior arguments that the language of the supplemental instruction invited the jury to consider the noncapital firearm specification from the guilt phase as an aggravating circumstance. The Court finds this argument to be illogical and wholly without merit. The Ohio Supreme Court determined that "the record does not support" Petitioner's argument, and "[t]he record clearly demonstrates that the trial court's statement that 'the aggravating circumstances are those that you have found in previous specifications' referred only to the death penalty specifications for which the jury had previously found appellant guilty of committing." *Chinn*, 85 Ohio St.3d at 557. This determination is entitled to AEDPA deference, and this Court hereby denies sub-claim 9(C) as without merit.

Sub-claim E: Failure to object to the penalty phase instruction on the nature and circumstances of the offense

In sub-claim 9(E), Petitioner argues that his trial counsel failed to object at the penalty phase to the trial court's instruction on the "nature and circumstances of the aggravating circumstance." (ECF No. 27, at 85.) According

to Petitioner, that instruction rendered the jury's sentencing process unconstitutionally vague by incorporating a statutory mitigating factor, the circumstances of the offense, into the aggravating circumstances.

The Original R&R determined this claim was barred by *Cooey v. Coyle*, 289 F.3d 882 (6th Cir. 2002). Petitioner's only objection is that "*Cooey* is an incorrect statement of law and Chinn reserves the right to challenge it on appeal." (ECF No. 63, at 67.)

In *Cooey v. Coyle*, 289 F.3d 882, 927-28 (6th Cir. 2002), the Sixth Circuit considered and rejected this precise argument. In concluding that Ohio Revised Code Sections 2929.03(D)(1) and 2929.04 were not unconstitutionally vague, the Sixth Circuit held:

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

Id. at 927–28 (6th Cir. 2002). *Cooey* is binding on this Court and sub-claim 9(E) is without merit.

Sub-claim F: Failure to object to victim impact testimony

In Sub-claim 9(F), Petitioner argues the victim impact statement made by the victim's mother was improper, and his counsel were ineffective for failing to object. This Court has discussed and rejected the underlying claim regarding the victim impact statement in the section of this Opinion and Order addressing Petitioner's Eighteenth Claim for Relief. As will be discussed in that section, pursuant to *Post v. Bradshaw*, 621 F.3d 406, 420 (6th Cir. 2010), any error in the admission of the statement was cured by appellate reweighing by the Ohio Supreme Court. Sub-claim 9(F) is without merit.

Sub-claim G: Failure to request limiting instruction regarding Shirley Cox's testimony

In sub-claim 9(G), Petitioner argues his trial counsel were ineffective for failing to request a limiting instruction regarding Shirley Cox's testimony that she met Petitioner at her husband's law firm. The Magistrate Judge determined that trial counsel did not act deficiently, finding that "defense counsel had fought hard to keep this fact away from the jury." (ECF No. 86, at 37.) The Magistrate Judge noted that "getting a limiting instruction would likely re-emphasize the fact of their meeting place." (*Id.*) This Court agrees. As discussed more fully in connection with Petitioner's Third Claim for Relief, trial counsel objected strenuously to the testimony of Shirley Cox, particularly in regard to where she met Petitioner. It is likely trial counsel chose not to request a limiting instruction in order to avoid drawing additional attention to this matter. Petitioner cannot overcome the hurdle of proving that trial counsel's decision to forego requesting a limiting instruction was anything more than sound trial strategy. Sub-claim 9(G) is without merit.

Sub-claim H: Failure to object to prejudicial hearsay testimony

***43** In sub-claim 9(H), Petitioner argues his trial counsel were ineffective because they failed to object to prejudicial hearsay statements of Marvin Washington and Christopher Ward. In a prior Opinion and Order, Judge Sargus dismissed, as without merit, the portion of this claim that pertains to the statements of Christopher Ward. (ECF No. 30, at 54-55.) For the reasons more fully discussed in the section of this Opinion and Order rejecting Petitioner's Fifth Claim for Relief, this Court finds Petitioner's claim regarding the statements of Marvin Washington, as introduced through the testimony of Detective Lantz, to also lack merit. Petitioner did not suffer prejudice by the introduction of Washington's statement about the line-up, and therefore, trial counsel were not ineffective for failing to object. Sub-claim 9(H) is without merit.

Sub-claim I: Failure to object to prosecutorial misconduct

In sub-claim 9(I), Petitioner argues that his counsel provided ineffective assistance because they failed to object to prosecutorial misconduct throughout his trial. The Magistrate Judge determined this sub-claim was without merit, because Petitioner's underlying claims of prosecutorial misconduct set forth in his Second Claim for Relief are without merit. This Court agrees. The state court decisions rejecting Petitioner's

claims of prosecutorial misconduct were neither contrary to nor an unreasonable application of Supreme Court precedent. Given that the state courts found no prejudicial error in the form of prosecutorial misconduct, counsel cannot be deemed ineffective for failing to object to the alleged misconduct. Sub-claim 9(I) is also without merit.

Sub-claim J: Cumulative Prejudice

Petitioner argues in his final sub-claim that the cumulative prejudice from trial counsel's errors is sufficient to warrant habeas relief. The Magistrate Judge rejected this argument, finding that because Petitioner has not demonstrated prejudice as to any of his sub-claims, "there is no prejudice to accumulate." (ECF No. 60, at 39.) This Court agrees.

For the foregoing reasons, the Court finds all of Petitioner's sub-claims of ineffective assistance of trial counsel to be without merit. Accordingly, the Court **DISMISSES** Petitioner's Ninth Claim for Relief. The Court agrees with the Magistrate Judge that reasonable jurists would not find debatable or wrong the Court's resolution of this claim and therefore, Petitioner is denied a COA.

Tenth Claim for Relief:

> Petitioner's convictions violate the Due Process Clause as the State's evidence was insufficient to prove the element of identity. U.S. Const. amend. XIV.

In his tenth claim for relief, Petitioner argues that his conviction was based on insufficient evidence, as the State failed to offer sufficient proof that he committed the crimes. (Petition, ECF No. 3, at 37; Traverse, ECF No. 27, at 87-90.) Noting that no physical evidence linked him to the crimes, Petitioner argues that the eyewitness testimony identifying him as the perpetrator was insufficient to prove that he was the "Tony" that was Marvin Washington's accomplice.

***44** The Magistrate Judge recommended that this Court deny Petitioner's claim as without merit, and because the state appellate court's decision rejecting the claim did not contravene or unreasonably apply federal law. (ECF No. 60, at 132-137.) More precisely, the Magistrate Judge concluded that the Ohio Supreme Court applied the appropriate federal legal standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979), and that its application of *Jackson* was not objectively unreasonable. In so doing, the Magistrate Judge recounted verbatim the Ohio Supreme Court's decision considering and rejecting Petitioner's claim. Because Petitioner – in nearly every claim in his Petition – circles back to what he characterizes as the weak evidence of his guilt, this Court finds it important to recite as well:

> In his eighth proposition of law, appellant contends that the evidence is insufficient to establish his identity as the perpetrator of the aggravated murder. He also claims that the evidence is insufficient to show that he specifically intended to cause the death of his victim. Appellant's contentions are not well taken.
>
> In this proposition, appellant essentially asks us to evaluate the credibility of witnesses and to resolve all evidentiary conflicts in his favor. However, in reviewing the sufficiency of evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis *sic.*) *Jackson v. Virginia*, (1979), 443 U.S. 307, 319, 99 S.Ct 2781, 2789, 61 L.Ed.2d 560, 573.
>
> Appellant argues that Marvin Washington's testimony is inherently unreliable and wholly unbelievable. We emphatically disagree. Washington's trial testimony was cogent and intelligible, and we are completely satisfied that his testimony identifying appellant as the killer, if accepted, sufficiently and overwhelmingly establishes appellant's guilt beyond a reasonable doubt. Appellant points out that Washington was a participant in the crimes. This is undoubtedly true. Washington was an eyewitness to the killing and he participated in and witnessed all aspects of the crimes. As a participant, he was in a much better position to identify the killer than anyone else who testified at trial. Washington had nothing to gain from testifying against appellant. Prior to testifying, Washington was charged with and was sentenced in juvenile court for his participation in these crimes. Washington's testimony at appellant's trial was not part of any plea agreement.

Additionally, as a juvenile offender, Washington was not eligible for the death penalty as an accomplice to the crimes. Therefore, in addition to having been in the best position to identify the killer, Washington simply had no reason to lie.

At trial, Washington testified that he and appellant robbed two men in Dayton and that they kidnapped Jones in Jones's car. Welborn corroborated Washington's description of the robbery, the abduction, the kidnapping, and the car theft. Welborn testified that Washington was one of the perpetrators of the robbery. Welborn never saw the face of the second robber, but Washington's testimony clearly identified appellant as the other participant in the crimes. Washington testified that he and appellant drove Jones to an area of Jefferson Township. According to Washington, appellant then got out of the car and shot Jones. Stacy Dyer witnessed the shooting. Although Dyer did not get a look at the shooter and therefore could not identify him, Dyer's testimony corroborated, in large part, Washington's description of the events that occurred in Jefferson Township on the night of January 30, 1989. Washington also testified that he and appellant then drove in the victim's car to Lome Avenue in Dayton and that they spoke to Christopher Ward. Ward testified that he saw Washington and appellant in Jones's car in the early morning hours of January 31, 1989. Therefore, Ward's testimony not only corroborated Washington's testimony but also served to severely undermine appellant's alibi defense.

***45** Appellant points out that Washington failed to immediately identify him at a lineup conducted on February 27, 1989. However, the reason that Washington had failed to do so was adequately explained at trial. Additionally, there is no dispute that immediately after the lineup Washington summoned Detective Lantz into an interview room and positively identified appellant as the perpetrator of the aggravated murder.

Appellant also points out that several witnesses at trial indicated that the man who was with Washington on the night of the murder was taller than appellant. However, this discrepancy in the evidence does not severely undermine either Washington's testimony identifying appellant as the killer or Ward's testimony that he saw appellant and Washington in the victim's car shortly after the murder. The fact remains that Washington was the state's eyewitness to the crimes and that he positively identified appellant as the killer. The jury accepted Washington's testimony. Upon a review of the entire record, it is clear to us that Washington's testimony was neither inherently unreliable nor inherently unbelievable. Indeed, upon a careful review of the record before us, we find Washington's testimony to be entirely believable. However, we note, in passing, that our view of the credibility of witnesses is not what is important on the question of sufficiency of the evidence. What is important is our finding that the evidence in this case was sufficient to establish appellant's identity as the perpetrator of the aggravated murder.

Appellant also claims that the evidence is insufficient to show that he specifically intended to cause Jones's death, since the fatal shot had been fired into the upper portion of Jones's left arm. However, the evidence at trial established that the muzzle of the revolver was pressed against the victim's sweatshirt at the time the weapon was discharged. The projectile entered through the victim's left arm, entered his chest, perforated the main pulmonary artery, and came to rest near the base of his heart. We therefore have great difficulty accepting appellant's characterization of the evidence as indicating nothing more than that the victim was "shot in the arm." The shot was fired in a manner that was likely to and did cause the victim's death. Additionally, "[i]t is well-established that 'where an inherently dangerous instrumentality was employed, a homicide occurring during the commission of a felony is a natural and probable consequence presumed to have been intended. Such evidence is sufficient to allow a jury to find a purposeful intent to kill.' " *State v. Esparza* (1988), 39 Ohio St.3d 8, 14, 529 N.E.2d 962, 968. The evidence was clearly sufficient to show that appellant specifically intended to cause the death of his victim.

Upon a careful review of the entire record, we find that the evidence was more than sufficient to establish appellant's identity as the perpetrator of the aggravated murder and to show that he specifically intended to cause the death of his victim. Accordingly, we reject appellant's eighth proposition of law.

State v. Chinn, 85 Ohio St.3d 548, 565-567, 709 N.E.2d 1166, 1181-1183 (1999).

In rejecting Petitioner's insufficiency of the evidence claim, the Magistrate Judge noted that "[a]fter a thorough review and upon consideration of all the evidence in the light most favorable to the prosecution, this Court holds that a reasonable juror could have found by proof beyond a reasonable doubt that the State has proven the essential element of identity. The state court decision listed in great specificity the evidence presented." (ECF No. 60, at 136.) In his objections to the R&R, Petitioner argues that "the Magistrate Judge failed to examine the credibility and reliability of Washington before relying on his testimony," and "without Washington, there was no case against Chinn." (ECF No. 63, at 75.) Petitioner proceeds to list all the reasons that in his view, Washington was not a credible witness, while minimizing the evidence that corroborated certain details of Washington's testimony. In his objections to the Supplemental R&R, Petitioner reiterates that "Washington's testimony was inherently unreliable, no reasonable juror could believe that his testimony amounted to proof beyond a reasonable doubt, and the remaining evidence was insufficient to support a conviction; furthermore, the Ohio Supreme Court's rejection of this claim is not entitled to deference under the AEDPA." (ECF No. 91, at 27-28.)

***46** An allegation of insufficient evidence states a claim for relief under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307 (1979). When reviewing a sufficiency of the evidence claim in habeas corpus, this Court must apply "two layers of deference" – one to the jury verdict, and a second to the state appellate courts' consideration of that verdict, as required by the AEDPA:

> In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. *See United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993). Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could *not* have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable. *See* 28 U.S.C. § 2254(d)(2).

Brown v. Konteh, 567 F.3d 191, 205 (6th Cir. 2009); *see also Tanner v. Yukins*, 867 F.3d 661, 672 (6th Cir. 2017) (finding "the applicable law tightly constrains our review of the state appellate court and the jury"); *Tucker v. Palmer*, 541 F.3d 652 (6th Cir. 2008).

Here, the Magistrate Judge has carefully reviewed the evidence and determined that Petitioner cannot establish that he is entitled to relief, and that additionally, Petitioner is not entitled to a COA. This Court agrees with the Magistrate Judge's decision. The Court has reviewed the entire state court record and cannot find that Petitioner presents a meritorious sufficiency of the evidence claim. Woven throughout the Petition is Petitioner's contention that there was a fundamental weakness in the state's case against him. This Court simply does not agree, and more importantly, neither did the state courts asked to review his convictions and sentence. With respect to Petitioner's argument that Marvin Washington was "wholly unbelievable," the Ohio Supreme

Court stated that it "emphatically disagree[d]." *Chinn*, 85 Ohio St.3d at 566. That court found Washington's trial testimony to be "cogent and intelligible," and noted that it was "completely satisfied that his testimony identifying appellant as the killer, if accepted, sufficiently and overwhelmingly establishes appellant's guilt beyond a reasonable doubt." *Id.* When viewed in a light favorable to the prosecution, there was ample evidence of Petitioner's guilt, including testimony by his accomplice, who identified Petitioner and detailed Petitioner's role in this offense. Moreover, many of those details were corroborated by additional witnesses. Accordingly, the Tenth Claim for Relief is dismissed with prejudice and a COA shall not issue.

Eleventh Claim for Relief:

***47** Petitioner's right against cruel and unusual punishment and his right to due process were violated by multiple errors in the jury instructions at the penalty phase. U.S. Const. amends. VIII, XIV.

A. The trial court failed to adequately instruct the jury as to what the aggravating circumstances were that the jury had to weigh to determine whether to sentence petitioner to death.

B. The trial court failed to merge duplicative specifications for the jury's weighing process.

C. The jury improperly weighed both the "principal offender" and "prior calculation and design" elements of the felony murder capital specifications.

Petitioner's Eleventh Claim for Relief was previously dismissed as procedurally defaulted. (Opinion and Order, ECF No. 30, at 55-68.)

Twelfth Claim for Relief:

> The penalty phase instructions kept petitioner's jury from considering all relevant mitigating factors.

In his Twelfth Claim for Relief, Petitioner argues his death sentence violates the Eighth Amendment because the improper jury instructions created a "reasonable likelihood" that the jury was not able to consider or give "full mitigating effect" to all of his mitigation evidence. (Petition, ECF No. 3, at 43; Traverse, ECF No. 27, at 104.) Specifically, Petitioner objects to the following instructions:

> You will consider all the evidence, the arguments, the statement of the Defendant, and all of the information and reports that are relevant to the nature and circumstances of the mitigating facts, and the mitigating facts include but are not limited to the nature and circumstances of the offense, and the history, character, and background of the Defendant; and you may consider, I guess, should consider any facts that are relevant to the issue of whether the Defendant should be sentenced to death.

(Trial Tr. Vol. IV at 731; ECF No. 132-7, PAGEID 9434.) As set forth in the Ohio Supreme Court's opinion on this issue, during deliberations, the jury sent the trial court a note, in which it requested to have mitigation redefined by the court:

> Judge:
>
> We would like a summary of the elements that make up the mitigating and aggrevating [sic] circumstances/factors....

The trial court answered:

> The mitigating factors are those which are relevant to the issue of whether the defendant should be sentenced to death, and they include, but are not limited to, the nature and circumstances of the offense and the

> history, character and background of the defendant.

State v. Chinn, 85 Ohio St.3d 548, 556 (1999).

In the R&R, the Magistrate Judge began his analysis by reciting the Ohio Supreme Court's rather lengthy discussion rejecting this claim on direct appeal. *See Chinn*, 85 Ohio St.3d at 554-557. Next, the Magistrate Judge reiterated the long standing principle that "[i]n order for habeas relief to be warranted on the basis of incorrect jury instructions, a petitioner must show more than that the instructions are undesirable, erroneous, or universally condemned; taken as a whole they must be so infirm that they rendered the entire trial fundamentally unfair." (ECF No. 60, at 141.) Furthermore, as the Magistrate Judge noted, "[t]he only question for a habeas court to consider is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' " (*Id.*) (*quoting Estelle v. McGuire*, 502 U.S. 62 (1991)).

***48** The Magistrate Judge opined:

> For clarification purposes the jurors sent a note to the trial judge requesting: "[w]e would like a summary of the elements that make up the mitigating and aggrevating [sic] circumstances/factors...." The trial court responded to the question by reiterating that, "[t]he mitigating factors are those which are relevant to the issue of whether the defendant should be sentenced to death, and they include, *but are not limited to*, the nature and circumstances of the offense and the history, character and background of the defendant."
>
> Petitioner contends that in this response "the trial court completely eliminated nonstatutory or 'catchall' mitigation from the jury's consideration. The trial court's response omitted any reference to O.R.C. 2929.04(B)(7) mitigation: 'any other factors that are relevant to the issue of whether the offender should be sentenced to death.' Accordingly, the jury's ability to consider or give 'full mitigating effect' was eviscerated by the court's truncated instruction on nonstatutory mitigating factors." (Traverse, Doc. No. 27, PAGEID 381.) The Ohio Supreme Court held "the arguments raised ... are not supported by a fair and impartial review of the record. Nothing in the trial court's penalty phase instructions or in its response to the jury's questions supports [Chinn's] assertion that the jury was precluded from considering mitigation." This Court agrees. The judge's original definition of mitigating factors to the jury contained a "catch-all" phrase. (Trial Tr. Vol. IV at 731.) In response to the jury question, the trial judge responded that the mitigation factors "include, but are not limited to." While perhaps neither were stated in the most articulate manner possible, both the original instruction and the response conveyed to the jurors that the mitigating factors to be considered were left to the individual juror's discretion. Thus, the instruction does not limit what the jurors may consider as a mitigating factor, but rather reiterates the circumstances, factors, or elements which the jurors may give consideration which excuses or lessens the defendant's culpability in the crime. Such "catch-all" phrase has been held to be constitutional. *Boyde v. California*, 494 U.S. 370 (1990).
>
> The Twelfth Claim for Relief should be dismissed with prejudice and Petitioner should be denied a certificate of appealability on this claim.

(ECF No. 60, at 141-142.) (emphasis added).

Petitioner objects to the decision of the Magistrate Judge, and specifically to the Magistrate Judge's finding "that the use of the phrase 'should consider' in the jury instructions did not result in constitutional error.' " (ECF No. 91, at 28.) Petitioner argues that "[t]elling jurors that they 'should' do something is not the same as telling them they 'must' do something," and "[t]he distinction between must and should in the criminal law is long-standing in American jurisprudence." (*Id.*). The Court does not find Petitioner's objections persuasive.

Recently, the Sixth Circuit reiterated that " '[a] challenge to a jury instruction is not to be viewed in 'artificial isolation,' but rather must be considered within the context of the overall instructions and trial record as a whole.' " *Wheeler v. Simpson*, 852 F.3d 509, 519 (6th Cir. 2017) (quoting *Hanna v. Ishee*, 694 F.3d 596, 620–21 (6th Cir. 2012)). Establishing that the jury instructions in a capital case, when taken as a whole, are "so infirm that they rendered the entire trial fundamentally unfair" is a high standard indeed. *Id.* The Sixth Circuit has held that " '[t]he burden is even greater than that required to demonstrate plain error on appeal.' " *Id.* (quoting *Buell v. Mitchell*, 274 F.3d 337, 355 (6th Cir. 2001)). Here, nothing

in the trial court's instruction or additional response to the jury's question supports Petitioner's claim that the jury was precluded from considering mitigating evidence. Petitioner's focus on the trial court's use of the word "should" rather than "must" is nonsensical. As the Magistrate Judge noted, "Chinn has failed to show, or even intelligibly argue, how a reasonable juror could have misconstrued what the trial judge said as to refuse to consider fully any relevant mitigating evidence Chinn offered." (ECF No. 86, at 45.)

***49** This Court finds Petitioner's objections unpersuasive and hereby adopts the Magistrate Judge's Original R&R, as well as the Supplemental R&R. (ECF Nos. 60, 86.) The Court dismisses Petitioner's Twelfth Claim for Relief and further finds that reasonable jurists would not disagree with the Court's resolution of this claim. Petitioner is denied a COA.

Thirteenth Claim for Relief

> Petitioner's right to due process and his right against cruel and unusual punishment were violated because he was denied his right to present all relevant mitigating evidence to the sentencer, on remand to the trial court and he was also sentenced to death without a valid recommendation from his trial jury on remand to the trial court. U.S. Const. amends. VIII, XIV.
>
> A. The original death penalty recommendation of petitioner's trial jury was void after *Chinn I.*
>
> B. Petitioner's right to present all relevant mitigating evidence was violated after *Chinn I.*

In his Thirteenth Claim for Relief, Petitioner challenges the reimposition of his death sentence by the trial court. Specifically, Petitioner argues that once the court of appeals reversed his death sentence and remanded for a new sentencing hearing by the trial court, that his original jury recommendation for a sentence of death became void. (Petition, ECF No. 3, at 45); (Traverse, ECF No. 27, at 107.) Additionally, he argues that the trial court erred when it refused to allow him to present additional mitigating evidence upon remand that he did not present during the mitigation phase of his trial. (*Id.*)

During the mitigation phase of his trial, Petitioner offered evidence regarding the effect of his father's murder, as well as claims of innocence or residual doubt. As will also be discussed in connection with Petitioner's Fifteenth Claim for Relief, the Court of Appeals determined that the trial court ignored these factors in its own independent weighing, after the jury had recommended a sentence of death. *State v. Chinn*, No. 11835, 1991 WL 289178, *19-21, 24 (Ohio App. 2nd. Dist. Dec. 27, 1991) ("*Chinn I*"). The court of appeals remanded the case to the trial court for resentencing. In its disposition of the appeal, the court of appeals provided the following guidance to the trial court:

> Although it does present a rather novel question, we find that when a sentencing error was committed solely by the trial judge in his review of the jury's recommendation, it is analogous to a situation in which the defendant's case was heard by a three-judge panel which committed a sentencing error. The Supreme Court has held that
>
> When a reviewing court vacates the death sentence of a defendant imposed by a three-judge panel due to error occurring at the penalty phase ... such reviewing court may remand the action to that trial court for a resentencing hearing at which the state may seek whatever punishment is lawful, including, but not limited to, the death sentence.
>
> *State v. Davis* (1988), 38 Ohio St.3d 362, syllabus. Accordingly, we will vacate Chinn's death sentence and remand the issue of sentencing to the trial court so that it may weigh the proper mitigating factors against the single aggravating circumstance. Pursuant to this reevaluation, the trial court may impose whatever lawful punishment it deems appropriate, including but not limited to a sentence of death.

Id. at 24.

On remand, Petitioner argued that he should be allowed to present new mitigating evidence not presented during his trial. The trial court did not grant Petitioner the opportunity to present additional evidence and limited its consideration to the evidence already considered by the jury. The trial court conducted a re-weighing of the aggravating circumstances and mitigating factors, and again imposed a death sentence, without Petitioner being present. Petitioner appealed the reimposition of the death sentence, arguing he should have been permitted to present additional mitigation evidence at

a full resentencing hearing. The court of appeals rejected Petitioner's argument, finding the trial court followed proper procedure:

> ***50** When we remanded Chinn's case, we did not expect the trial court to conduct a resentencing hearing, and we find no compelling reason why Chinn should have been afforded a second opportunity to present mitigating evidence prior to sentencing. Chinn was given a full opportunity to present such evidence at the initial sentencing hearing. The error for which we remanded the matter occurred after the mitigating evidence had been presented and after the jury had made its recommendation based upon that evidence. *On remand, the trial court was required to proceed from the point at which the error occurred. State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113. In Chinn's case, the error occurred after the sentencing hearing.
>
> Moreover, Chinn's contention that he should have been allowed to present additional mitigating evidence on remand is inconsistent with Ohio's capital sentencing framework. In capital sentencing, the jury first must weigh the aggravating and mitigating factors and decide whether to recommend the death penalty. R.C. 2929.03(D)(2). Then, if the jury recommends death, the trial court must consider the same evidence and decide whether it, too, finds the aggravating circumstances to outweigh the mitigating factors. R.C. 2929.03(D)(3). Because the sentencing error for which we remanded this case related only to the trial court's independent evaluation of the aggravating and mitigating factors, allowing Chinn to present additional mitigating evidence would have allowed the trial court to make its recommendation based upon information which was not before the jury. Such a result is inconsistent with the statutory framework for imposing the death penalty.
>
> In sum, Chinn was not entitled to an opportunity to improve or expand his evidence in mitigation simply because we required the trial court to reweigh the aggravating circumstance and mitigating factors. To the extent that Chinn's trial counsel may have acted ineffectively in presenting mitigating evidence in the first instance, Chinn could have raised such an argument on direct appeal from his conviction or he may do so through a petition for post-conviction relief. Such an argument is not properly raised, however, on this appeal from resentencing.

State v. Chinn, No. 15009, 1996 WL 338678, *2-3 (Ohio App. 2nd Dist. June 21, 1996) (*Chinn II*) (emphasis added). Ultimately, the court of appeals reversed Petitioner's death sentence on the basis that the trial court failed to afford Petitioner the opportunity to be present at the resentencing hearing. *Id.* at 8. Upon remand, the trial court sentenced Petitioner to death for the third time and in his presence. That sentence was affirmed, and Petitioner appealed to the Ohio Supreme Court. *State v. Chinn*, No. 1997 WL 464736, *3 (Ohio App. 2nd Dist. Aug. 15, 1997) (*Chinn III*).

The Ohio Supreme Court summarized Petitioner's claim regarding the resentencing procedure as follows:

> In his seventh proposition of law, appellant contends that he was ineligible for the death penalty on remand from the court of appeals' 1991 decision vacating his original death sentence. Appellant claims that "when the court of appeals vacated Chinn's death sentence it also vacated the trial jury's sentencing recommendation." We disagree. In neither case where the court of appeals vacated appellant's death sentence did the appellate court purport to vacate the jury's verdict recommending imposition of the death penalty. Nor was the court of appeals required to vacate the jury's recommendation in this case. The appellate court specifically determined, and we agree, that the recommendation of the jury was untainted by error. Moreover, contrary to appellant's contentions, *Penix* does not preclude the trial court from imposing the death sentence on remand. The reason, of course, is that the errors identified and relied upon by the court of appeals in vacating appellant's original death sentence in 1991 related to the trial judge's independent evaluation of sentence. These errors were committed *after* the jury had returned its verdict in the penalty phase. Under these circumstances, the court of appeals correctly determined that *Penix* does not prohibit the trial judge, on remand, from accepting the jury's 1989 sentencing recommendation. Rather, as the court of appeals recognized, the trial court was required to proceed on remand from the point at which the errors had occurred, *i.e.*, after the jury had returned its recommendation of death.

***51** In this proposition, appellant also argues that he had "an absolute right to present any new mitigating evidence at his resentencing hearing in 1994." In support of this proposition, appellant relies on several United States Supreme Court opinions requiring that the sentencer not be precluded from considering relevant mitigating evidence in a capital case. See, e.g., *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1; and *Hitchcock v. Dugger* (1987), 481 U.S. 393, 107 S. Ct. 1821, 95 2d 347. However, each of those cases involved a situation where the capital sentencer was prohibited, in some form or another, from considering relevant mitigating evidence at trial. In the case at bar, no relevant mitigating evidence was ever excluded from consideration during the penalty phase of appellant's 1989 trial. Therefore, the case at bar is clearly distinguishable from the United States Supreme Court's pronouncements in *Lockett*, *Skipper*, and *Hitchcock*. Accordingly, as was the case in *State v. Davis* (1992), 63 Ohio St.3d 44, 46, 584 N.E.2d 1192, 1194-1195, we find *Lockett*, *Skipper*, and *Hitchcock* to be inapplicable here. It is of no consequence that the additional mitigating evidence in *Davis* involved *post-trial* accomplishments, whereas appellant's additional mitigation evidence involves matters appellant claims he could have presented but did not present during the mitigation phase of his 1989 trial. In this case, as in *Davis*, the errors requiring resentencing occurred after the close of the mitigation phase of the trial. Under these circumstances, the trial court is to proceed on remand from the point at which the error occurred. Appellant's arguments to the contrary are not well taken. In addressing this issue, the appellate court stated, "In sum, Chinn was not entitled to an opportunity to improve or expand his evidence in mitigation simply because we [the court of appeals] required the trial court to reweigh the aggravating circumstance and mitigating factors." *Chinn*, Montgomery App. No. 15009, unreported, at 6. We agree with the court of appeals' assessment of this issue.

Additionally, appellant takes issue with the fact that in its 1996 sentencing entry the trial court simply stated, "it is the conclusion of this Court that the verdict of the jury recommending death be accepted." Appellant contends that the trial court failed to independently weigh the aggravating circumstance and the mitigating factors in reimposing the death sentence in 1996 and failed to comply with the requirements for the issuance of a sentencing opinion under R.C. 2929.03(F). However, the trial court's 1994 sentencing option fully complied with the requirements of R.C. 2929.03(F). The mere fact that the trial court did not specifically incorporate its 1994 sentencing opinion into its 1996 sentencing entry does not rise to the level of reversible error. Furthermore, appellant failed to raise this issue during his final appeal to the court of appeals and, therefore, appellant's arguments have been waived.

Accordingly, for all of the foregoing reasons, we reject appellant's seventh proposition of law.

State v. Chinn, 85 Ohio St.3d 548, 563-564 (1999).

Finally, the Ohio Supreme Court summarized the mitigation evidence:

> In mitigation, appellant presented evidence concerning his history, character, and family background. Appellant's father was murdered in 1972. Appellant's grandmother testified that appellant, as a child, was "very emotionally upset" over his father's death. She also testified that appellant is deeply devoted to his nieces and nephews and to his entire family. Appellant's brother and sister testified that appellant helped them spiritually and that he is close to his family and helpful to family members. Appellant's mother, Anna Less, testified that appellant was born in 1957. Lee testified that appellant, during childhood, had no disciplinary problems and was a "very sensitive" and "active child." According to Lee, appellant became even more sensitive following his father's death. During childhood, appellant read from the Bible, believed in God, and was devoted to his family members. Lee testified that appellant had enrolled in Cambridge Technical Institute to better his life through education. Appellant gave an unsworn statement in which he proclaimed that he was innocent. Appellant stated that he had been involved in sports and certain civic organizations and activities during his childhood. He expressed his belief in God, his devotion to family, and his bitterness over his father's death. Appellant claimed to be "a compassionate and concerned human being." He also indicated that he had enrolled in Cambridge Technical Institute to better himself and that he was proud of his accomplishments in school.

***52** *Id.* at 577-78.

In the Original R&R, the Magistrate Judge conducted a thorough analysis and concluded that the Ohio Supreme Court's decision with respect to this claim was neither contrary to nor an unreasonable application of relevant United States Supreme Court precedent. (ECF No. 60, at 148-153.) Specifically, the Magistrate Judge determined that no United States Supreme Court precedent requires a retrial under the circumstances present in Petitioner's case:

> Chinn first argues that his sentence is unconstitutional because when the court of appeals remanded the case back to the trial court for sentencing, it voided the original jury recommendation. *Id.* The Sixth Circuit has noted that "the state courts of Ohio have construed the state statute at issue to apply only when a jury, not a three-judge panel, recommends a sentence of death." *See Davis v. Coyle*, 475 F.3d 761, 775 (6th Cir. 2007); *Davis II*, 38 Ohio St.3d 361, 372, 528 N.E.2d 925, 936 (1988). Here Chinn was in fact tried by a jury, but the alleged errors did not occur until *after* the jury had made a recommendation. As such, and as stated by the Ohio state courts, that portion of his trial was not defective. The case was remanded to the trial judge to cure the errors *he made* in determining whether or not to accept the jury recommendation. The effect of the reversal of the sentence by the state court of appeals is, in any event, a question of state law. No United States Supreme Court precedent commands a re-trial under those circumstances.
>
> Additionally, Petitioner argues that the decision of the Ohio Supreme Court unreasonably applied federal law and constrained the legal principles of *Lockett* and *Skipper* to only mitigation evidence that had been presented in the original 1989 trial. (Traverse, Doc. No. 27, PAGEID 382.) Once his case was remanded to the trial court, Chinn filed [a] motion to present additional mitigation evidence. (Traverse, Doc. No. 27, PAGEID 383.) Multiple affidavits attest to an in-chambers conference and state that there was no additional hearing on the matter and that Chinn proffered all his additional mitigation evidence. (Return of Writ, Doc. No. 24, Apx. Vol. VI at 67-74.) The proffer included a report from the Montgomery County Sheriff's Office that said Chinn had not caused any discipline problems with either jailers or other inmates during the time he had been incarcerated in the county jail **awaiting and during** his 1989 trial. *Id.* He also proffered "evidence undermining the reliability of his conviction and the credibility of his co-defendant," with testimony that he was at home when the crime occurred and with testimony from Dr. Solomon Fulero regarding the unreliability of eyewitness testimony. *Id.* Additionally, he offered evidence impeaching the State's key witness, Washington, because of a mental impairment, testimony from Dr. Caroline Everington regarding the impact of mental retardation and its effect on the ability to make identifications, and testimony regarding an incident that occurred before Washington's testimony when Washington was brought into the courtroom so someone could point Chinn out to him. *Id.* He also proffered Washington's juvenile records including psychological reports, neuropsychological reports, chemical abuse assessment, a social history and updates, a supplemental police report, and a statement made to police describing Tony. *Id.* Chinn argues that because he was precluded from presenting this additional mitigation evidence, this was a *Skipper* violation resulting in a denial of his Eighth Amendment and Fourteenth Amendment rights. (Traverse, Doc. No. 27, PAGEID 386.)

***53** (ECF No. 60, at 148-149.)

The Magistrate Judge also discussed the applicability of *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007). Like Petitioner, *Davis* involved a prisoner who had been sentenced to death, and then re-sentenced to death after the Ohio Supreme Court vacated his original sentence. 475 F.3d at 763-64. At re-sentencing, the trial court refused to allow Davis to introduce new mitigation evidence concerning his adaptability and good behavior from the date of his first sentencing. *Id.* at 770-71. This new evidence would have rebutted the State's argument at re-sentencing that Davis was too dangerous an offender to serve a life sentence. *Id.* at 772. The Sixth Circuit noted that "the record in this case establishes without a doubt that [the new mitigation evidence] was highly relevant to the single aggravating factor relied upon by the state – that future dangerousness should keep Davis on death row." *Id.* at 773. The Sixth Circuit ordered a second re-sentencing by the trial court, and did not permit the state appellate courts to cure the error by re-weighing, because "the improperly excluded evidence was never put into the record ... and therefore, no factual basis for re-weighing exist[ed]." *Id.* at 774.

Distinguishing Petitioner's case, the Magistrate Judge concluded:

> The evidence proffered by Chin[n] on remand in this case is not *Skipper/Davis* evidence. That is, it does not purport to show anything about Petitioner's behavior **after** the jury made its death sentence recommendation. Rather, it is new mitigating evidence which would have been available for presentation to the jury at the time of trial but was not presented. Nor did the prosecutor on resentencing make any argument about future dangerousness that would have made post-verdict behavior of Petitioner relevant in mitigation of that argument.

(ECF No. 60, at 152.)

In his objections, Petitioner argues that the Ohio Supreme Court's refusal to extend *Skipper v. North Carolina*, 476 U.S. 1 (1986), to this case was objectively unreasonable. In *Skipper*, the Supreme Court held that the trial court infringed on the defendant's "right to place before the sentencer relevant evidence in mitigation of punishment" when the court excluded certain evidence that it deemed cumulative. 476 U.S. 1, 4 (1986). There, the defendant sought to admit at his sentencing hearing the testimony of two jailers, and a regular visitor at the jail. *Id.* at 3. The witnesses would have testified regarding the defendant's good behavior in jail while awaiting trial. This evidence would have mitigated the State's assertion that if given a life sentence, the defendant posed a threat to the safety of other inmates. *Id.* at 4. The State argued that the testimony was properly excluded because it was cumulative. The Supreme Court concluded the additional evidence was not cumulative and that its exclusion constituted reversible error. *Id.* at 8. The Supreme Court explained:

> The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses – and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges – would quite naturally be given much greater weight by the jury.

***54** *Id.* In light of the State's argument that the defendant posed a continuing threat to other prisoners, the Court concluded "it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence." *Id.* The Court held that exclusion of the evidence constituted reversible error. *Id.*

This Court agrees with the Magistrate that the new evidence Petitioner sought to introduce on remand to the trial court for resentencing was not the kind of evidence at issue in *Skipper* and *Davis*. Here, the State did not raise any arguments about Petitioner's future dangerousness that would have made his post-trial behavior relevant in mitigation at the second re-sentencing. Rather, Petitioner sought a second bite of the apple – a chance to relitigate some of the information that was originally presented, as well as offer new information that had not been presented previously but was available at the time of trial. Because *Skipper* and *Davis* are distinguishable, this Court cannot conclude that Petitioner is entitled to relief on his Thirteenth Claim for Relief, and accordingly, the Court **OVERRULES** Petitioner's objections, and **ADOPTS** the recommendation of the Magistrate Judge to dismiss this claim.

The Court notes, however, that the trajectory of Petitioner's state court direct appeal process was lengthy and complex and resulted in two reversals of Petitioner's death sentence and the issuance of four separate legal opinions. Due to the complicated procedural history, as well as the relative similarity to *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007), the Court will grant Petitioner a COA on this claim.

Fourteenth Ground for Relief

> Petitioner's right to due process and his right against cruel and unusual punishment were violated when his jury was misinstructed to be unanimous in order to find that aggravating circumstances did not outweigh mitigating factors. U.S. Const. amends. VIII, XIV.

Petitioner's Fourteenth Ground for Relief was previously dismissed as procedurally defaulted. (Opinion and Order, ECF No. 30, at 68-70.)

Fifteenth Claim for Relief:

> Petitioner's right to the effective assistance of counsel was violated by counsel's prejudicially deficient performance in failing to investigate, prepare, and present compelling mitigation evidence during the penalty phase of Petitioner's trial. U.S. Const. Amends. VI, VIII, XIV.

In his Fifteenth Claim for Relief, Petitioner argues that he was denied the effective assistance of counsel at the mitigation phase of his trial, because his counsel failed to investigate, identify, and present all available mitigating evidence. This claim has two parts. First, Petitioner argues his counsel were ineffective because they did not offer evidence of his good prison conduct while awaiting trial at the Montgomery County jail. Secondly, Petitioner argues counsel failed to present additional evidence of residual doubt, to include alibi evidence that Petitioner was home when the crime occurred, an expert witnesses to challenge the reliability of eyewitness testimony, an expert to challenge the testimony of Marvin Washington on the basis of intellectual disability, Marvin Washington's juvenile records, and a supplemental police report from Christopher Ward that may have also called into question Ward's mental capacity. (Petition, ECF No. 3-2, at 53-55); (Traverse, ECF No. 27, at 128-131.)

***55** Petitioner has litigated the underlying issues comprising the substance of this claim extensively through the State courts. The state courts originally addressed the issue of residual doubt in the context of a claim alleging the trial court erred in its own weighing of the mitigating factors and in making the findings required by R.C. 2929.03(D)(3). Specifically, the Second District Court of Appeals affirmed the jury's verdict and found no error with the jury's recommendation of death, but found the trial court erred in its own consideration of the mitigating factors and aggravating circumstances. The court of appeals remanded for a new sentencing hearing:

> A capital defendant's right to mitigate his sentence is not merely statutory, but a constitutional guarantee. *Lockett v. Ohio* (1978), 438 U.S. 586, 608; *Furman v. Georgia* (1972), 408 U.S. 238, rehearing denied (1972), 409 U.S. 902. A factor that could never possibly tip the scales in favor of life imprisonment would be "mitigating" in name only. The Eighth Amendment requires that any mitigating evidence, given the right factual circumstances, have the potential of precluding the death penalty. *Id.* The precise weight to assign to a factor lies, in the first instance, in the sound discretion of the sentencing court. However, in this case the trial court abused its discretion by completely ignoring the factor of residual doubt.
>
> *Scott* cannot be read as eviscerating the mitigation value of residual doubt. Rather, *Scott* serves as a reminder to the court that the defendant's continued protestations of innocence must be viewed in light of fact that the issue of guilt has already been resolved. Residual doubt is, as the name implies, the gap between "beyond a reasonable doubt" and absolute certainty. The size of this gap is, necessarily, dependent upon the facts in the case. In *Scott*, *supra*, the Supreme Court found that the only fact which contributed to residual doubt was the defendant's continued protestations of innocence, and therefore the factor had little mitigating effect. However, in the case at bar there are a number of facts in addition to Chinn's claims of innocence which cause the gap between reasonable doubt and absolute certainty to be far broader than in *Scott.*

It is uncontroverted that Chinn is five feet five inches tall. (T.702). However, everyone who saw "Tony" claimed that he was much taller. Couch, the bookstore employee, testified that "Tony" was "certainly taller" than Washington, who also stands five feet five inches, and estimated "Tony's" height at five feet seven to nine inches. (T. 74-75). Dyer, who witnessed the murder of Jones, testified that the victim and the murderer were the same height. (T.90). Jones was five feet ten inches tall. (T. 23). Welborn, the man whom "Tony" robbed, told police that "Tony" was five feet nine inches tall. (T. 126). Finally when Washington originally described "Tony" to the police, he too said that he was taller than himself, standing at least five feet seven inches. (T. 265).

Further residual doubt may have been created by the fact that witnesses were unable to pick Chinn out of a lineup. Welborn was able to positively identify Washington, but identified someone other than Chinn as being "Tony". (T. 132). Dyer and Couch were also unable to identify Chinn. Washington did not identify Chinn in a line-up, but then changed his story. He testified that he had deliberately misidentified Chinn from fear of being seen through the one way mirror.

Washington's testimony was crucial to Chinn's conviction, but given Washington's admitted culpability in the murder of Jones his testimony is inherently suspect. This suspicion is intensified by the fact that Washington testified that he had been introduced to "Tony" and his girlfriend Stephanie Woods by Henry Walker one year before the night of the murder. (T. 257). Detective Lantz testified that he had spoken to both Walker and Woods, and both claimed not to know anyone named "Tony", and neither could identify Chinn by his picture. (T. 412-413). Washington's friend, Ward, was also able to identify Chinn. However, Ward initially told police that [sic] did not get a clear look at "Tony", (T. 158), and before making the identification inquired into the availability of a reward. (T. 181).

***56** It must also be remembered that Chinn produced evidence from several sources that he was elsewhere taking an examination for school at the time when Washington said he met "Tony" and was at home with his mother and brother thereafter. Furthermore, neither the murder weapon nor any other incriminating evidence was discovered which would implicate Chinn. The totality of these circumstances may create a substantial amount of residual doubt as to whether Chinn actually was "Tony".

Since Jones was shot once in the arm, there may also be residual doubt as to whether "Tony" intended to kill Jones.

The trial court erred in not considering these mitigating factors.

State v. Chinn, No. 11835, 1991 WL 289178, *19-21 (Ohio App. 2nd Dist. Dec. 27, 1991) ("*Chinn I*"). The case was remanded to the trial court for a resentencing hearing, directing the trial court to take into consideration residual doubt. The trial court once again sentenced Petitioner to death, and Petitioner appealed to the court of appeals for a second time.

In *Chinn II*, the Second District again vacated Petitioner's death sentence, this time finding the trial court had denied Petitioner the right to be present at resentencing. *State v. Chinn*, No. 15009, 1996 WL 338678 (Ohio App. 2nd Dist. June 21, 1996) ("*Chinn II*"). Prior to remanding the case to the trial court for a second resentencing in Petitioner's presence, the court of appeals determined that the trial court had appropriately considered the mitigating evidence, including residual doubt:

> Regarding mitigating factors, the trial court did state its own opinion that residual doubt should not be treated as a mitigating factor. The trial court acknowledged our instruction that residual doubt must be considered, however, and it stated that it had no residual doubt about Chinn's guilt. We did not require the trial court to give any particular weight to the mitigating factors; we required, as the statute does, only that it identify those factors and consider whether they should be given any weight. Based upon our review of the trial court's sentencing opinion, it complied with our instructions on remand. If the trial court harbored no residual doubt of Chinn's guilt, it did not

> err by assigning that mitigating factor "negligible or no weight."

Chinn II, 1996 WL 338678, *4. The Second District then conducted its own analysis of residual doubt, opining:

> In *Chinn I,* we discussed the mitigating factor of residual doubt, meaning the gap between proof beyond a reasonable doubt which formed the basis of the finding of guilt and proof to a degree of absolute certainty. Indeed, we remanded Chinn's case for resentencing because the trial court had not considered each mitigating factor about which Chinn had introduced evidence, including residual doubt. In doing so, we pointed to the evidence in the record which lent support to Chinn's argument that there was some residual doubt as to his guilt. See *Chinn I, supra.* We noted that the gap between proof beyond a reasonable doubt and proof to a degree of absolute certainty was greater in Chinn's case than in some other cases discussing residual doubt. *Id.* We stated no opinion, however, as to how that evidence should be weighed, along with the other mitigating factors, against the aggravating circumstance.
>
> In light of our extensive discussion in *Chinn I* of the evidence "which may [have created] a substantial amount of residual doubt as to whether Chinn was actually 'Tony,' " we will state with some specificity the evidence which leads us to conclude that residual doubt, as a mitigating factor, is entitled to little weight in this case.
>
> ***57** Chris Ward was a friend of Marvin Washington, Chinn's alleged cohort in Jones' murder. Ward testified that he saw Washington and Chinn in the early morning hours of January 31, 1989, which was within a short time of Jones' murder. On that occasion, Ward stated that Washington drove into a friend's yard in a black car, honking the horn. Ward and the friend went outside, looked at the car, and talked with Washington. Ward testified that Chinn was in the passenger seat of the car, and that Washington identified Chinn as "Tony." When Ward asked whose car it was, Washington said it was "Tony's" car, and Ward shook "Tony's" hand.
>
> After their brief conversation with Ward, Washington and "Tony" drove away in the car, and Ward went back into his friend's house. A few minutes later, Washington returned without the car. Washington told Ward that he had let "Tony" have the car, and Ward testified that Washington had acted very nervous. When questioned about his behavior, Washington told Ward that "Tony" had shot someone in Jefferson Township.
>
> Jones' car was discovered by a police officer shortly after dawn on January 31. Ward identified photographs of Jones' car as the car in which he had seen Washington and Chinn the prior night. Ward identified Chinn's picture and picked him out of a lineup as the man he had seen with Washington the night of the murder, and Ward provided a description of "Tony's" clothing which matched the description given by Gary Welborn, Jones' friend and fellow robbery victim. Ward also identified Chinn in court as the man he had seen in the black car on January 31, 1989.
>
> Ward's testimony corroborated significant portions of the testimony of both Welborn and Washington, and Ward appears to us from our review to have been a credible witness with no reason to fabricate his story.
>
> Despite Washington's role in the murder, his testimony also appears to have been believable. In particular, we think it noteworthy that Washington could identify Chinn to the police only as "Tony." Any contention that Washington falsely directed blame toward another suspect in an effort to deflect attention from his own role in the crime is undercut by this imprecise identification. Further, the record does not suggest any reason for which Washington would have singled Chinn out other than his involvement in the crime.
>
> We also note that Chinn's alibi, insofar as it was corroborated by disinterested witnesses, did not account for his whereabouts at the time of the murder. Only Chinn's mother testified that he had been at home with his brother when the murder occurred.
>
> For these reasons, among others, we harbor little residual doubt of Chinn's guilt, and we have considered that mitigating factor accordingly in our independent weighing of the aggravating circumstance and mitigating factors. Having found that the aggravating circumstance outweighs the mitigating factors, we conclude that the sentence of death is appropriate.

Id. at *5-6.

Petitioner appealed his death sentence for the third time. In August 1997, the court of appeals affirmed the judgment of the trial court and upheld Petitioner's death sentence. *State v. Chinn*, No. 16206, 1997 WL 464736 (Ohio App. 2nd Dist. Aug. 15, 1997) (*Chinn III*). The Second District held:

> The only other mitigating factor, residual doubt, also is entitled to limited weight. In his brief to this court, however, Chinn suggests that we found "a substantial amount of residual doubt" in *Chinn I*, yet harbored "little residual doubt" when reviewing the same facts four years later in *Chinn II.* We cannot agree with Chinn's characterization of our prior rulings. In *Chinn I*, we held that the trial court erred by failing to consider as a mitigating factor residual doubt concerning Chinn's guilt. In connection with that ruling, we proceeded to identify specific evidence presented at trial that we noted "may create a substantial amount of residual doubt" about Chinn's guilt. *Chinn I, supra.*
>
> ***58** In *Chinn II*, however, this court actually evaluated the residual doubt evidence and, after that review, explained why the residual doubt factor was entitled to little weight in mitigation. In fact, given our pronouncement in *Chinn I* that a substantial amount of residual doubt might exist, in *Chinn II* we stated with particularity the evidence leading us to conclude that the residual doubt factor was entitled to little mitigating weight. For the reasons explained in *Chinn II*, we continue to harbor little residual doubt about Chinn's guilt, and we accord that factor little weight in mitigation.
>
> Consequently, having considered and independently weighed the aggravating circumstance and mitigating factors, and having considered both the offense and the offender, we find that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. We reach this conclusion based in part upon our belief that Chinn's scant mitigating evidence withers when weighed against his callous murder of Jones while committed an aggravated robbery.

Chinn III, 1997 WL 464736, *3.

Petitioner appealed the decision in *Chinn III* to the Ohio Supreme Court, who independently reviewed Petitioner's death sentence for appropriateness, concluding:

> Upon a review of the evidence in mitigation, we find that the evidence concerning appellant's history, character, and background is entitled to some, but very little, weight in mitigation. Specifically, we find that appellant's support and devotion for his family, his helpfulness to others, and his efforts toward education are entitled to some, but very minimal, weight in mitigation. Appellant's religious beliefs and his bitterness over his father's death are also entitled to little or no weight in mitigation. Appellant's father died more than a decade before appellant committed this senseless and tragic murder of Brian Jones, an innocent victim who offered absolutely no resistance in the aggravated robbery. Further, appellant's belief in God obviously did not dissuade him from robbing and killing. Additionally, appellant's assertions of innocence—a matter pertaining to the issue of "residual doubt"—are entitled to no weight in mitigation. Residual doubt is irrelevant to the issue of whether appellant should be sentenced to death, *State v. McGuire* (1997), 80 Ohio St.3d 390, 686 N.E.2d 1112, syllabus, and we have absolutely no doubt of appellant's guilt.

State v. Chinn, 85 Ohio St.3d 548, 578 (1999).

The state courts also addressed the issue of residual doubt during Petitioner's state post-conviction proceedings, wherein he presented the instant claim of ineffective assistance of trial counsel:

> The third and fourth claims raised by Chinn in his petition for post-conviction relief involve his contention that his conviction and sentence are void or voidable because: (1)

his trial attorney rendered ineffective assistance of counsel by failing to investigate and present mitigating evidence; and (2) the one aggravating circumstance present in his case does not outweigh the mitigating factors. Specifically, Chinn argued that trial counsel failed to present evidence of his good conduct in prison while awaiting trial, and failed to present "additional evidence of residual doubt." He also argued that the death sentence was inappropriate because the aggravating circumstance did not outweigh all of the mitigating factors; i.e., both those factors presented to the judge and jury and those not presented.

The trial court denied both of these claims under the doctrine of *res judicata.* The court stated that the claim of ineffective assistance of counsel could have been raised on direct appeal. The court further stated that the mitigating factors had been considered by this court in a prior direct appeal.

***59** We find that although we had previously weighed the aggravating circumstance and mitigating factors in the prior direct appeals, the post-conviction petition claims involve mitigating factors that were not raised in those appeals. Furthermore, all of the mitigating evidence that Chinn referred to in support of this claim is *dehors* the record, and was therefore not capable of being presented on direct appeal. We conclude that the trial court did err by ruling that the claim of ineffective assistance of counsel was barred by the doctrine of *res judicata.* However, we must affirm the trial court's decision on other grounds.

In the prior direct appeals, we addressed, and independently weighed, the aggravating circumstance and mitigating factors present in this case. Indeed, we concluded that the aggravating circumstance outweighs the mitigating factors presented at sentencing. Therefore, we must now determine whether our assessment of the mitigating factors and aggravating circumstance would change based upon the additional evidence.

In Ohio, good behavior while in jail awaiting trial has been recognized as a mitigating factor. See e.g., *State v. Moreland* (1990), 50 Ohio St.3d 58, 70, 552 N.E.2d 894. Therefore, we will presume for the sake of argument that the failure to present this evidence did constitute ineffective assistance of counsel. In order to prevail on this issue, Chinn must show a "reasonable probability that the outcome would have been different but for the ineffective assistance of counsel." *State v. Lascola* (1988), 61 Ohio App. 3d 228, 236, 572 N.E.2nd 717. Evidence of good conduct in jail is entitled to very little weight in mitigation. *Moreland*, at 70. We cannot conclude that the requested evidence would have changed the outcome of the sentencing hearing. Therefore, we find that Chinn's claim of ineffective assistance prejudicial to his rights is not well-taken.

Likewise, we find that Chinn's claim that trial counsel should have presented additional evidence of residual doubt "is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death." *State v. McGuire* (1997), 80 Ohio St. 3d 390, 686 N.E.2nd 1112, paragraph 1 of the syllabus. Therefore, since any evidence regarding residual doubt would not be relevant to the sentence imposed, we cannot say that counsel was ineffective for failing to present such evidence.

Accordingly, we find that the trial court's denial of Chinn's claim of ineffective assistance of counsel for failure to present mitigating evidence, as well as his claim that the aggravating circumstance did not outweigh the available mitigating factors was correct, albeit for reasons differing from than those relied upon by the court. Since we conclude that Chinn's claim is not meritorious, we further find that the trial court did not err by failing to conduct an evidentiary hearing on this issue.

State v. Chinn, No. C.A. 16764, 2000 WL 1458784, *4-5 (Ohio App. 2nd Dist. Aug. 21, 1998).

This Court must analyze Petitioner's allegations of ineffective assistance of trial counsel under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, *Strickland* requires a showing that counsel made errors so serious that counsel was not functioning as counsel at all. Secondly, the Petitioner must show that the deficient performance prejudiced the defense. *Id.* at 680. In evaluating whether the representation fell into the category of ineffective assistance, the Court must look to "prevailing professional norms." *Id.* When analyzing an ineffectiveness claim for the failure to investigate, the court must consider the claim by assessing the reasonableness of the decision and by giving heavy deference to counsel's judgment. *Id.* at 691. Moreover, the United States Supreme Court has cautioned

federal habeas courts to "guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). That is, " '[s]urmounting *Strickland*'s high bar is never ... easy,' ... [e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is even more difficult." *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). The Court instructed that the standards created under *Strickland* and § 2254(d) are both " 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* (citations omitted). Thus, when a federal habeas court reviews a state court's determination regarding an ineffective assistance of counsel claim, "[t]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

***60** Here, the Magistrate Judge noted that at the time of Petitioner's trial, Ohio courts recognized residual doubt as a mitigating factor. Thereafter, in *State v. McGuire*, 80 Ohio St.3d 390, 686 N.E.2d 1112 (1997), the Ohio Supreme Court determined that "[r]esidual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender." *Id.* at 403. According to the Magistrate Judge, "the timing of *McGuire* reinforces the correctness of the court of appeals' decision: while *McGuire* was decided after this case was tried, it was decided well before this case was decided on direct appeal by the Ohio Supreme Court in 1999. Thus had defense counsel presented the proffered residual doubt evidence in mitigation at trial, it would have been disregarded as irrelevant when the case reached the Ohio Supreme Court." (ECF No. 86, at 50.) This conclusion holds true so long as the case reached the Ohio Supreme Court on death penalty review. Petitioner, of course, sees the matter differently, and would argue that the question is whether the outcome of the sentencing proceedings would have been different had his counsel presented this evidence in the first instance. That scenario is highly unlikely, as the defense theory of the case was one of identity and the jury found Petitioner guilty beyond a reasonable doubt of all charges. As such, there is no reasonable way to conclude that the outcome of Petitioner's sentencing proceeding would have been different had counsel argued residual doubt, which is no longer a valid sentencing consideration in the State of Ohio.

With respect to the issue of Petitioner's good performance in jail while awaiting trial, the state courts determined that this was a relevant factor, and for the sake of argument, were willing to consider that counsel's performance was deficient in this regard. However, the state courts concluded that even assuming deficient performance, evidence of good prison conduct awaiting trial is entitled to very little weight in mitigation. The Court cannot conclude that this evidence had a reasonable probability of affecting the outcome of Petitioner's sentencing proceedings, and the state court decision in that regard is entitled to deference on habeas review.

For the foregoing reasons, Petitioner is not entitled to relief on his Fifteenth Claim for Relief. The Court does not believe reasonable jurists would find its decision debatable or wrong and declines to issue a certificate of appealability as to this claim.

Sixteenth Claim for Relief:

> Petitioner's due process right to a fair trial was violated because he was denied his right to be present when the trial court gave supplemental jury instructions. U.S. Const. amend. XIV.

In his Sixteenth Claim for Relief, Petitioner argues his rights were violated when the trial court held discussions with the jurors regarding clarification of instructions, outside of his presence. (Petition, ECF No. 3, at 55); (Traverse, ECF No. 27, at 132.) The Ohio Supreme Court denied this claim on the merits, finding the record did not support Petitioner's claim:

> Appellant contends that he is entitled to a new trial because there is nothing in the record to indicate that appellant and defense counsel were present on two occasions involving communications between the trial court and the jury. However, we are unwilling to presume that appellant and his attorneys were not present during the times in question. Rather, "the record must *affirmatively indicate the absence* of a defendant or his counsel during a particular stage of the trial." (Emphasis added.) *State v. Clark* (1988), 38

> Ohio St.3d 252, 258, 527 N.E.2d 844, 851. The record does not affirmatively so indicate and, therefore, we reject appellant's tenth proposition of law.

State v. Chinn, 85 Ohio. St. 3d 548, 568, 709 N.E. 2d 1166, 1183 (1999).

In the Original R&R, the Magistrate Judge recommended this claim be denied on the merits, agreeing there is no record evidence establishing that Petitioner or his counsel were absent during the relevant times. (ECF No. 60, at 163-167.) The Magistrate Judge agreed there was no affirmative factual finding by the state court's that Petitioner was indeed present, but concluded that "no such finding is necessary where they were presumed to be present in the absence of evidence to the contrary and no rule of constitutional law prohibits that presumption." (ECF No. 86, at 52.)

Petitioner objects to this recommendation, countering that "[t]here is absolutely no indication in the record that either Chinn or his attorneys *were present* when this exchange between the judge and the jury took place." (ECF No. 63, at 99.) (emphasis added). Petitioner refers to the guilt phase of the proceedings where "communications between the trial court and the jury were conducted in open court and on the record. (ROW Tr. at 622-41.)" (*Id.*) By contrast, Petitioner argues, the penalty phase jury communications are not reflected in the transcript, and therefore, this Court should infer that he and his counsel were absent at the relevant times.

***61** This Court, like the Ohio Supreme Court, will not presume error from a silent record. Furthermore, as the Magistrate Judge pointed out, if Petitioner and/or his counsel were absent, Petitioner could have raised this claim in post-conviction and presented evidence *dehors* the record in the form of an affidavit of trial counsel. This he did not do. The Court adopts the recommendation of the Magistrate Judge, overrules Petitioner's objections, and finds Petitioner's Sixteenth Claim for Relief to be wholly without merit. Furthermore, no COA should issue as to this claim.

Seventeenth Claim for Relief:

> Petitioner's right to be tried and sentenced by a fair and impartial tribunal was violated because the State trial judge presiding over Petitioner's trial and sentencing was biased. U.S. Const. amends. V, VI, VIII, IC, XIV.

Petitioner's Seventeenth Claim for Relief was previously dismissed as procedurally defaulted. (Opinion and Order, ECF No. 30, at 70-74.)

Eighteenth Claim for Relief:

> Petitioner's right against cruel and unusual punishment and the right to due process were violated when a victim impact statement with opinions about punishment and petitioner's potential for rehabilitation was made at the capital sentencing hearing. U.S. Const. amends. VIII, XIV.

In his Eighteenth Claim for Relief, Petitioner argues his constitutional rights were violated when the trial court considered a victim impact statement made by Brian Jones's mother. The record reflects that Mrs. Jones delivered a statement to the court after the jury had recommended death but before the trial court imposed sentence. Petitioner claims Mrs. Jones expressed her opinion that death was appropriate and Petitioner was not amenable to rehabilitation. (Traverse, ECF No. 27, at 140.)

In *Booth v. Maryland*, the United States Supreme Court held that the admission of victim impact evidence "at the sentencing phase of a capital murder trial violates the Eighth Amendment." 482 U.S. 496, 509 (1987). The Court distinguished two categories of victim impact information – evidence that relates to the victim and the impact of the victim's death on the victim's family, and the family members' opinions as to the appropriate punishment. *Id.* at 503, 508. In *Payne v. Tennessee*, the Supreme Court overruled

a portion of *Booth*, holding "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." 501 U.S. 808, 827 (1991). The Sixth Circuit has characterized *Payne* as overturning "only that part of *Booth* that disallowed 'evidence ... relating to the victim and the impact of the victim's death on the victim's family.' " *Middlebrooks v. Carpenter*, 843 F.3d 1127, 1141 (6th Cir. 2016). *Payne* did not disturb "the portion of *Booth* that forbids 'a victim's family members' characterization and opinions about the crime, the defendant, and the appropriate sentence' from being admitted into evidence." *Middlebrooks*, 843 F.3d at 1141 (citing *Fautenberry v. Mitchell*, 515 F.3d 614, 638 (6th Cir. 2008) (quoting *Payne*, 501 U.S. at 830 n.2)).

The full statement of Mrs. Jones appears in the transcript as follows:

> First of all, I want to say this is very hard and very difficult for us. We are here for our son, Brian Jones, who cannot be here to speak for himself, so we're here to speak on his behalf and for the rest of our family. First of all, we would like for you and everyone to know what a great loss that we have suffered, the pain has been and will be beyond what words could describe. Only another person that has lost a child to such a tragedy could begin to feel the empty, lonely feelings. Needless to say, we have suffered the greatest loss of our entire life. We know that nothing or no one is going to replace that empty and void feeling and that part of our lives are gone. Now, we must begin to try to pick up the pieces and put our lives back together as good as we can. I really don't feel that this will ever be possible because, first of all, we feel very threatened by this Defendant and his family. We have not done or said anything, your Honor, about them; but yet, we are afraid for our safety and we feel very threatened by them. I'm afraid to leave my home alone. I'm afraid for my daughter to leave her home alone; and regardless of what I'm doing, if I know that she's leaving, I will quit whatever I'm doing and go and be with her because I fear what could happen to her. I fear of the morning when my husband leaves for work. I stand at the window. He leaves just before daylight. I stand at the window and watch him until he gets in his car and pulls out our driveway. Never in my life have I ever done this before, I've been doing this ever since our son has been killed. Your Honor, this terrible, threatening fear that we are living with is not a good feeling. We really do feel – We really do feel very threatened by this Defendant and what he might do our family. With his previous record, if he had been put away where he should have been, my son may be living today. Your Honor, this makes me feel very ill inside to think that if this Defendant had not been out there on the streets, on January 30th, that my son would be with us. We would not be going through all of this pain that we're feeling. We would not be afraid and feel threatened as we do today. Your Honor, we feel that this Defendant has been given every opportunity that there is. He's been on shock probation, and by his own actions, has chosen not to accept any of them; and now we feel that the time has come for him to be punished according to the law of Ohio. My family and I thank you and the Courts for being kind to us, and for everything you have done. Thank you a lot.

***62** (Return of Writ, Trial Tr. Vol. V, at 740-42; ECF No. 132-7, PAGEID 9446-9448.)

Petitioner presented this claim as his twenty-first proposition of law before the Ohio Supreme Court, who rejected the claim on the merits:

> Appellant's twenty-first proposition of law concerns alleged victim-impact evidence that was heard by the trial judge after the jury was discharged but immediately before the trial court pronounced sentence on all of the crimes appellant was found guilty of committing. Appellant claims that the evidence included an expression of opinion by Brian Jones's mother that appellant should be sentenced to death. However, Mrs. Jones never specifically stated her opinion as to the appropriate punishment. Rather, she stated that "now we feel that the time has come for [appellant] to be punished according to the law of Ohio." Appellant also complains that Mrs. Jones stated or implied that appellant was incapable of rehabilitation. However, the record does not fully support appellant's claims in this regard. Moreover, and in any event, there is absolutely nothing in the record to suggest that the trial court was influenced by irrelevant factors in sentencing appellant for the capital crime. Therefore, we find no reversible error here.

State v. Chinn, 85 Ohio St.3d 548, 575-76 (1999).

In the Original R&R, the Magistrate Judge agreed with the Ohio Supreme Court, and found no merit to Petitioner's claim. Specifically, the Magistrate Judge determined:

> Petitioner argues that the victim impact statement made by the victim's mother exceeded the proper scope allowed under the Eighth Amendment. (Traverse, Doc. No. 27, PAGEID 415.) Specifically, because she expressed her views on rehabilitation and because life without parole was not an option at the time of Petitioner's trial, Mrs. Jones' concerns and views on Chinn's rehabilitation was essentially a push for the imposition of a sentence of death. (Traverse, Doc. No. 27, PAGEID 421.) Chinn argues that it was error for the sentencer to consider opinions about the defendant's character, potential for rehabilitation, and opinion on proper punishment and that the state court decision was unreasonable when it found she did not express any improper opinions and the record did not support the Eighth Amendment claim. (Traverse, Doc. No. 27, PAGEID 420.) Under clearly established law, he says, her opinions were improper, Chinn's Constitutional rights were violated, and the state courts' reasoning in view of the record was an unreasonable and improper application of established U.S. Supreme Court law. (Traverse, Doc. No. 27, PAGEID 421.)
>
> The statement in question was made by Mrs. Jones to the judge after the jury had made its recommendation of a sentence of death but prior to the court's sentencing. Her statement, which is comprised of approximately two pages of transcript, related the effect of Brian's death on his family. (Trial Tr. Vol. V at 740-741.) It expressed feelings of loss and her constant fear for the well-being of other family members. *Id.* Specifically, Mrs. Jones spoke of a "[t]errible threatening fear that we live with ... We really do feel threatened by this Defendant and what he might do our family[sic]." *Id.* She continued by stating "[w]ith his previous record, if he had been put away where he should have been, my son may be living today. Your Honor, this makes me very ill inside to think that if this Defendant had not been out there on the streets on January 30th, that my son would be with us ... Your Honor, we feel that this Defendant has been given every opportunity that there is. He's been on shock probation, and by his own actions, has chosen not to accept any of them; and now we feel that the time has come for him to be punished according to the law of Ohio." (Trial Tr. Vol. V at 741-742.)
>
> ***63** The comments above do reflect Mrs. Jones opinion as to Petitioner's past rehabilitation attempts. The statements, do not however, go so far as to imply that the only option for punishment would be death, but rather she asks that he be punished in accordance with the laws of Ohio. *Id.* However, even if we find a violation, the statements must be so prejudicial as to render the trial fundamentally unfair. That is not the case here. The statement was made outside the presence of the jurors after they had given their recommendation to the trial court. In *Fautenberry v. Mitchell*, the Sixth Circuit questioned if *Booth* was applicable in cases where the victim impact statement was before a judge, rather than a jury. 515 F.3d 614, 639 (6th Cir. 2008). *Fautenberry* reasoned that the *Booth* court was concerned that the victim impact evidence might "distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime ..." and "divert

> the jury's attention away from the defendant's background and record[ ] and the circumstances of the crime ..." or "create an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." *Id.* at 639; *citing Booth*, 482 U.S. at 505, 507. They held that this risk is severely diminished when the information is before a judge and not a jury, therefore giving *Booth* "minimal relevance." *Fautenberry*, 515 F.3d at 639. Absent evidence to the contrary, it is assumed that the judge did not rely on the improper portion of the victim impact statement. As the Sixth Circuit stated in *Fautenberry*, "the Ohio Supreme Court's finding that there was no indication that the three-judge panel relied on the victim-impact evidence was a 'factual finding that is presumed to be correct under the AEDPA.' " *Id.*; *see also Cooey v. Coyle*, 289 F.3d 882, 910-11 (6th Cir. 2002) (affirming the district court's deference to the Ohio Supreme Court's factual finding that there was "no affirmative indication that the victim impact statements were considered in sentencing [the petitioner] to death.") Likewise, in this case, there is no indication made by the Ohio Supreme Court that the trial judge considered and relied on that portion of the victim impact statement in rend[er]ing sentence.
>
> Petitioner's Eighteen Claim for Relief is without merit and should be dismissed with prejudice. No certificate of appealability should be granted on this claim.

(ECF No. 60, at 169-171.)

In his objections to the R&R, Petitioner objects to the Magistrate Judge's determination that the statements by Mrs. Jones did not violate the Eighth Amendment's prohibition on the introduction of victim impact statements consisting of the "victim's family members characterizations and opinions about the crime, the defendant, and the sentence." (ECF No. 63, at 107, citing *Payne*, 501 U.S. at 830, n.2.) Petitioner asserts that "Mrs. Jones' statements indicated that Chinn posed an ongoing threat of violence, that he was not capable of rehabilitation, and that death was the appropriate punishment." (*Id.* at 108.) With respect to the Magistrate Judge's conclusion that Mrs. Jones did not "go so far as to imply that the only option for punishment would be death, but rather she asks that he be punished in accordance with the laws of Ohio," Petitioner argues:

> This interpretation of Mrs. Jones' statement does not withstand scrutiny. Mrs. Jones clearly wasn't suggesting that the trial court should set aside the jury's death recommendation. Furthermore, life without parole was not available as a sentence at the time of Chinn's trial and sentencing. The statements in question came right after Mrs. Jones had finished explaining that Chinn caused her to fear for her own personal safety, as well as the safety of her loved ones, so it is highly unlikely that Mrs. Jones intended to suggest that a sentence providing for the possibility of parole at some point in the future would be an acceptable alternative to the death penalty. Given the totality of circumstances, Mrs. Jones' request for Chinn 'to be punished according to the law of Ohio' cannot be construed as anything other than a request for the death penalty to be imposed.

(*Id.* at 108 n.29.) Furthermore, Petitioner argues that the decision of the Ohio Supreme Court is not entitled to deference under 28 U.S.C. § 2254(d). According to Petitioner, "[n]o fair-minded jurist reviewing the sentencing transcript in this case could seriously believe that Mrs. Jones intended to convey anything other than a message that Chinn was beyond rehabilitative hope." (*Id.* at 111.) As a result, Petitioner argues, his death sentence "is constitutionally invalid unless the statements did not have a substantial and injurious effect on the penalty phase verdict." (*Id.* at 109.) Finally, Petitioner argues that the decision of the Ohio Supreme Court is not entitled to deference because that court "plac[ed] the burden on Chinn to demonstrate prejudice instead of requiring the State to establish the error was harmless beyond a reasonable doubt...." (*Id.* at 112.)

***64** The Magistrate Judge cited *Post v. Bradshaw*, 621 F.3d 406, 420 (6th Cir. 2010), for the proposition that the erroneous admission of victim impact evidence could be cured through appellate reweighing by the Ohio Supreme Court. Petitioner disagrees with *Post*, arguing "*Post* is an incorrect statement of law which should be overruled, and Chinn reserves the right to challenge it on appeal." (ECF No. 63, at 109.) In *Post*, the petitioner's trial counsel placed victim-impact evidence and other prejudicial information before the court, by way of a presentence investigation report ("PSR") and a statement from the victim's son. *Post*, 621 F.3d at 419. The Sixth Circuit held that "[n]o prejudice could flow from the allegedly improper victim impact evidence," because "[a]ny error was

cured when the Ohio Supreme Court, without considering the victim-impact evidence, independently reweighed the aggravating and mitigating factors and affirmed the sentence of death." *Id.* at 420. The Court concluded that "[i]t is therefore not reasonably probable that the result of the proceedings would have been different had counsel prevented the evidence from being considered by the three-judge panel." *Id.*

This Court finds Petitioner's objections to the decision of the Magistrate Judge unpersuasive, and finds that Petitioner's Eighteenth Claim for Relief lacks merit for the following reasons. First, it is not apparent that an error occurred. The Magistrate Judge assessed Mrs. Jones comments as "relat[ing] the effect of Brian's death on his family" and "express[ing] feelings of loss and her constant fear for the well-being of other family members." (ECF No. 60, at 169.) The Magistrate Judge noted that although her comments did express an opinion about Petitioner's past rehabilitation attempts, the comments did not "go so far as to imply that the only option for punishment would be death, but rather she ask[ed] that he be punished in accordance with the laws of Ohio." (*Id.* at 170.) Secondly, the Magistrate Judge determined that even if the statement was improper, Petitioner is not entitled to relief unless the statements were so prejudicial as to render the entire trial unfair. That is simply not the case when the statements at issue were made *after* the jury returned its sentencing recommendation. In *Fautenberry v. Mitchell*, 515 F.3d 614 (6th Cir. 2008), the Sixth Circuit questioned whether *Booth* would even apply to a situation where the victim information was before a judge or three judge panel. The Sixth Circuit opined that the risks noted by *Booth* – that the victim impact evidence might distract the jury or "create an impermissible risk that the capital sentencing decision will be made in an arbitrary manner" – is "severely diminished" when the information is before the court rather than the jury. *Id.* at 639. Next, the pronouncement by the Ohio Supreme Court that "there is absolutely nothing in the record to suggest that the trial court was influenced by irrelevant factors in sentencing appellant for the capital crime," is a finding of fact entitled to deference by this Court on habeas corpus review. Finally, as noted by *Post* which is still good law in this Circuit, "[n]o prejudice could flow from the allegedly improper victim impact evidence," because "[a]ny error was cured when the Ohio Supreme Court, without considering the victim-impact evidence, independently reweighed the aggravating and mitigating factors and affirmed the sentence of death." *Post*, 621 F.3d at 420.

The Court hereby **DISMISSES** Petitioner's Eighteenth Claim for Relief. Furthermore, this Court does not find that reasonable jurists would disagree with its resolution of this claim and therefore, a COA should not issue.

Nineteenth Claim for Relief:

> Petitioner's right against cruel and unusual punishment and his right to due process were violated because O.R.C. § 2929.03(D)(1) renders O.R.C. § 2929.04(A) and (B) unconstitutionally vague. U.S. Const. amends. VIII, XIV.

Petitioner's Nineteenth Ground for Relief was previously dismissed as procedurally defaulted. (Opinion and Order, ECF No. 30, at 74-81.)

Twentieth Claim for Relief:

***65** Petitioner's right to due process was violated by the ineffective assistance of counsel in his first appeal as of right to the Ohio Court of Appeals of Montgomery County. U.S. Const. amend. XIV

A. Counsel failed to assign as error the vagueness defect in Ohio's sentencing scheme. O.R.C. § 2929.03(D)(1) incorporates the nature and circumstances of the offense, a statutory mitigating factor under O.R.C. § 2929.04(B), into the aggravating circumstance. Accordingly, petitioner's death sentence is arbitrary. *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Stringer v. Black*, 503 U.S. 222 (1993).

B. Counsel failed to assign as error the trial court's failure to define "principal offender," which was an essential element of the O.R.C. § 2929.04(A)(7) aggravating circumstance in this case. *See Cabana v. Bullock*, 474 U.S. 376 (1986).

C. Counsel failed to assign as error, the trial court's erroneous instruction on both the "principal offender" and "prior calculation and design" components of the O.R.C. § 2929.04 (A)(7) aggravating circumstance. Only one of those statutory alternatives applied to this case and it was improper to instruct the jury on both. *State v. Penix*, 513 N.E.2d 744 (Ohio 1987). Counsel's failure to assign this issue as error was certainly prejudicial to petitioner because the court of appeals vacated his death sentence, inter alia, because the trial court considered both components in its in its original sentencing calculus. *State v. Chinn*, No. 1991 WL 289178, 15-17 (Ohio App. 2nd Dist. 1991).

D. Last, appellate counsel were ineffective because they failed to assign as error trial counsel's failure to object to the errors in paragraphs A-C, *supra. Strickland*, 466 U.S. 668.

In his Twentieth Claim for relief, Petitioner sets forth four sub-claims of ineffective assistance of appellate counsel. (Petition, Doc. No. 3 at 65); (Traverse, Doc. No. 27, at 159-162.) The Ohio Supreme Court dismissed this claim summarily:

> Appellant also argues that he was deprived of the effective assistance of counsel in the court of appeals. We find no merit to appellant's contention. The fact that appellate counsel was able to persuade the court of appeals to reverse the death sentence on two separate occasions over the course of the years is a testament to the effectiveness of appellant's counsel. None of the instances of alleged ineffective assistance of appellate counsel compels reversal here.

State v. Chinn, 85 Ohio St.3d 548, 576, 709 N.E.2d 1166, 1188 (1999).

The Magistrate Judge determined that the Court touched upon the substance of each of the four sub-claims in the Court's prior Opinion and Order resolving procedural default:

In his first sub-claim, Petitioner argues that appellate counsel were ineffective in their failure to argue Ohio's capital sentencing scheme is unconstitutionally vague. (Traverse, Doc. No. 27, PAGEID 436.), specifically that Ohio Revised Code § 2929.03 (B) permits the use of the nature and circumstances of the offense as a mitigating factor, but that Ohio Revised Code § 2929.03(D)(1) permits the sentencer to consider the nature and circumstances in aggravation. *Id.*

In making its procedural default determination of the underlying sub-claim, which is effectively Petitioner's Nineteenth Ground for Relief, the District Court considered the claim on the merits to the extent necessary to determine if ineffective assistance of counsel could excuse Chinn's failure to properly raise this claim on direct appeal. (Opinion, Doc. No. 30, PAGEID 562-569.) After a thorough analysis as to whether or not appellate counsel was ineffective in this regard, the District Court held "[e]ven assuming that counsel's decision was unreasonable, or that counsel omitted the issue out of pure oversight, the Court cannot conclude under the prejudice prong of *Strickland* that there is a reasonable probability that the outcome of petitioner's appeal would have been different had appellate counsel raised this issue." (Opinion, Doc. No. 30, PAGEID 568.)

***66** In his next sub-claim, Chinn argues appellate counsel erred when they failed to object to the trial court's failure to define the "principal offender" element. (Traverse, Doc. No. 27, PAGEID 436.) He argues this was error as "principal offender" was an element of the charge that the jury needed to find to convict him of capital murder. *Id.*

Again, in making its procedural default decision of this underlying sub-claim, which is Petitioner's Seventh Ground for Relief, the District Court considered the claim on the merits to the extent necessary to determine if ineffective assistance of counsel could excuse Chinn's failure to properly raise this claim on direct appeal. (Opinion, Doc. No. 30, PAGEID 535-540.) The Court previously held, "that neither trial counsel nor appellate counsel were ineffective, sufficient to excuse the default of petitioner's seventh claim for relief." *Id.* at 539.

Next, Petitioner alleges appellate ineffectiveness in failing to raise on appeal error in the penalty phase instruction

directing the jury to find the "principal offender" and "prior calculation and design" elements of the felony murder specification. (Traverse, Doc. No. 27, PAGEID 435-436.) He argues that under Ohio law only one of the two elements may be considered and weighed. *Id.*

The District Court also addressed this underlying claim in its previous opinion. Again, in making its determination on whether or not the ground for relief, here, the Eleventh Ground for Relief, sub-section c, was procedurally defaulted, the Court addressed the effectiveness of counsel to determine if there was cause and prejudice to excuse such default. (Opinion. Doc. No. 30, PAGEID 547, 554-556.) Thus, the Court addressed the underlying claim on both procedural default and on the merits and found that, "[t]his court is not persuaded either that counsel performed deficiently in failing to object or that petitioner was prejudiced by counsel's failure to object." *Id.* at 554. "For these reasons, the Court cannot find either that defense counsel performed deficiently in failing to object to an instruction that was not facially improper...." *Id.* at 555. Because trial counsel was not ineffective, we cannot hold appellate counsel ineffective for their failure to raise trial counsel's alleged deficiency.

In his last sub-claim, Chinn argues ineffectiveness of appellate counsel in their failure to make the claim that trial counsel were ineffective in their failure to raise the above claims, for not objecting to the instruction containing both "principal offender" and "prior calculation and design," for failing to object when "principal offender" was not defined and, for not challenging the vagueness defect in Ohio's statute. (Traverse, Doc. No. 27, PAGEID 437.)

Again, in making its procedural default decision of this underlying sub-claim, which is Petitioner's Ninth Ground for Relief, sub-claims a, d and e, the Court concluded that while not procedurally defaulted, sub-claim d is without merit. (Opinion, Doc. No. 30, PAGEID 540-543.)

In sum, the Twentieth Claim for Relief should be dismissed with prejudice and Petitioner should be denied a certificate of appealability on it.

(ECF No. 60, at 173-175.)

Although Petitioner objects to the determination of the Magistrate Judge, he merely repeats his arguments as to why he believes the sub-claims are meritorious. Petitioner does not address the Magistrate Judge's conclusion that Judge Sargus effectively ruled on the merits of his ineffective assistance of appellate counsel claims, when the Court determined those claims lacked merit and therefore could not serve as cause to excuse the default of the correlating substantive claims of error. The Magistrate Judge is correct.

***67** Sub-claim A correlates to Petitioner's Nineteenth Claim for Relief; sub-claim B correlates to Petitioner's Seventh Claim for Relief; sub-claim C correlates to sub-claim C of Petitioner's Eleventh Claim for Relief, and sub-claim D correlates to sub-claims A, D and E of Petitioner's Ninth Claim for Relief. In previously finding claims Nineteen, Seven, Eleven (C), and Nine (D) procedurally defaulted, Judge Sargus determined that the ineffective assistance of appellate counsel for failing to raise those claims also lacked merit. (Opinion and Order, ECF No. 30, at 47-52, 54-68, 74-81.) Accordingly, the Court dismisses Petitioner's Twentieth Claim for Relief with prejudice. The Court declines to issue a COA.

IV. Leave to Amend

For the past eight years, Petitioner has made multiple attempts to amend his habeas petition to add claims challenging the constitutionality of Ohio's lethal injection method of execution, as well as a claim that Ohio's capital sentencing scheme, and particularly how it operated in his case upon resentencing, was unconstitutional pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016). Ultimately, his attempts have been denied by well-reasoned decisions by the Magistrate Judge. (ECF Nos. 186, 190, 196, 201, and 205.) Petitioner followed each with objections. (ECF Nos. 187, 193, 197, 202.)

In a November 8, 2017, Decision and Order, (ECF No. 186), the Magistrate Judge denied Petitioner leave to amend his petition to add lethal injection method of execution claims, on the basis of *In re Campbell*, 874 F.3d 454 (6th Cir. 2017), which held that such claims are not cognizable in habeas corpus and must proceed under § 1983. (ECF No. 186.) That decision also restated an earlier denial of Petitioner's motion to add a *Hurst* claim, on the basis that *Hurst* is not applicable to cases on collateral review. The

Magistrate Judge filed a December 13, 2017, Supplemental Memorandum (ECF No. 190) and a January 19, 2018, Second Supplemental Memorandum on Proposed Amendments (ECF No. 196), both of which provided additional discussion regarding why *Hurst v. Florida* does not apply on collateral review. On August 7, 2019, and after this case was transferred to the Undersigned, the Magistrate Judge issued a Third Supplemental Memorandum on Proposed Amendments (ECF No. 201), reiterating his prior decision that Petitioner should not be permitted to add claims under *Hurst* or to add lethal injection invalidity claims. Finally, on March 10, 2020, the Magistrate Judge issued a Fourth Supplemental Memorandum on Proposed Amendments (ECF No. 205), citing the United States Supreme Court decision in *McKinney v. Arizona*, 140 S.Ct. 702 (2020), which held *Hurst* does not apply on collateral review.

"A motion to amend a habeas corpus petition is, per 28 U.S.C. § 2242, subject to the same standards which apply generally to motions to amend under Fed. R. Civ. P. 15(a)." *Lindsey v. Jenkins*, No. 1:03-cv-702, 2018 WL 4654691, *4 (S.D. Ohio, Sept. 27, 2018). A motion to amend is a non-dispositive motion which magistrate judges are authorized to decide in the first instance. 28 U.S.C. § 636(b)(1)(A). *Monroe v. Houk*, No. 2:07-cv-258, 2016 WL 1252945, at *1 (S.D. Ohio, Mar. 23, 2016). A non-dispositive ruling can be set aside only if it is "clearly erroneous or contrary to law." Fed. R. Civ. Pro. 72(a); 28 U.S.C. § 636(b)(1)(A). A court reviews a magistrate judge's legal conclusions *de novo*. *McKnight v. Bobby*, No. 2:09-cv-059, 2017 WL 1154119, at *1 (S.D. Ohio Mar. 28, 2017). Because Petitioner's objections all involve questions of law, this Court applies a *de novo* standard of review.

For the reasons discussed in the Magistrate Judge's November 8, 2017 Decision and Order, ECF No. 186, as well as the supplemental memoranda, ECF Nos. 190, 196, 201 and 205, the Court denies Petitioner's request for leave to amend his petition. In this case, amendment would be futile because Petitioner's proposed *Hurst* claim and his proposed method-of-execution claims would not survive a motion to dismiss. Specifically, Petitioner is denied leave to add a *Hurst* claim, because *Hurst* "do[es] not apply retroactively on collateral review." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). [3]

***68** Furthermore, Petitioner is denied leave to amend his petition to add lethal injection invalidity claims, because such claims are not cognizable in habeas corpus on the basis of *In re Campbell*, 874 F.3d 454 (6th Cir. 2017). *See Bays v. Warden,* No. 18-3101, 2020 WL 1514841, *1, 5-6 (6th Cir. Mar. 30, 2020) (discussing the Sixth Circuit's evolving position regarding the proper "procedural vehicle" for lethal injection claims and finding that "this court's precedent in *In re Campbell*, 874 F.3d 454 (6th Cir. 2017), forecloses Bay's argument that his lethal injection claims are cognizable in habeas rather than as a claim under 42 U.S.C. § 1983"). The Court overrules Petitioner's objection that *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) abrogates *In Re Campbell*. As the Magistrate Judge reasoned, "*Bucklew* did not mention *Campbell* or any other case in which a sister circuit may have held that method of execution claims were not cognizable in habeas...." (ECF No. 201, at 7) (quoting *Raglin v. Mitchell*, No. 1:00-cv-767, 2019 WL 3797967, *1 (S.D. Ohio Jun. 10, 2019)). This position is supported by the Sixth Circuit's very recent decision in *Bays*, applying *Campbell*, after *Bucklew*, to foreclose a lethal injection invalidity claim in habeas corpus. *Bays*, 2020 WL 1514841, *5-6. The decision to deny Petitioner leave to amend does not leave Chinn without remedy, as he is a plaintiff in *In re: Ohio Execution Protocol Litigation*, Case No. 2:11-cv-1016, the consolidated litigation under 42.U.S.C. § 1983, challenging the constitutionality of Ohio's method of lethal injection. That is where Chinn can and must pursue his method-of-execution claims.

In summary, permitting Petitioner to amend would be futile because his proposed *Hurst* claim and his proposed method-of-execution claims would not survive a motion to dismiss. The Court hereby **ADOPTS** the Magistrate Judge's November 8, 2017, Decision and Order (ECF No 186), the Second Supplemental Memorandum on Proposed Amendments (ECF No. 196), the Third Supplemental Memorandum on Proposed Amendments (ECF No. 201), and the March 10, 2020, Fourth Supplemental Memorandum on Proposed Amendments (ECF No. 205). The Court **OVERRULES** Petitioner's objections. (ECF Nos. 187, 193, 197, 202.) Petitioner is denied leave to amend his petition.

V. Conclusion

For the foregoing reasons, the Court **ADOPTS** and **AFFIRMS** the Magistrate Judge's Original R&R (ECF No. 60) and Supplemental R&R (ECF No. 86), and

hereby **OVERRULES** the Objections (ECF No. 63) and Supplemental Objections (ECF No. 91.)

Furthermore, the Court **ADOPTS** and **AFFIRMS** the Magistrate Judge's November 8, 2017, Decision and Order (ECF No. 186), and Supplemental Memoranda on proposed amendments (ECF Nos. 190, 196, 201 and 205) and **OVERRULES** Petitioner's objections. (ECF Nos. 187, 193, 197, 202.) Petitioner is denied leave to amend his petition.

The Court **CERTIFIES** the following issues for appeal: Claims One, Three and Thirteen. The Court **DENIES** a certificate of appealability as to all other claims.

The Court hereby **DISMISSES** this habeas corpus action **WITH PREJUDICE**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 2781522

Footnotes

1 Although the parties use the term "mental retardation," the Court will use the phrase "intellectual disability" where possible. *See* *Frazier v. Jenkins*, 770 F.3d 485, 490 n.1 (6th Cir. 2014) (citing *Hall v. Florida.*, 572 U.S. 701, 704 (2014)). Certain references will be made to older terminology as it was commonly used at the time of the previous proceedings in this case.

2 The prior Opinion and Order stated that sub-claim 9(I) was dismissed as without merit, but that appears to be a typographical error. (ECF No. 30, at 54-55.) It was a portion of sub-claim 9(H) that was discussed and dismissed.

3 The Court notes that the state courts have considered and denied Chinn's motion for a new sentencing phase of his trial on the basis of *Hurst*. *State v. Chinn*, No. 28345, 2020 WL 116037, *5 (Ohio App. 2nd Dist. Jan. 10, 2020) ("We conclude that Chinn has not demonstrated a right to have the holding in *Hurst* applied retroactively to his case. We further conclude that even if *Hurst* did apply, Chinn has not demonstrated the type of Sixth Amendment violation found in that case.").

2013 WL 3288375
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Western Division.

Davel CHINN, Petitioner,
v.
WARDEN, MANSFIELD CORRECTIONAL INSTITUTION, Respondent.

No. 3:02–cv–512.
|
June 28, 2013.

Attorneys and Law Firms

Melissa J. Jackson, Steven Scott Nolder, Federal Public Defender, Christa M. Hohmann, Erin Gallagher Barnhart, Federal Public Defender for the Southern District of Ohio, Rachel Troutman, Ohio Public Defender, Columbus, OH, for Petitioner.

Brenda Stacie Leikala, Ohio Attorney General's Office, Holly E. Leclair Welch, Matthew A. Kanai, Office of the Ohio Attorney General, Matthew C. Hellman, Columbus, OH, for Respondent.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

MICHAEL R. MERZ, United States Magistrate Judge.

***1** This capital habeas corpus case is before the Court on Petitioner's Objections (Doc. No. 63) to the Magistrate Judge's Report and Recommendations on the merits of the case as it stood before the 2012 Amended Petition (the "Original Report," Doc. No. 60). The Warden has filed a Response to the Objections (Doc. No. 66) and Judge Sargus has recommitted the matter to the Magistrate Judge for a supplemental report and recommendations in light of the Objections and Response (Doc. No. 76).

Procedural Status of the Case

The murder in this case occurred January 30, 1989. The case was in the Ohio courts continuously from the time Chinn was indicted on March 3, 1989, until he filed his Petition here November 4, 2002. As filed, the Petition included twenty claims for relief (Doc. No. 3). On Respondent's Motion, Judge Sargus dismissed Claims for Relief 5(C), 7, 11, 14, 17, and 19 as procedurally defaulted and Claims for Relief 9(D) and 9(I) on the merits (Opinion and Order, Doc. No. 30). The Original Report recommended that the remaining claims be dismissed with prejudice and that a certificate of appealability issue as to Claims for Relief One, Three, Five(A) and Thirteen (Doc. No. 60, PageID 923). The Warden filed no objections on the certificate of appealability issues, but Chinn objects to the recommended disposition of all the claims covered in the Original Report (Objections, Doc. No. 63).

After the present Objections became ripe, Chinn filed an Amended Petition adding Grounds for Relief Twenty–One and Twenty–Two relating to Ohio's current lethal injection protocol (Doc. No. 72). The Warden filed a Return to the Amended Petition (Doc. No. 79), Chinn filed a Reply (Doc. No. 81) and the Warden has filed a Sur–Reply (Doc. No. 84). The issues raised by the Amended Petition have not yet been the subject of a report and recommendations and are not dealt with in this Supplemental Report, pending determination that those claims are ripe for decision.

Background Facts

The background facts of this case, as recited by the Ohio Supreme Court, are as follows:

> On the evening of January 30, 1989, Davel "Tony" Chinn, appellant, completed a midterm examination at Cambridge Technical Institute in Dayton. Later that night, fifteen-year-old Marvin Washington saw appellant near Courthouse Square in downtown Dayton. Washington, who had known appellant for approximately one year, knew him only by the name of "Tony." Washington and appellant spent part of the night drinking beer and loitering around the downtown area. At some point, appellant showed Washington a .22 caliber nickel-plated revolver and suggested that they look for someone to rob. At approximately 11:00p.m.,

Washington went into an adult bookstore on South Ludlow Street and was ejected from the store because of his age. Thereafter, Washington and appellant loitered in the area of South Ludlow Street looking for someone to rob.

Meanwhile, Gary Welborn and Brian Jones had pulled their cars into a parking lot at the corner of South Ludlow Street and Court Street and had parked side-by-side in opposite directions to converse with each other through their driver's side windows. Appellant and Washington spotted the two men and decided to rob them. Washington approached Jones's vehicle from the rear, and appellant approached Welborn's car from the rear. Appellant pulled out a small silver revolver, pressed it against the side of Welborn's head, and demanded money. Welborn saw Washington's face, but he was unable to see the face of the gunman. Welborn handed his wallet to Washington, and Jones handed his wallet to the gunman. According to Welborn, "the guy with the gun said we'd better have at least a hundred dollars between us or he'd kill us both." After emptying the victims' wallets of money, the two assailants began discussing which car they wanted to steal. Following a brief discussion, they decided to steal both cars. Washington got into the driver's side of Jones's car and forced Jones into the passenger's seat. Appellant instructed Welborn to remain still. As appellant began walking toward the back of Welborn's vehicle, Welborn seized the opportunity to escape. At trial, Welborn testified, "The guy, he comes around. He starts walking around my car, telling me not to touch my keys. He still has the gun pointed at me. I watch him in my rearview mirror and sideview mirror. As soon as he gets behind my car, I duck down. I thought he was going to kill me now or later anyway so I ducked down in my car seat, threw it in drive, and took up off [sic] Ludlow the wrong way, straight to the police station." Welborn arrived at the station at approximately 11:30 p.m., and reported the incident to police.

***2** After Welborn had escaped, appellant got into the back seat of Jones's car and held the revolver to Jones's neck while Washington drove the car away from Dayton and toward an area in Jefferson Township. At some point, appellant instructed Washington to turn the vehicle around and to pull over to the side of the road. Washington complied with appellant's instructions. After Washington had stopped the car, he leaned forward in the driver's seat so that appellant could exit the two-door vehicle from the driver's side. According to Washington, appellant got out of the car and walked around to the passenger's side. Appellant then got Jones out of the car and shot him. Appellant and Washington drove away from the scene in Jones's automobile. While fleeing from the scene, appellant told Washington that he shot Jones because Jones could have identified them and because Jones "didn't have enough money." Appellant told Washington that he had shot Jones in the arm.

Stacy Ann Dyer lived at 5500 Germantown Pike in Jefferson Township. Dyer witnessed the shooting but did not see the gunman's face. Dyer testified that on January 30, 1989, at approximately 11:30 p.m., she had just arrived home and parked in her driveway facing the street. At that time, Dyer saw a black twodoor Chevrolet Cavalier pull off to the side of the road on Germantown Pike. Dyer observed a man get out of the driver's side of the vehicle and walk over to the passenger's side. She also saw the silhouette of a person exiting the vehicle from the passenger's side. The two people then walked to the back of the car. At that moment, Dyer heard a gunshot and a scream. The victim ran through Dyer's yard and fell to the ground in her neighbor's yard. Dyer then saw the black car speed away from the scene. Dyer ran inside her house and informed her father and her sister what had happened. Dyer's sister called police, and Dyer and her father went outside to check on the victim. They found the victim, Brian Jones, on his knees with his face to the ground. Dyer asked the victim whether he was injured, but Jones did not respond. When police and paramedics arrived at the scene, Jones was still breathing but was unconscious. He never regained consciousness and was pronounced dead on arrival at the hospital.

Dr. David M. Smith performed the autopsy. Smith found that Jones had died as a result of a massive acute hemorrhage due to a gunshot wound to his arm and chest. Smith found that the projectile had entered through Jones's left arm, had proceeded directly into Jones's chest, and had perforated the main pulmonary artery. Smith recovered the .22 caliber lead projectile from an area near the base of Jones's heart. Carl H. Haemmerle, an expert in firearms, examined the .22 caliber projectile and determined that it had been fired from a revolver. He also examined the sweatshirt that Jones had been wearing at the time of the shooting. Evidence revealed that the muzzle of the weapon

had been in direct contact with the garment at the time the shot was fired.

***3** Following the shooting, Washington and appellant drove in Jones's car to 5214 Lome Avenue in Dayton. There, Washington introduced appellant to Christopher "Bay" Ward. Ward testified that, on January 31, 1989, at approximately 12:30 or 1:00 a.m., Washington had pulled up to 5213 Lome Avenue in the black Chevrolet Cavalier and had introduced Ward to a man named "Tony," who was seated in the front passenger's seat. Ward spoke to Washington for approximately thirty to forty-five minutes until Washington and the man he was with drove away. Later that night, Washington returned to Lome Avenue and told Ward that "Tony" had shot someone in Jefferson Township.

On February 5, 1989, police arrested Washington based on information they had received from Ward. Washington confessed to police and named Tony as the killer. However, Washington was unable to give police the suspect's last name and address. On February 7, Washington helped police prepare a composite sketch of Tony. Later, after police had nearly exhausted all leads in their search for Tony, the composite sketch was released to the news media. On Wednesday, February 22, 1989, a Dayton area newspaper printed the composite sketch along with an article indicating that the suspect's name was Tony.

Shirley Ann Cox worked as a receptionist in her husband's law office. On Thursday, February 23, two men walked into the office. One of the men identified himself as Tony Chinn and requested to see Cox's husband. Cox informed the man that her husband was not available. That night, while Cox was reading the previous day's newspaper, she saw the composite sketch of the suspected killer. She said to her husband, "My God, I don't believe this." "This Tony Chinn that was in [the office] this morning is in the paper." On Friday, February 24, Cox called police to inform them that she had seen the suspect and that his name was Tony Chinn.

After speaking to Cox, police obtained a photograph of appellant and placed it in a photo array with the pictures of five other men. On February 24, police showed the photo array to Washington and to Ward. Washington positively identified appellant as the killer. Additionally, Ward identified appellant as the man he had seen in the passenger's seat of the victim's car-the man Washington had referred to as "Tony." That same day, on February 24, police arrested appellant in connection with murder.

On February 27, police conducted a lineup. Washington, Ward, Cox, Dyer, and Welborn all viewed the lineup. Dyer and Welborn could not identify appellant. Welborn attempted to make a selection based on the voices of the subjects but chose someone other than appellant. Ward and Cox were able to positively identify appellant. Washington initially indicated that the killer was not in the lineup. However, after leaving the room where the lineup was conducted, Washington summoned Detective David Lantz into an interview room and told him that number seven in the lineup (appellant) was the killer. Washington explained to the detective that he had previously indicated that appellant was not in the lineup out of fear that appellant was able to see him through the screen in the room where the lineup was conducted.

***4** *State v. Chinn,* 85 Ohio St.3d 548, 553, 709 N.E.2d 1166 (1999).

Analysis

First Ground for Relief: Failure to Disclose *Brady* Material

In his first claim for relief Chinn argues that his conviction must be reversed because the State failed to disclose impeaChinng evidence about its witness Marvin Washington, specifically that Washington was moderately retarded with neuropsychological deficits which might have impacted his credibility. (Petition, Doc. No. 3 at 8); (Traverse, Doc. No. 27, PageID 285.)

The Ohio Second District Court of Appeals decided this claim on the merits, applying *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *State v. Chinn,* 2001 Ohio App. LEXIS 3127, 2001 WL 788402 (2nd Dist.2001). Because the state courts decided this claim on the merits, the Original Report concluded our review was required to be deferential under 28 U.S.C. § 2254(d)(1) (Original Report, Doc. No. 60, PageID 783).

For the most part Petitioner's Objections reiterate what was argued in his Petition and Traverse (Objections, Doc. No. 63, PageID 944–952). He takes exception to the holding that, although the material could have been used to impeach Washington, it failed to meet the other *Brady* prongs. "It does not follow that the impeachment of the State's key witness would be immaterial, although the Magistrate Judge somehow came to that conclusion." (Objections, Doc. No. 63, PageID 945.)

Under *Brady,* evidence is material if there is a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell,* 556 U.S. 449, 469–470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). Reasonable probability means the likelihood of a different result is great enough to "undermine confidence in the outcome of the trial." *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "[E]vidence impeaChinng an eyewitness may not be material *if the State's other evidence is strong enough to sustain confidence in the verdict."* (Objections, Doc. No. 63, PageID 944) *citing Smith v. Cain,* —— U.S. ——, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012) (emphasis added).

Petitioner argues that the State's evidence against him was not strong and the jury's verdict was dependent on the testimony of Marvin Washington. As support he cites to the Ohio Supreme Court's opinion that "[t]he state's case against [him] hinged on the testimony of Marvin Washington. If the jury accepted Washington's testimony, the jury was certain to convict appellant, but if the jury did not believe Washington, it was certain to acquit appellant of all charges." *State v. Chinn,* 85 Ohio St.3d 548, 561, 709 N.E.2d 1166 (1999). Chinn maintains that in the Original Report, "[t]he Magistrate Judge listed reasons the jury *might* still believe Washington's testimony [if they had had the additional impeachment evidence], but gave no reasons that show the jury *would* have still believed Washington." (Objections, Doc. No. 63, PageID at 945 .) Additionally, Chinn objects that the Original Report listed the evidence available at trial to support the conviction, but other than the testimony of Washington, fails to specify what evidence was considered.

***5** Chinn cites to various discrepancies within Washington's testimony, to wit; that he had difficulty remembering details accurately, specifically as to Chinn's number in the photo array and police lineup and that he had met Chinn through Henry Walker and Stephanie Woods. (Objections, Doc. No. 63, PageID 946–49.) He also notes discrepancies in various reports as to the height of the man with Washington and Jones, all of which place the shooter closer to the height of the victim (about 5′10) whereas Chinn is only about 5′6. *Id.* Finally, he reiterates that he had an alibi on the night of the murder.

The evidence cited above by Chinn was before the jurors and trial judge. As quoted in the Original Report, the evidence relied on by both the state courts and this Court included:

> From the time of his interview to the time of his trial testimony, Washington's version of events remained consistent, coherent, and plausible. When making his subsequent identifications of Chinn, Washington identified him from a second photo spread after stating that the defendant was not present in the first spread. He later identified Chinn after a line-up. There was a corroboration of events and identification by other witnesses. Additionally, there was testimony as to Washington's high level of adaptive functioning. Finally, defense counsel himself testified that he *might* have used the information contained within the records for impeachment purposes, but he did not feel Washington would have met the criteria for mental retardation. (Trial Tr. Vol. VI at 129–134.) The juvenile records were not material to guilt, nor is there a reasonable probability that had they been disclosed, the result of the proceeding would have been different.

(Original Report, Doc. No. 60 at PageID 788–89.) The corroboration included detailed testimony from Christopher Ward, who spoke with Washington and "Tony" for about half an hour on the night of the murder. In addition, the depiction of the sequence of events from Stacy Dyer corroborated the

testimony of Washington. Information was before the jury as to Washington's identification of Chinn, and initial lack thereof, in the police lineup, as well as the discrepancy as to what number he selected from the photo array. Likewise, the jury was made aware through the trial testimony of Detective Lantz that Washington told him that he met Chinn through Henry Walker and Stephanie Woods, but when questioned, both Walker and Woods denied knowing Chinn. It is up to the trier of fact to make a determination on both credibility and as to how much weight each piece of evidence should be afforded.

When determining whether the withheld information was material and therefore prejudicial, habeas courts consider it in light of the evidence available for trial that supports the petitioner's conviction. *See Towns v. Smith,* 395 F.3d 251, 260 (6th Cir.2005); *Clinkscale v. Carter,* 375 F.3d 430, 445 (6th Cir.2004). As stated in the Original Report, Petitioner has established the first prong of a *Brady* violation, that the omitted records could have been used for impeachment purposes. However the remaining prongs have not been established: that the evidence was material to the outcome of his trial, and that there was prejudice resulting from the omission of this evidence. Given the evidence presented at trial, the juvenile records showing neuropscychological defects were not material, nor is there a reasonable probability that had they been disclosed, the result of the proceeding would have been different. The decision of the state court of appeals was therefore neither contrary too, nor an unreasonable application of *Brady.*

***6** The Magistrate Judge again concludes the First Ground for Relief should be denied on the merits but deserves the encouragement to proceed further which would be implicit in granting a certificate of appealability.

Second Ground for Relief: Prosecutorial Misconduct

In his Second Ground for Relief, Chinn asserts he was deprived of a fair trial, in both the guilt and penalty phases, by pervasive prosecutorial misconduct (Petition, Doc. No. 3, PageID 669–673; Traverse, Doc. No. 27, PageID 302). This claim was decided on the merits in the state courts, and the Original Report concluded that the state courts' decision was neither contrary to nor an objectively unreasonable application of United States Supreme Court precedent (Original Report, Doc. No. 60, PageID 814). The Original Report recommended that the claim for relief be denied on the merits and that a certificate of appealability also be denied. *Id.*

Asserted Guilt Phase Misconduct

In his Objections, Chinn again challenges the prosecutor's conduct by arguing that he vouched for credibility of witness Marvin Washington; he vouched for the police by misstating evidence; he urged the jurors to consider that "victims have rights too"; and he challenged Petitioner's alibi evidence by making references to a witness who did not testify. (Objections, Doc. No. 63, PageID 953.) Chinn specifically argues that the State was offering opinions as to the credibility of the witnesses and the strength of their case, taking exception to the trial judge's finding that the prosecutor only "asked the jury to assess the credibility of these witnesses." *Id.*

The only addition Chinn makes in the Objections to the arguments made in the Petition and Traverse is that he disagrees with the Court's findings that the prosecutor was asking the jurors to assess the credibility of witnesses, as the evidence shows that the State was actually offering an opinion as to the credibility and strength of the witnesses. *Id.* He relies on *Caldwell v. Russell,* 181 F.3d 731, 737 (6th Cir.1999), *abrogated on other grounds by Mackey v. Dutton,* 217 F.3d 399, 406 (6th Cir.2000), for the proposition that a prosecutor may not express personal opinions as to these matters. *Id., citing Caldwell.* He argues that the prosecutor's comments here, as in *Caldwell,* go beyond merely arguing the case and imply that the prosecutor knows something that is not being presented, thus jeopardizing the defendant's right to be tried solely on the evidence presented before the court. (Objections, Doc. No. 63, PageID 954.) However, the *Caldwell* court continued in its analysis and held that, "[b]y contrast, a state's attorney is free to argue that the jury should arrive at a particular conclusion based upon the record evidence, including the conclusion that the evidence proves the defendant's guilt." *Caldwell v. Russell,* 181 F.3d 731, 737 (6th Cir.1999).

As the state courts recognized, prosecutorial misconduct will warrant habeas relief only if the relevant misstatements were so egregious as to render the entire trial unfair to a degree tantamount to a deprivation of due process. *Donnelly v.*

DeChristoforo, 416 U.S. 637, 643–45, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). *See State v. Chinn,* 85 Ohio St.3d 548, 709 N.E.2d 1166 (1999), holding "[t]he instances of alleged misconduct, taken singly or together, did not substantially prejudice appellant or deny him a fair trial and a fair and reliable sentencing determination." *Id.* at 559, 709 N.E.2d 1166.

***7** Chinn next argues that the Court failed to consider the cumulative impact of the prosecutorial misconduct at the culpability phase of trial (Objections, Doc. No. 63, PageID 955, *citing United States v. Trujillo,* 376 F.3d 593 (6th Cir.2004), holding that "errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone ... may cumulatively produce a trial setting that is fundamentally unfair." *Id.* at 614, *quoting United States v. Hernandez,* 227 F.3d 686, 697 (6th Cir.2000) and *Walker v. Engle,* 703 F.2d 959, 963 (6th Cir.1983).

The Original Report rejected each of the guilt-phase prosecutorial misconduct claims on the merits, holding

1. There was no misconduct on the claim the prosecutor was vouChinng for the credibility of witnesses (Original Report, Doc. No. 60, PageID 799–800).

2. There was no prejudice from the brief reference in closing argument to testimony which had not been given (Original Report, Doc. No. 60, PageID 801).

3. There was no prosecutorial misconduct violating the United States Constitution in reference to the absent alibi witness, Darryl Chinn (Original Report, Doc. No. 60, PageID 802–803).

4. The prosecutor's comment that it was the defense which asked for an involuntary manslaughter instruction, while improper, was not prejudicial (Original Report, Doc. No. 60, PageID 804).

5. The prosecutor's comment that "victims have rights to" was not misconduct (Original Report, Doc. No. 60, PageID 804–805).

6. There was no prosecutorial misconduct in calling Shirley Cox as a witness (Original Report, Doc. No. 60, PageID 805).

Trujillo, relied on by Chinn in his Objections, is not an application of *Donnelly* or other Supreme Court precedent on evaluating the cumulative effect of prosecutorial misconduct. Rather, it states the test for reviewing cumulative error made by a trial judge in a criminal case tried in federal court.

The Original Report did not expressly state the Magistrate Judge's conclusion, stated now, that the two instances of prosecutorial misconduct in the guilt phase did not render the trial fundamentally unfair. The state courts' conclusion to that effect is neither contrary to nor an objectively unreasonable application of *Donnelly.*

Asserted Penalty Phase Misconduct

The Original Report also rejected Chinn's claims of prosecutorial misconduct in the penalty phase of the trial (Doc. No. 60, PageID 805–814).

Chinn objected to the prosecutor's comment on the absence of proof by Chinn of one of the statutory mitigating factors, to wit, that he was underprivileged. The Original Report concluded there was no constitutional violation in the comment. *Id.* at PageID 810–811.

Chinn objects that somehow the comment precludes the jury from considering "any relevant mitigating factor," (Objections, Doc. No. 63, PageID 956, *citing Eddings v. Oklahoma,* 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The prosecutor's comment here was that there was evidence which showed the absence of a mitigating factor, that is, showing that Chinn was not underprivileged. There is no law known to this Court which permits a jury to speculate on the possibility of a mitigating factor when evidence has been produced that that factor is not present in a case. *Eddings* and its progeny make clear that mitigating evidence must be admitted, but the absence of evidence of a statutorily prescribed mitigating factor focuses the jury's attention on the evidence, not on speculation.

***8** The Original Report also concluded that, if there was any error here, it was cured by appellate reweighing (Original Report, Doc. No. 60, PageID 811, *citing Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Chinn objects (Objections, Doc. No. 63, PageID 956). He concedes that *Lundgren v. Mitchell,* 440 F.3d 754 (6th Cir.2006) is to the contrary, but argues that Lundgren "is

an incorrect statement of law and Chinn reserves the right to challenge it on appeal." *Id.* Any right to challenge the *Lundgren* on appeal depends on Chinn's receiving a certificate of appealability on this issue. In the Original Report, the Magistrate Judge recommended denying a certificate on this claim and Chinn makes no new argument in his Objections (see particularly PageID 958–959).

The Magistrate Judge again respectfully recommends that the Second Ground for Relief be denied and that Chinn be denied a certificate of appealability on these claims.

Third Ground for Relief: Admission of Testimony of Shirley Cox

In his Third Ground for Relief, Chinn asserts he was denied a fair trial by admission of the testimony of Shirley Cox. Ms. Cox worked in the downtown Dayton law office of her husband, Bobby Joe Cox. On the morning of February 23, 1989, Chinn came into that office, identified himself as "Tony Chinn," and spoke to her for about fifteen minutes. That evening she saw in the newspaper a police composite sketch of the perpetrator of the Jones shooting and identified him to the Dayton Police as the person she had met that morning. The entirety of Ms. Cox's brief testimony is reproduced in the Original Report at PageID 817–823.

Chinn claims this testimony illogically bolstered the identity evidence and allowed the jury to infer that he was seeking legal advice. Both the Second District Court of Appeals and the Ohio Supreme Court found that the portion of Ms. Cox's testimony about where she met Chinn should have been excluded, but the Ohio Supreme Court concluded its admission was harmless beyond a reasonable doubt. *State v. Chinn,* 85 Ohio St.3d 548, 560–561, 709 N.E.2d 1166 (1999). The Original Report found this conclusion was neither contrary to nor an objectively unreasonable application of clearly established Supreme Court precedent. (Doc. No. 60, PageID 827.)

Chinn objects that this Court is required to review the admission of this evidence *de novo* under the standard of *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (Objections, Doc. No. 63, PageID 964, *citing Ruelas v. Wolfenbarger,* 580 F.3d 403 (6th Cir.2009) .)

The Original Report noted that the Ohio Supreme Court had found the admission of this testimony was harmless beyond a reasonable doubt (Doc. No. 60, PageID 827). Although that court did not cite *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). it was obviously applying the *Chapman* test: harmlessness beyond a reasonable doubt. The Original Report concluded "[b]ecause the Ohio Supreme Court's finding of harmless beyond a reasonable doubt would have satisfied the *Chapman* standard, *a fortiori* it satisfies *Brecht."* (Doc. No. 60, PageID 827.)

***9** That conclusion is completely consistent with *Ruelas.* In that case, Judge Martin wrote:

> [I]n *Fry [v. Pliler,* 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007)] the Justices also told us that *Brecht's* "substantially injurious" test "obviously subsumes" the question whether *Chapman* was reasonably applied: How could the determination that something was harmless beyond a reasonable doubt be unreasonable if it did not also have a "substantially injurious" effect on the jury? Moreover, because "it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*)," *Fry,* 551 U.S. at 120, *Fry,* as a practical matter, "subsumes" Esparza. *[Mitchell v. Esparza,* 540 U.S. 12, 17–18, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003)]. But again: *Esparza* was not overruled. Per that case, a habeas court remains free to, before turning to *Brecht,* inquire whether the state court's *Chapman* analysis was reasonable. If it was reasonable, the case is over. But in *Fry* the Justices also emphatically stated (there was no dissent regarding this point), that a habeas court may go straight to *Brecht* with full confidence that the AEDPA's stringent standards will also be satisfied.

Ruelas, 580 F.3d at 412–413.

The next sentence of the Original Report reads "[a]nd this Court cannot say that it [the Ohio Supreme Court's decision] is contrary to or an unreasonable application of *Brecht."* (Doc. No. 60 at 827.) It should have read and is hereby amended to read that the Ohio Supreme Court's decision was neither contrary to nor an objectively unreasonable application of *Chapman.* The Ohio Supreme Court's reasoning in this regard is persuasive. Ms. Cox was not permitted to testify what it was that Chinn wanted to consult her husband about. An error is harmless if it played such an inconsequential role in

the actual trial in which it occurred that it assuredly had no impact on the trial's verdict. *Wilson v. Mitchell,* 498 F.3d 491 (6th Cir.2007), *citing* 2 R. Hertz & J. Liebman, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 31.4d (5th ed.2005). She had to give context to her meeting with Chinn and all are agreed that, if she had merely said it was at her husband's business, there would have been no difficulty. Although Mr. Cox is known to this Court as having a practice concentrated in criminal defense, that was not disclosed to the jury. There is nothing *per se* incriminating about consulting an attorney and the visit to Mr. Cox's office was nearly a month after the crime in suit was committed.

Chinn's Objections as to the Third Ground for Relief are not persuasive and the Magistrate Judge again recommends it be denied on the merits. Because the Ohio courts found constitutional error here, albeit harmless error, the Original Report recommended that a certificate of appealability issue on this Ground for Relief and Respondent has not objected.

Fourth Ground for Relief: Restriction of Cross–Examination of Christopher Ward

***10** In his Fourth Ground for Relief, Chinn asserts his Confrontation Clause rights were violated when he was prevented from cross-examining Christopher Ward about a statement he allegedly made to Major McKeever of the Jefferson Township Police regarding how much attention he had paid to Chinn when he saw him on the night of the murder. Chinn's counsel wanted to ask the following questions: Did Ward make an oral statement to Major McKeever on February 5, 1989? If so, did he say that he did not pay "any attention to the other man in the car whose name was Tony?" Trial counsel's basis for the question was Major McKeever's police report, not a statement signed by Ward at the time of his interview which apparently also exists.

The court of appeals found error in the refusal to permit this cross-examination, but that the error was not prejudicial. *State v. Chinn,* 1991 Ohio App. LEXIS 6497, 1991 WL 289178 (Ohio App. 2nd Dist.1991). The Ohio Supreme Court on further direct appeal [1] concluded that "the error, if any, ... did not unfairly prejudice appellant." *State v. Chinn,* 85 Ohio St.3d 548, 571, 709 N.E.2d 1166 (1999). The court expressly applied the *Chapman* test, concluding "The error, if any, was harmless beyond a reasonable doubt." *Id.* at 573, 709 N.E.2d 1166.

The Original Report recommended dismissal of this Ground for Relief with prejudice because "Petitioner has not shown prejudice arising from the inability to cross-examine this witness on this statement." (Doc. No. 60, PageID 834.)

In his Objections, Chinn argues that his Confrontation Clause right "encompasses the right to impeach adverse witnesses with their own prior statements," (Doc. No. 63, PageID 968, *citing Lewis v. Wilkinson,* 307 F.3d 413, 419 (6th Cir.2002)). At issue in that case was an entry in the diary of the complaining witness in a rape case which went directly to the issue of consent and motive for pressing charges. The statement was unquestionably that of the victim. The trial court had excluded the diary entry from use on cross-examination under the Ohio rape shield law, Ohio Revised Code § 2907.02(D). In *Lewis,* the Sixth Circuit relied on its prior decision in *Boggs v. Collins,* 226 F.3d 728 (6th Cir.2000). In *Boggs* the court recognized as a general matter that a trial court has discretion "to impose limits [on cross-examination] based on concerns about harassment, prejudice, confusion of the issues, witness safety, or interrogation that is only marginally relevant." 228 F.3d at 736, *citing Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In this case the trial judge refused to permit defense counsel to question Ward about a purported prior statement of his because it was reported in a police report, i.e., it was a purported prior oral statement which the witness had not adopted. The trial judge's ruling, quoted in the Ohio Supreme Court opinion, was "The Court: Police reports are inherently inaccurate and that is the very reason why under criminal rule 16 they are not to be made available and not to be used on cross-examination of any witnesses. On that basis, the Court sustains the objection," quoted at 85 Ohio St.3d 548, 571, 709 N.E.2d 1166. The court of appeals found the ruling was error because "[t]he question propounded by Appellant did not concern a police report, but a prior statement of the witness to a police officer. Any constraints on the use or introduction of a police report in which the same matter might appear were not in issue." *State v. Chinn,* 1991 Ohio App. LEXIS 6497 *86, 1991 WL 289178 (Ohio Ct.App., Montgomery County Dec. 27, 1991). The Ohio Supreme Court declined to decide if it was error and held there was "no prejudicial

impact whatsoever." *Chinn,* 85 S.Ct. at 573. Both courts were presented with Confrontation Clause claims and decided them without citing to any United States Supreme Court precedent.

***11** On the underlying question of whether it is a violation of the Confrontation Clause to prevent cross-examination about a purportedly inconsistent prior statement, the Objections rely on *Giles v. Maryland,* 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967) (Objections, Doc. No. 63, PageID 968). There was no majority opinion in *Giles.* The petitioners had claimed state suppression of favorable evidence and knowing use of perjured testimony. Without deciding those constitutional questions, the Court remanded the cases for the Maryland courts to consider two police reports made part of the record at the Supreme Court level. Plainly, *Giles* does not include a holding of the Supreme Court that the Confrontation Clause is violated whenever questioning about a purported prior inconsistent statement is prevented. And a state court decision on a constitutional issue can be reversed in habeas corpus only if it is contrary to or an objectively unreasonable application of the holding of a Supreme Court decision. The fact that the Ohio court did not explain this portion of its decision does not preclude AEDPA deference. *Harrington v. Richter,* 562 U.S. ——, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011).

The other constitutional decision made by the Ohio Supreme Court on this Ground for Relief is that any error in preventing the questioning was harmless beyond a reasonable doubt. As with the Third Ground for Relief, the state court was clearly applying the *Chapman* test, although it again did not cite *Chapman.*

The Ohio Supreme Court's application of *Chapman* was not objectively unreasonable. First of all, it is unclear from the record that Ward actually made the statement about which defense counsel wished to ask him [2]. When the author of the report, Major McKeever, was himself questioned about the report, he indicated that the purported statement by Ward was really more his own observation than Ward's statement. That admission by McKeever is lent credibility by the fact that its content was contrary to the State's interest, i.e., it diminished the credibility of Ward's identification of Chinn.

Secondly, as the Ohio Supreme Court also noted, there were a number of other identifications of Chinn by Ward. *Chinn,* 85 Ohio St.3d at 573, 709 N.E.2d 1166. Finally, as the Ohio Supreme Court also found, "the alleged inconsistent statement, even if Ward had made it, was not inconsistent with any of Ward's trial testimony." *Id.* Chinn argues in his Objections both that this was Ward's prior statement (there is no evidence to that effect) and that it has a "glaring inconsistency" with his trial testimony (Objections, Doc. No. 63, PageID 969). The record does not support either of those conclusions.

The Ohio Supreme Court's decision on the question presented in the Fourth Ground for Relief is neither contrary to nor an objectively unreasonable application of clearly established Supreme Court precedent. The Magistrate Judge again respectfully recommends it be denied on the merit and Petitioner be denied a certificate of appealability.

Fifth Ground for Relief: Admission of Hearsay

***12** In his Fifth Ground for Relief, Chinn argues the trial court violated his constitutional rights when, on three occasions, it allowed hearsay testimony into evidence. Sub-claim C was dismissed by Judge Sargus as procedurally defaulted.

Sub-claim A asserts error in allowing Detective Lantz to testify that Shirley Cox picked Chinn from a line-up. The Ohio Supreme Court rejected this claim on the merits and the Original Report concluded this was not an objectively unreasonable application of Supreme Court precedent (Doc. No. 60, PageID 842).

Ms. Cox testified but was not asked about her line-up identification of Chinn on direct. She could have been asked about it on cross, [3] but it would not have made good sense for the defense to introduce that identification to the jury. After she testified, the State called Detective David Lantz who was permitted to testify, over objection, to Ms. Cox's identification. The Ohio Supreme Court held Lantz's testimony about Ms. Cox's identification is excluded from the Ohio Rules of Evidence definition of hearsay as a statement of "identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification and the declarant testifies at trial and is subject to cross-examination." Ohio R. Evid. 801(D)(1)(c).

The Objections do not quarrel with the finding in the Original Report that Ms. Cox did not become unavailable when she was excused, because she worked less than two blocks from the courthouse; she could have been recalled by the defense if there was any reason to believe she would recant her identification.

Instead, the Objections assert that admission of this testimony does not come within the then-governing rule of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), which required as a matter of Confrontation Clause law that, as to an unavailable declarant, hearsay could be admitted if it (1) bears particularized guarantees of trustworthiness or (2) falls within a firmly-rooted hearsay exception (Objections, Doc. No. 63, PageID 973, *citing Miller v. Stovall,* 608 F.3d 913 (6th Cir.2010)). To show that "an out-of-court identification at a police lineup does not fall within either one of these exceptions," the Objections rely on *Mitchell v. Hoke,* 930 F.2d 1 (2nd Cir.1991). However, *Mitchell v. Hoke* says nothing about the exclusion of an out-of-court identification from the definition of hearsay. It holds that a lineup identification does not come within the residual hearsay exception codified in Fed.R.Evid. 803(24), even assuming that exception is "firmly rooted." 930 F.2d at *2–3. It was admitted that the declarant was available, but had recanted his identification, which undercut any notion it was highly probative as required by Fed.R.Evid. 803(24). *Id.* The case nowhere holds that out-of-court lineup identifications are inherently unreliable.

Even if *Mitchell* were in point, which it is not, it is also not a decision of the United States Supreme Court. A lower court may not use circuit precedent "to refine or sharpen a general rule of Supreme Court jurisprudence into a specific rule that" the Supreme Court has not announced. *Marshall v. Rodgers,* 569 U.S. ——, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (*per curiam*).

***13** In sum, Ms. Cox was available for cross-examination. Had she been prepared to discredit Detective Lantz's testimony in any way, she could have been recalled to the stand. In any event, Lantz's testimony fits squarely within the definition of non-hearsay in Ohio R. Evid. 801[4] and no United States Supreme Court precedent holds that the admission of such a state violates the Confrontation Clause. The Magistrate Judge again respectfully recommends that Sub-claim A be denied on merits but that a certificate of appealability be issued.

Sub-claim B asserts error in allowing Detective Lantz to present hearsay testimony of a statement by witness Marvin Washington that he could make an identification from the lineup but had not done so because he was frightened that Chinn could see him. Sub-claim B is without merit for the same reasons as Sub-claim A. In addition, Washington testified to the same facts at trial and was subject to cross-examination about them, so there is no "unavailability" issue. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability on this sub-claim.

Sixth Ground for Relief: Ineffective Assistance of Trial Counsel: Expert Witnesses

In his Sixth Ground for Relief, Chinn claims his trial counsel provided ineffective assistance by not calling an expert witness on the potential fallacies of eyewitness identification and on the likely effects of mental retardation on testimony. These claims were presented first to the state courts in post-conviction where the trial court decided them after an evidentiary hearing at which two experts and trial counsel testified. The trial court's denial of relief was affirmed by the court of appeals after a thorough discussion of the evidence. *State v. Chinn,* 2001 Ohio App. LEXIS 3127, 2001 WL 788402 (2n d Dist.2001) (quoted at length in the Original Report, Doc. No. 60, PageID 843–854). Since the Ohio Supreme Court declined jurisdiction over a requested appeal, the court of appeals' decision is the last reasoned state court judgment on this claim.

In the Original Report, the Magistrate Judge concluded that the court of appeals' decision was neither contrary to nor and objectively unreasonable application of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As regards presentation of an expert on the potential fallacies of eyewitness identification, Chinn relies in his Objections on *Ferensic v. Birkett,* 501 F.3d 469 (6th Cir.2007). *Ferensic* is not an ineffective assistance of trial counsel case, but rather one where a proffered expert on eyewitness identification

was excluded because the expert's report was produced in an untimely manner. In that case, the Sixth Circuit emphasized the utility of eyewitness expert testimony in dispelling common misunderstandings about the reliability of eyewitness identification testimony and noted that the jury in that case seemed hesitant about identification. 501 F.3d at 482. However, nothing in the *Ferensic* decision suggests it is ineffective assistance of trial counsel to fail to present such an expert. Nor is there anything in the appellate court decision here which suggests a categorical rejection of such experts. Instead, the court compared the testimony on this subject in post-conviction of Dr. Solomon Fulero [5] with the actual eyewitness identifications in this case. Chinn notes two points on which an expert might have dispelled common misperceptions. He says most people do not realize that a witness' memory can be changed after the event or that a witness's certainty is not a guaranty of accuracy (Objections, Doc. No. 63, PageID 979).

***14** In rejecting this portion of the ineffective assistance of trial counsel claim, the court of appeals wrote:

> The factors about which Fulero testified were not particularly relevant to the testimonies of Cox and Ward. Cox testified that Chinn was in her presence for ten to fifteen minutes. Thus, she apparently had sufficient time to view his face. Ward testified that he had been in Chinn's presence for thirty to forty-five minutes. Thus, he had sufficient time to view his face. Neither Cox nor Ward testified about the presence of any salient detail and neither reported that they had been in fear while in Chinn's presence. Although Cox's race is unknown from the record, both Ward and Washington were black. There was no evidence that Cox or Ward were mentally retarded. There was no evidence that Cox was alcohol-impaired at the time she witnessed "Tony." Ward testified that he had not been drinking or smoking marijuana on the night he had met Chinn. Further, there was no evidence presented that would support the conclusion that either Cox or Ward had received post-event information which would have changed their identifications of Chinn. Thus, pursuant to the record, none of the factors discussed by Fulero were relevant to the testimonies of Cox or Ward.
>
> The main witness against Chinn was Washington. On the night of the crime, Washington was with "Tony" from approximately 7:00 p.m. to midnight, a significant length of time. Further, Washington knew "Tony" before the night of the crime because he had previously met and "partied" with him. In fact, the two were together awhile before they decided to rob someone and ultimately spent the entire evening together. Washington knew that Chinn was carrying a gun before the crime was committed, but it apparently was not visible to him during most of the evening. Washington did not report being in fear at any time during the night. Although he might have experienced fear or stress during the actual crime, he was not the victim of the crime.
>
> Both Washington and Chinn were black. Washington testified that when he had met Chinn on the evening of the crime, Chinn had been drinking alcohol. Washington, who had not had any alcohol before meeting Chinn, then began drinking with Chinn and the two eventually purchased more beer and consumed it before committing the crime. Washington testified that he had felt intoxicated by the time he had arrived at the scene where the crime had been committed. Although Washington might have been alcohol-impaired at the time of the crime, he had not had alcohol at the time he originally saw and recognized Chinn.
>
> There is no evidence that Washington acquired post-event information about the crime that altered his memory. In fact, Detective Lantz testified that at the time Washington gave his first account of the events of that evening, Lantz had not given him any information about the crime. Lantz also said that until Washington had implicated "Tony," investigators had never suspected anyone linked to that name. Further, Lantz testified that Washington's testimony at Chinn's trial had been consistent with his original story. Thus, none of the factors discussed above would have been particularly relevant to Washington's testimony.

***15** *State v. Chinn,* 2001 Ohio 1550, 2001 Ohio App. LEXIS 3127 *21–24, 2001 WL 788402 (2nd Dist.2001). The court of appeals applied the correct standard under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and Chinn has not demonstrated its application to the proposed expert eyewitness identification testimony is contrary to or an unreasonable application of *Strickland.* Indeed, Chinn has pointed to no case finding ineffective assistance of trial counsel for failure to present a witness such as Dr. Fulero.

Chinn also claims it was ineffective assistance of trial counsel to fail to present an expert on the effects of mental retardation on a witness's testimony. The Original Report also rejected this claim on the basis of the court of appeals' opinion on appeal from denial of post-conviction relief (Original Report, Doc. No. 60, PageID 859–860). In dealing with this sub-claim, the court of appeals wrote:

> The only factor that might have been relevant was the effect of mental retardation on Washington's ability to perceive and remember information.
>
> At the post-conviction relief hearing, Everington testified that Washington had suffered from moderate range mental retardation, had had a limited ability to comprehend, had been easily swayed by others, had been eager to please authority figures, could have been easily distracted, had had significant weakness in long-term recall, and had distorted and confused new information. Fulero testified that mentally retarded people show a decreased accuracy rate in making later identifications and are also more suggestible and often have desires to please authority and to hide their mental retardation.
>
> On the other hand, Monta, an experienced criminal attorney, testified that, after meeting Washington, he had thought Washington probably would have passed psychological "muster." He also stated that the case was probably not centered solely on Washington's identification of Chinn because other witnesses who testified had implicated Chinn in the commission of the crime. Although DeVoss testified positively about Washington's characteristics and abilities, we note that she met Washington in April 1989 and thought he was a "blooming idiot" at that time. During her contact with him between April 1989 and 1992, she decided otherwise, but Chinn's trial was in August 1989, so DeVoss most likely would not have been available to testify positively about Washington's characteristics at the time of Chinn's trial.
>
> Lantz testified that Washington had understood questions and had appropriately answered them. He said that in his interactions with Washington, nothing had led him to think that Washington had been mentally retarded or had been unable to give a truthful account of the events in question. Dr. Martin testified that little can be known by looking solely at a person's IQ scores and that IQ scores do not give information about a person's level of adaptive functioning.
>
> Considering all of this evidence, we cannot conclude that there is a reasonable probability that the result of the trial would have been different had Chinn's counsel called experts to testify about eyewitness identification and Washington's mental retardation. The only eyewitness identification factor that was relevant in the case was Washington's alleged mental retardation and the effects of that retardation were disputed. Although Everington could have testified as to her beliefs about Washington, such testimony was contradicted by the testimonies of Monta, Lantz, and Martin.

***16** Further, we have carefully reviewed Washington's testimony at Chinn's trial. His testimony is remarkably coherent and consistent. We do not agree with Everington's testimony that, during Chinn's trial, Washington had been unable to recall important facts from the night of the crime, had not understood questions, and had given inconsistent and inappropriate answers. Although Washington was unable to give times for many of the events during the evening, he testified that he had not been wearing a watch. While Washington was unable to remember some facts about the evening of the crime, such as with which hand Chinn had held the gun, Washington did remember other very specific facts, such as what he had worn on the night of the crime, the general type of clothing that Chinn had worn, that Jones' car had had a digital clock, and that Chinn had been drinking a sixteen ounce "big mouth Micky" when he had first seen him. Further, although Washington admitted during his testimony that he could not read or write in cursive, we do not believe that such abilities were required for Washington to accurately identify Chinn.

Washington picked Chinn from a photo spread, after not picking suspects from earlier photo spreads that had not contained Chinn's photograph. Thus, although mentally retarded people might be eager to please authorities, assuming Washington was mentally retarded, he must not have been eager enough to please authorities to immediately pick a suspect from the first photo spread or to immediately identify Chinn during the police lineup. Finally, although mentally retarded people might generally have a decreased accuracy rate in making later identifications, such decreased accuracy rate does not mean Washington's identification of Chinn was wrong. In fact, Washington's familiarity with Chinn prior to the night of the

> crime likely increased his accuracy rate in identifying him. As Martin testified, a person's level of adaptive functioning is not apparent from his IQ scores. The witnesses who came in contact with Washington prior to Chinn's trial thought that, while Washington might not have been especially bright, he would have passed "muster" and that his story was consistent and plausible.
>
> Considering all of the evidence on the record, we cannot conclude that there is a reasonable probability that had Chinn's counsel called experts on eyewitness identification and mental retardation, the result of the trial would have been different. Thus, we will not conclude that the trial court erred in concluding that Chinn's counsel was not ineffective for failing to call experts on eyewitness identification and mental retardation.

State v. Chinn, supra, at *24–28. Here again Chinn has failed to demonstrate that this decision is an unreasonable application of *Strickland.*

The Magistrate Judge again respectfully recommends this Ground for Relief be denied and a certificate of appealability be denied.

Seventh Ground for Relief: Failure to Define "Principal Offender"

***17** In his Seventh Ground for Relief, Chinn claims he was denied due process when the trial judge failed to give the jury a definition of "principal offender." The Original Report noted this claim had been dismissed as procedurally defaulted and that ruling remained the law of the case. Chinn has made no objection to that conclusion.

Eighth Ground for Relief: Failure to Provide *Brady* Material and Follow the Local "Case Management" Plan

Equal Protection Sub-claim

The first part of Chinn's Eighth Ground for Relief is that he was denied equal protection of the laws when the trial court refused to enforce the local rule of the Montgomery County Common Pleas Court providing for "open file" discovery in criminal cases. On direct appeal the Ohio Supreme Court put to one side the question of the value of "open file" discovery and concluded Chinn actually had much of the material he would have obtained from the prosecutor's file and had failed "utterly" to show any prejudice from failure to receive the balance of the information. *State v. Chinn,* 85 Ohio St.3d 548, 569, 709 N.E.2d 1166 (1999).

The Original Report found this claim not to be cognizable in habeas corpus because it sought enforcement of a local rule which was not constitutionally compelled (Doc. No. 60, PageID 862). In his Objections, Chinn emphasizes that this is a constitutional claim under the Equal Protection Clause, to wit, that treating Chinn differently from other criminal defendants in the Montgomery County Common Pleas Court was constitutionally invidious discrimination (Objections, Doc. No. 63, PageID 986–988). Although this claim is cognizable in habeas corpus, it is without merit.

Chinn argues that "[w]hen state action interferes with a fundamental right, the Court should evaluate the equal protection challenge to that action under a strict scrutiny standard of review." (Objections, Doc. No. 63, *citing San Antonio School District v. Rodriquez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).) As a general proposition of law, that is certainly correct. See, e.g., *Plyler v. Doe,* 457 U.S. 202, 216–17, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The question then is whether the particular decision complained of interfered with a "fundamental right." Chinn identifies the right in question as the "right to a fair trial." (Objections, Doc. No. 63, PageID 986.) That is far too general a description. That way of characterizing failure to enforce this particular local rule would elevate every local criminal rule to the level of a "fundamental right." Chinn cites no authority for the proposition that local criminal discovery rules rise to the level of fundamental rights. It would be hard to reconcile such a characterization with the well-established rule that there is no constitutional right to discovery at all in a criminal case. *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *Lorraine v. Coyle,* 291 F.3d 416, 441 (6th Cir.2002).

The Objections criticize the Report for "apparently" requiring Chinn to show that there were similarly-situated person who were granted this discovery (Doc. No. 63). On the contrary, it was Chinn who suggested the need for such proof by alleging that there were such similarly-situated person and then providing no examples. (See Original Report, Doc. No. 60, PageID 861, n. 6.)

***18** Since there is no fundamental right to discovery in a criminal case, the trial judge's action in denying Chinn application of the "Case Management Plan" must be judged on rational basis scrutiny. *Vacco v. Quill,* 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997). The states cannot make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference. *Id.; Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam); *Radvansky v. City of Olmsted Falls,* 395 F.3d 291, 312 (6th Cir.2005).

Rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness or logic of legislative choices." *FCC v. Beach Communication, Inc.,* 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). See also, e.g., *Dandridge v. Williams,* 397 U.S. 471, 486, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Nor does it authorize "the judiciary [to] sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam). For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. See, e.g., *Beach Communications, supra,* at 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (slip op., at 7); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988); *Hodel v. Indiana,* 452 U.S. 314, 331–332, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (per curiam). Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. See, e.g., *Nordlinger v. Hahn,* 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *Dukes, supra,* at 303. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger, supra,* at 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (slip op., at 13). *See also, e.g., United States R. Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 528, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959). Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications, supra.* See also, e.g., *Nordlinger, supra; Sullivan v. Stroop,* 496 U.S. 478, 485, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990); *Fritz, supra,* at 174–179; *Vance v. Bradley,* 440 U.S. 93,111 (1979); *Dandridge v. Williams, supra,* at 484–485.

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications,* supra,. *See also, e.g ., Vance v. Bradley, supra,* at 111; *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 812, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976); *Locomotive Firemen v. Chicago R .I. & P.R. Co.,* 393 U.S. 129, 139, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968). A statute is presumed constitutional, see supra, at 6, and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973), whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it " 'is not made with mathematical nicety or because in practice, it results in some inequality.' " *Dandridge v. Williams, supra,* at 485, *quoting Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.Ed. 369 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69–70, 33 S.Ct. 441, 57 L.Ed. 730 (1913). See also, *e.g., Burlington Northern R. Co. v. Ford,* 504 U.S. 648, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992); *Vance v. Bradley, supra,* at 108, and n. 26; *New Orleans v. Dukes, supra,* at 303; *Schweiker v. Wilson,* 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981). We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Schweiker v. Wilson, supra.* In neither case did we purport to apply a different standard of rational-basis review from that just described. True, even the standard of rationality as we so often have defined it must find some footing in the realities of the

subject addressed by the legislation. In an equal protection rational basis review, the burden is on the one attacking the governmental arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. *Heller v. Doe,* 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

***19** Here the trial judge, a part of the court which adopted the Case Management Plan, articulated its purpose—to promote settlement of criminal cases. Noting that this case was headed for trial in any event, he found that applying the Case Management Plan would not further the state purpose for which it was adopted. That is surely a rational basis for declining to apply the local rule. Chinn has therefore not demonstrated an Equal Protection violation as to this part of his Eighth Ground for Relief. [6]

***Brady v. Maryland* sub-claim**

Chinn's claim under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in his Eighth Ground for Relief is that the delayed disclosure of Gary Welborn's statement that he saw a third person (other than Washington) with Chinn prior to the crime, i.e., in the vicinity of Ludlow and Court Streets in Dayton.

The Original Report noted defense counsel had been able to cross-examine Welborn about this third person and quoted the court of appeals' decision that there was no *Brady* violation (Doc. No. 60, PageID 864–66). Chinn objects "to the Magistrate Judge's reliance on '[t]he Court of Appeals' conclusion that there was no prejudice from the delay in disclosure of this information' because the state court of appeals never made that conclusion with regard to the Welborn statement." (Objections, Doc. No. 63, PageID 988.) However, the relevant language from the court of appeals' opinion quoted in the Original Report was "we see no reasonable possibility that Chinn would have been acquitted if he had known this information." (Doc. No. 63, PageID 866, *quoting State v. Chinn,* 1991 Ohio App. LEXIS 6497, *74, 1991 WL 289178 (2n d Dist.1991). That is precisely the standard to be applied in deciding if there is prejudice from a failure to disclose:

> To establish prejudice, Belmontes must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S., at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. That showing requires Belmontes to establish "a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing," and "that had the jury been confronted with this ... mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Wiggins v. Smith,* 539 U.S. 510, 535, 536, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).
>
> *Wong v. Belmontes,* 558 U.S. 15, 19–20, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009).

The Original Report concluded that Chinn had not shown prejudice (Doc. No. 63, PageID 867). Chinn objects that, if the defense had had the description of the third person and his car earlier, they might have been able to track him down and he might have impeached Washington. But this is all speculative. With the descriptions, the third person had not been found nor had his statement been taken by the time of the post-conviction process, which took many years, in part because of a remand for an evidentiary hearing. The court of appeals' conclusion that prejudice had not been shown is not an unreasonable application of *Brady* and the Eighth Ground for Relief should be dismissed on the merits.

Ninth Ground for Relief: Ineffective Assistance of Trial Counsel

***20** In his Ninth Ground for Relief, Chinn asserts he was deprived of the effective assistance of trial counsel in in nine different ways, making sub-claims 9(A) through 9(I). Chinn's objections to the proposed dispositions of the sub-claims are dealt with seriatim.

Sub-claim A: Failure to Object to Instructions on Both "Principal Offender" and "Prior Calculation and Design" Components of the Felony Murder Capital Specification

Ohio Revised Code § 2929.04 provides as a possible capital specification that the offense of aggravated murder was committed in connection with certain designated felonies and "either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior

calculation and design." Sub-claim 9(A) asserts ineffective assistance of trial counsel for failure to object to the fact that the trial judge instructed on both "principal offender" and "prior calculation and design" components. The Original Report found there was no prejudice in the failure to object because the Ohio Supreme Court considered the asserted trial court error on the merits and did not find it defaulted for failure to object (Doc. No. 63, PageID 874).

The Ohio Supreme Court found no error in the disjunctive instruction on these two elements actually given by the trial judge. *State v. Chinn,* 85 Ohio St.3d 548, 558–59, 709 N.E.2d 1166 (1999). Chinn's position is premised on the notion that if counsel had objected, the trial judge would have chosen some other instruction which would have been more easily understandable to the jury and on that instruction the jury would not have recommended a capital sentence (Objections, Doc. No. 63, PageID 996). However, it cannot be deficient performance for a lawyer to fail to object to a legally correct jury instruction even if an instruction more favorable to the defendant can be imagined and would have also been lawful.

Sub-claim B: Failure to Object to the Failure of the Trial Court to Merge Kidnapping and Aggravated Robbery Aggravating Circumstances

In Sub-claim 9(B), Chinn claims ineffective assistance of trial counsel from counsel's failure to object to the trial court's failure to merge the kidnapping and aggravated robbery aggravating circumstances. While finding error in the lack of merger, both the court of appeals and the Ohio Supreme Court independently re-weighed the aggravating circumstances and mitigating factors and merged these two components for that purpose. The Original Report concluded that this reweighing was sufficient to cure the error (Doc. No. 60, PageID 875–76). In his Objections, Chinn concedes that the Sixth Circuit has approved re-weighing as a cure for ineffective assistance of trial counsel in *Post v. Bradshaw,* 621 F.3d 406 (6th Cir.2010). Chinn asserts "*Post* is an incorrect statement of law...." Be that as it may, it is binding on this Court.

Furthermore, it is unclear that re-weighing as a cure for ineffective assistance of trial counsel is what is involved here. Both the court of appeals and the Ohio Supreme Court engaged in reweighing the aggravators and mitigators after merging these two components even though the court of appeals found the claim procedurally defaulted. *State v. Chinn,* 1991 Ohio App. LEXIS 6497, *37, 1991 WL 289178 (2nd Dist.1991). If the Ohio courts did not enforce the default but proceeded to consider the asserted error on the merits, Chinn suffered no prejudice from counsel's failure to object.

Sub-claim C: Failure to Object to Jury Instruction Which Could Have Led the Jury to Treat a Firearm Specification as an Aggravating Circumstance

***21** In Sub-claim 9(c), Chinn claims he received ineffective assistance of trial counsel when his attorney did not object to a penalty phase instruction which, he claims, permitted the jury to treatment a firearm specification which it had found as to one of the underlying felonies as if it were an aggravating circumstance on the aggravated murder.

Chinn raised the underlying claim of trial court error in Proposition of Law No. 1 in the Ohio Supreme Court. *State v. Chinn,* 85 Ohio St.3d 548, 554, 709 N.E.2d 1166 (1999). The Ohio Supreme Court found there was no trial court error because

> The firearm specifications were submitted to the jury only in the guilt phase and were not even identified as "specifications" on the verdict forms that were returned by the jury at the conclusion of the guilt phase. The only specifications that were identified as such on the verdict forms in the guilt phase of appellant's trial were the three death penalty specifications that had been submitted to the jury in connection with Count One of the indictment, i.e., the R.C. 2929.04(A)(3) specifications and the two R.C. 2929.04(A)(7) specifications.

Id. at 557, 709 N.E.2d 1166.

The Original Report concluded that if there was no trial court error, there could not have been ineffective assistance of trial counsel from failure to object (Doc. No. 63, PageID 878). Chinn objects that the "plain language of the supplemental instruction clearly invited the jury to consider the noncapital

firearm specifications as aggravating circumstances that could support a death sentence." (Objections, Doc. No. 63, PageID 998.) This, says Chinn, is because the jury was told that the aggravating circumstances are those that you have found in the previous specifications. However, the only "specifications" which the jury had found were the specifications that qualified Chinn for the death sentence. In other words, although the guilt phase verdicts had firearms findings, they were not labeled "specifications." Because there was no trial court error, there is no prejudice from counsel's failure to object.

Sub-claim D: Dismissed by Judge Sargus.

Sub-claim E: Failure to Object to Instruction on Nature and Circumstances.

The Original Report found this claim was barred by the decision in *Cooey v. Coyle,* 289 F.3d 882 (6th Cir.2002). Chinn objects that, although that is the holding in *Cooey, "Cooey* is an incorrect statement of the law." (Objections, Doc. No. 63, PageID 999). "Correct" or not, *Cooey* is binding on this Court.

Sub-claim F: Failure to Object to Victim Impact Testimony

In Sub-claim 9(F), Chinn asserts that the victim impact statement made by the victim's mother was improper and it was ineffective assistance of trial counsel not to object. The Original Report found this sub-claim barred by *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (Doc. No. 60, PageID 878–79). Chinn objects that the testimony here went beyond *Payne* and the Sixth Circuit's allowance of cure by appellate re-weighing in *Post v. Bradshaw,* 621 F.3d 406 (6th Cir.2010), is not a correct statement of the law. It is nonetheless governing precedent.

Sub-claim G: Failure to Request Limiting Instruction for Shirley Cox's Testimony

***22** In Sub-claim 9(G) Chinn argues his counsel were ineffective for failure to request a limiting instruction regarding Shirley Cox's testimony that she met Chinn when he came to her husband's law office. The Original Report noted that defense counsel had fought hard to keep this fact away from the jury and that getting a limiting instruction would likely re-emphasize the fact of their meeting place (Doc. No. 60, PageID 879). Therefore the Magistrate Judge concluded it was not deficient performance to fail to ask for the instruction. *Id.*

Chinn objects that the Sixth Circuit has held it is deficient performance to fail to request a limiting instruction when the jury's attention has already been focused on the evidence at issue (Objections, Doc. No. 63, PageID 1001, *citing Mackey v. Russell,* 148 Fed. Appx. 355, 365–66 (6th Cir.2005). *Mackey,* as an unpublished opinion, does not have precedential weight. Even if *Mackey* stated the law on this point, that case was decided fifteen years after Chinn's trial and counsel cannot be expected to have anticipated its ruling. *See Strickland, supra,* at 689, on avoiding hindsight in evaluating counsel's performance. Finally, the *Mackey* court noted that "[t]he vast majority of cases hearing ineffective assistance claims based on failure to request a limiting instruction have determined that no prejudice resulted from counsel's failures." *Id.* at 367, *citing Mitzel v. Tate,* 267 F.3d 524, 538 (6th Cir.2001). The Objections are thus unpersuasive on this sub-claim.

Sub-claim H: Failure to Object to Prejudicial Hearsay Testimony

In Sub-claim 9(H) Chinn claims he received ineffective assistance when trial counsel failed to object to hearsay testimony, to wit, out-of-court statements of Marvin Washington offered through Detective Lantz and Christopher Ward. The Original Report found this subclaim to be without merit because Washington testified to the same information in open court (Doc. No. 60, PageID 880). Chinn objects for the reason given as to his Fifth Ground for Relief (Doc. No. 63, PageID 1001) and the Magistrate Judge relies on the analysis given there.

Sub-claim I: Failure to Object to Prosecutorial Misconduct

In Sub-claim 9(I) Chinn alleges he received ineffective assistance when trial counsel failed to object to "prosecutorial misconduct throughout this capital trial." (Petition, Doc. No. 3, PageID 695–96.) The Original Report found that this entire sub-claim had been dismissed by Judge Sargus (Doc. No. 60, PageID 880).

The Objections note that while Judge Sargus' opinion said that it was dismissing claim 9(I), "it is apparent from the record

that the District Court was actually referring to one of the components of claim 9(H) (Objections, Doc. No. 63, PageID 1002–03). Upon examination, the Magistrate Judge finds that there is a typographical error in Judge Sargus' Decision and Order (Doc. No. 30) at PageID 542–43 in the reference to "claim nine (I)" when the reference should have been to a different sub-claim. Because of this typographical error, the Magistrate Judge did not address Sub-claim 9(I) in the Original Report.

***23** However, in dealing with the Second Ground for Relief, the Magistrate Judge has concluded that the state court decision on these claims was neither contrary to nor an objectively unreasonable application of Supreme Court precedent. Given that the state courts reached the merits and found no error, there cannot have been ineffective assistance of trial counsel in failing to raise these claims.

Sub-claim J: Cumulative Prejudice

Chinn claims in his Petition that the cumulative prejudice from counsel's error is sufficient to warrant habeas relief (Petition, Doc. No. 3, PageID 696). The Original Report rejected this claim summarily (Doc. No. 60, PageID 880). Chinn objects that "given the multitude of errors that Chinn's trial lawyers committed, there is clearly a reasonable probability that Chinn would have received a more favorable verdict or sentence when the prejudicial effect of the errors is considered cumulatively as required by *Strickland."* (Objections, Doc. No. 63, PageID 1003.) Having found no prejudice on any of the sub-claims, there is no prejudice to accumulate.

Tenth Ground for Relief: Insufficient Evidence of Identity

In his Tenth Ground for Relief, Chinn asserts that there was constitutionally insufficient evidence to identify him as the perpetrator of this crime. The Original Report concluded that the Ohio Supreme Court applied the appropriate federal standard adopted in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and that its application was not objectively unreasonable (Doc. No. 60, PageID 881–885).

Chinn objects that "the Magistrate Judge failed to examine the credibility and reliability of [witness Marvin] Washington before relying on his testimony." (Objections, Doc. No. 63, PageID 1007.) Chinn notes that the court of appeals described Washington's testimony as "inherently suspect." (Objections, Doc. No. 63, *citing State v. Chinn,* 1991 Ohio App. LEXIS 6497 *55), 1991 WL 289178, but this was in the context of criticizing the trial court's weighing of mitigating factors, not in suggestion there might have been insufficient evidence of identity.

Chinn relies on *United States v. Cravero,* 530 F.2d 666 (5th Cir.1976), for the proposition that testimony which is "unbelievable on its face" is insufficient to support a verdict. *Cravero,* however, is not a case where the Court of Appeals overturned a verdict on such a basis. In fact, the court overturned a Crim. R. 29 decision by a judge and reinstated a jury verdict precisely because deciding credibility was for the jury:

> We believe that for the testimony to be incredible it must be unbelievable on its face. The fact that Lipsky has consistently lied in the past, engaged in various criminal activities, thought that his testimony would benefit him, and showed elements of mental instability does not make his testimony incredible. Lipsky's testimony on direct is quite plausible. This is not a case where a witness testifies to facts that he physically could not have possibly observed or events that could not have occurred under the laws of nature. *See, Geigy Chemical Corp. v. Allen,* 224 F.2d 110, 114 (5th Cir.1955). To be sure Lipsky was thoroughly impeached on cross-examination, but one cannot say that his testimony could not have been believed by a reasonable jury. [Footnote omitted.] *See, e.g., United States v. Hill,* 463 F.2d 235 (5th

Cir.1972); *United States v. Justice,* 431 F.2d 30 (5th Cir.1970).

***24** 530 F.2d at 670–71. In any event, *Cravero* was decided on direct appeal and long before the adoption of the AEDPA which requires double deference in dealing with a sufficiency of the evidence claim. *Coleman v. Johnson,* 566 U.S. ——, ——, 132 S.Ct. 2060, 2062, 182 L.Ed.2d 978, (2012) (*per curiam).* Chinn's Tenth Ground for Relief is without merit.

Eleventh Ground for Relief: Multiple Penalty Phase Jury Instruction Errors

The Original Report noted that this Ground for Relief had been dismissed by Judge Sargus as procedurally defaulted (Doc. No. 60, PageID 885). Chinn makes no objection to this conclusion.

Twelfth Ground for Relief: Improper Mitigation Jury Instructions

In his Twelfth Ground for Relief, Chinn claims that improper jury instructions created a reasonable likelihood that the jury was not able to give "full mitigating effect" to his mitigation evidence (Petition, Doc. No. 3 at 43). The Original Report recommended denying this Ground for Relief on the merits (Doc. No. 60, PageID 890).

The Warden did not object to the Original Report's failure to consider a procedural default, but comments in response to Chinn's Objections that the Court is permitted to consider procedural default *sua sponte.* The Magistrate Judge declines to do so in the absence of an objection by the Warden.

Although we ignore the procedural default, Chinn argues we should also give no AEDPA deference to the Ohio Supreme Court's opinion because that court did not ignore the default and performed plain error review (Objections, Doc. No. 63, PageID 1015). However, the opinion of a state court on plain error review is still entitled to AEDPA deference if the federal court reaches the merits despite the procedural default, which is what this Court has done. *Fleming v. Metrish,* 556 F.3d 520, 532 (6th Cir.2009).

Chinn argues *Metrish* is not controlling precedent because it is subsequent in time to *Jells v. Mitchell,* 538 F.3d 478 (6th Cir.2008), relying on the well-settled rule that a subsequent three-judge panel cannot overrule the published decision of a prior panel (Objections, Doc. No. 63, PageID 1015, *citing United States v. McMurray,* 653 F.3d 367 (6th Cir.2011), and *Salmi v. Sec'y. of HHS,* 774 F.2d 685 (6th Cir.1985)).

In *Fleming,* Judge Gilman wrote for the court that plain error review by a state court did not eliminate the obligation to give AEDPA deference to the merits of a decision by the state court:

> First, none of the cases cited by the dissent decide the question of whether a claim reviewed for plain error by a state court dispenses with our obligation to apply AEDPA deference to the merits of the decision reached by that court. They instead discuss the analytically prior question of whether a federal court is permitted to hear an issue in the first place under the doctrine of procedural default. See, e.g., *Jells v. Mitchell,* 538 F.3d 478, 511 (6th Cir.2008) (holding that a claim not raised before the Ohio Court of Appeals was procedurally defaulted even though the Ohio Supreme Court reviewed the claim for plain error on direct appeal); *Lundgren v. Mitchell,* 440 F.3d 754, 765 (6th Cir.2006) (holding that "a state court's plain error analysis does not save a petitioner from procedural default"); *Seymour v. Walker,* 224 F.3d 542, 557 (6th Cir.2000) (holding that habeas petitioners cannot resurrect procedurally defaulted claims on the sole basis that a state court has applied plain-error review to the issue on direct appeal). We of course agree with these cases to the extent that they stand for the well-established rule that a state court's application of plain-error review does not revive a habeas petitioner's otherwise procedurally defaulted claim on collateral review. But we disagree with our colleague's view that they control not only this court's ability to address a habeas petitioner's claim, but also the appropriate standard of review to apply once we have determined that the claim is reviewable on the merits.
>
> ***25** Second, the question of whether a claim should be addressed on collateral review under the judicially created doctrine of procedural default is independent of the question of whether Congress requires deference pursuant to AEDPA. This court declines to review procedurally

> defaulted claims out of respect for state-court enforcement of state procedural rules. *Clinkscale v. Carter,* 375 F.3d 430, 441 (6th Cir.2004) (citing *Coleman v. Thompson,* 501 U.S. 722, 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)) (observing that the purposes of the procedural-default rule include concerns of comity and federalism). Similarly, Congress enacted AEDPA "to further the principles of comity, finality, and federalism." *Williams v. Taylor,* 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). But the fact that similar concerns motivate both the procedural-default doctrine and AEDPA does not permit us to ignore the latter simply because the former doctrine is deemed inapplicable. Instead, we believe that this court's jurisprudence is reasonably clear about when a state-court's consideration of a claim is to be considered "adjudicated on the merits" for the purpose of triggering our review under AEDPA. See 28 U.S.C. § 2254(d).

Fleming v. Metrish, 556 F.3d 520, 530–531 (6th Cir.2009). Thus *Fleming* does not purport to overrule *Jells,* but to distinguish it. For a lower court, the question is not whether the distinction is persuasive, but whether it was made by a majority of a Sixth Circuit panel in a published decision. The Magistrate Judge finds *Fleming* is precedential. Chinn claims that *Fleming* is an "incorrect statement of the law," but it is nonetheless binding on this Court.

The portion of the instructions to which Chinn objects in this Ground for Relief reads as follows:

> You will consider all the evidence, the arguments, the statement of the Defendant, and all of the information and reports that are relevant to the nature and circumstances of the mitigating facts, and the mitigating facts include but are not limited to the nature and circumstances of the offense, and the history, character, and background of the Defendant; and you may consider, I guess, should consider any facts that are relevant to the issue of whether the Defendant should be sentenced to death.

(Trial Tr. Vol. IV at 731, quoted in Objections, Doc. No. 63, PageID 1013.) Responding to a request from the jury during deliberations for "a summary of the elements that make up the mitigating and aggrevating [sic] circumstances/factors," the judge gave this supplemental instruction:

> The aggravating circumstances are those that you have found in previous specifications and the mitigating factors are those which are relevant to the issue of whether the defendant should be sentenced to death, and they include, but are not limited to, the nature and circumstances of the offense and the history, character and background of the defendant.

***26** (Return of Writ, Apx. Vol. 1 at 289).

Chinn claims that these two instructions, taken together, somehow prevented the jury from considering all of the mitigating evidence he had presented. First of all, Chinn reads the first instruction as saying the jury was "free to completely ignore Chinn's mitigating evidence." (Objections, Doc. No. 63, PageID 1014). No juror familiar with ordinary English usage would construe those words in that way. The trial judge said "may consider" and then corrected himself to say "should consider." Using the words "I guess" in between would signify to the ordinary listener that the judge had caught his mistake and corrected it. Certainly there can be no objection to the words "should consider" taken alone. Certainly there can be no objection to the judge's correcting his mistake of saying "may consider." And there is no clearly established United States Supreme Court precedent holding that the manner in which the correction was made somehow violates Chinn's constitutional rights.

All the supplemental instruction does is to distinguish—accurately—between aggravating circumstances (which in this and any Ohio case are only the capital specifications already found by the jury to have been proven beyond a reasonable doubt) and mitigating factors (which includes all evidence presented by the defendant relevant to whether he should be sentenced to death, including without limitation

the nature and circumstances of the offense and the history, character and background of the defendant). The instructions do not comment on any of the mitigating evidence offered by Chinn or suggest that any of it is worth less consideration than any other or exclude any of it from consideration.

Jury instructions are not like ritual liturgical language which is required to be recited verbatim. Chinn has failed to show, or even intelligibly argue, how a reasonable juror could have misconstrued what the trial judge said so as to refuse to consider fully any relevant mitigating evidence Chinn offered. Ground Twelve should be dismissed with prejudice, whether considered after giving AEDPA deference to the Ohio Supreme Court decision or decided *de novo.*

Thirteenth Ground for Relief: Issues on Remand

Refusal to Consider Additional Mitigating Evidence

In his Thirteenth Ground for Relief, Chinn asserts his constitutional rights were violated when the trial judge refused to admit into evidence and consider additional mitigating evidence proffered when the case was remanded for correction of the trial judge's errors in imposing the death sentence.

On the initial direct appeal in this case, the Ohio Court of Appeals decided that the trial judge's sentencing opinion did not show that it had given sufficient consideration of the mitigating evidence which was presented. *State v. Chinn,* 191 Ohio App. LEXIS 6497, *48–56, 1991 WL 289178 (2nd Dist, 1991). It remanded the case not for a new sentencing trial, but for the trial judge to "weigh the proper mitigating factors against the single aggravating circumstance ... [and] impose whatever lawful punishment it deems appropriate, including but not limited to a sentence of death." *Id.* at *67. On remand Chinn argued he should be allowed to present new mitigating evidence not presented at trial, but the trial judge limited his consideration to the evidence already presented and considered by the jury; he again imposed a death sentence. On a second direct appeal, the court of appeals held this was proper procedure and the Ohio Supreme Court affirmed. *State v. Chinn,* 1996 Ohio App. LEXIS 2530, 1996 WL 338678 (2nd Dist.1996); *State v. Chinn,* 85 Ohio St.3d 548, 709 N.E.2d 1166 ((1999). On this particular issue, the Ohio Supreme Court held:

> ***27** In this proposition [of law seven], appellant also argues that he had "an absolute right to present any new mitigating evidence at his resentencing hearing in 1994." In support of this proposition, appellant relies on several United States Supreme Court opinions requiring that the sentencer not be precluded from considering relevant mitigating evidence in a capital case. See, *e.g., Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1; and *Hitchcock v. Dugger* (1987), 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347. However, each of those cases involved a situation where the capital sentencer was prohibited, in some form or another, from considering relevant mitigating evidence at trial. In the case at bar, no relevant mitigating evidence was ever excluded from consideration during the penalty phase of appellant's 1989 trial. Therefore, the case at bar is clearly distinguishable from the United States Supreme Court's pronouncements in *Lockett, Skipper,* and *Hitchcock.* Accordingly, as was the case in *State v. Davis* (1992), 63 Ohio St.3d 44, 46, 584 N.E.2d 1192, 1194–1195, we find *Lockett, Skipper,* and *Hitchcock* to be inapplicable here. It is of no consequence that the additional mitigating evidence in *Davis* involved *post-trial* accomplishments, whereas appellant's additional mitigation evidence involves matters appellant claims he could have presented but did not present during the mitigation phase of his 1989 trial. In this case, as in *Davis,* the errors requiring resentencing occurred after the close of the mitigation phase of the trial. Under these circumstances, the trial court is to proceed on remand from the point at which the error occurred. Appellant's arguments to the contrary are not well taken. In addressing this issue, the appellate court stated, "In sum, Chinn was not entitled to an opportunity to improve or expand his evidence in mitigation simply because we [the court of appeals] required the trial court to reweigh the aggravating circumstance and mitigating factors." *Chinn,* Montgomery App. No. 15009, unreported, at 6. We agree with the court of appeals' assessment of this issue.

Id. at 564–65, 709 N.E.2d 1166.

The Original Report concluded the Ohio Supreme Court's decision in this claim was neither contrary to nor an

unreasonable application of the relevant United States Supreme Court precedent (Doc. No. 60, PageID 895–901).

Chinn argues the Ohio Supreme Court's refusal to extend *Skipper v. North Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), to this case was objectively unreasonable. He argues that "[t]he fact that the evidence was available at the time of Chinn's initial sentencing is completely irrelevant." (Objections, Doc. No. 63, PageID 1021.) What the Ohio Supreme Court held was that "the errors requiring resentencing occurred after the close of the mitigation phase of the trial. Under these circumstances, the trial court is to proceed on remand from the point at which the error occurred." The unspoken premise is that the State had a substantial interest in the error-free jury verdict and recommendation of a capital sentence. The purpose of the remand was to have the trial judge decide on a sentence on the basis of the same evidence the jury had considered, which is completely consistent with Ohio's capital sentencing scheme. Nothing in *Skipper, Lockett,* or *Eddings* suggests that any of them require the evidence to be reopened when a case is remanded for correction of errors in a sentencing opinion.

***28** In *Oregon v. Guzek,* 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), the Supreme Court decided that *Lockett* did not prohibit a State from limiting the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial. Chinn argues that state court decisions must be measured against Supreme Court precedent at the time they are handed down, citing, correctly, *Greene v. Fisher,* —— U.S. ——, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011) (Objections, Doc. No. 63, PageID 1022). But *Guzek* did not overrule earlier Supreme Court precedent, instead refusing to extend it in a way parallel to what Chinn seeks here. What it shows instead is that it was not objectively unreasonable to refuse to extend *Lockett* or *Eddings* because all eight justices who participated in *Guzek*—all presumably reasonable jurists—did not think such an extension was required by precedent.

Refusal to Void the Death Sentence Altogether

In the Thirteenth Ground for Relief Chinn also claims that the original jury's death penalty recommendation became void when the court of appeals remanded the case for resentencing (Petition, Doc. No. 3 at 45). The Original Report rejected this claim on the basis that "[n]o United States Supreme Court precedent commands a re-trial under those circumstances," i.e., the circumstances presented by this remand where the error occurred after the jury made its recommendation.

Chinn objects that the Ohio Supreme Court's decision in this case violates the Due Process Clause because it represents "a marked and unpredictable departure from existing precedent." (Objections, Doc. No. 63, PageID 1023.) The previously existing precedent on which Chinn relies is *State v. Penix,* 32 Ohio St.3d 369, 513 N.E.2d 744 (1987). But the Ohio Supreme Court in this case did not overruled *Penix* and the decision here is not inconsistent with *Penix.* As the Ohio Supreme Court explained in *State v. White,* 132 Ohio St.3d 344, 972 N.E.2d 534 (2012), it had held in *Penix* that the trial jury which recommends the death sentence must be the same trial jury that convicted the offender in the guilt phase. *Id.* at ¶ 5, 513 N.E.2d 744. That is precisely what happened here. There is no retroactive application of an overruling of *Penix* which must be justified under Supreme Court retroactivity jurisprudence. And as *Rogers v. Tennessee,* 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001), makes clear, even a state court decision which declines to follow any longer a very well-settled common law rule (to wit, it is not murder unless the victim dies within a year and a day), is not void on retroactivity grounds.

Fourteenth Ground for Relief:
Improper Unanimity Instruction

The Original Report noted that this Ground for Relief had been dismissed by Judge Sargus as procedurally defaulted (Doc. No. 60, PageID 901). Chinn makes no objection to this conclusion.

Fifteenth Ground for Relief:
Ineffective Assistance in Mitigation

In his Fifteenth Ground for Relief, Chinn claims he received ineffective assistance of trial counsel in mitigation when his defense counsel did not present certain enumerated mitigating evidence, to wit, evidence of good behavior while incarcerated (admissible under *Skipper, supra*) and additional evidence supporting a residual doubt conclusion.

***29** The additional evidence was considered by the court of appeals on appeal from denial of Chinn's application for post-conviction relief. It concluded that the *Skipper* evidence, if presented, would not have changed the outcome of the sentencing proceeding and that the residual doubt evidence was irrelevant to "the issue of whether the defendant should be sentenced to death." *State v. Chinn,* 1998 Ohio App. LEXIS 3857 * 12, 2000 WL 1458784 (2n d Dist.1998). The Original Report concluded this decision was neither contrary to nor an unreasonable application of the relevant United States Supreme Court precedent (Doc. No. 60, PageID 910–11).

Chinn objects that the *Skipper* evidence is persuasive (Objections, Doc. No. 63, PageID 1026). However, he presents no authority to show the court of appeals conclusion is contrary to Supreme Court precedent. *Skipper* requires that behavior while incarcerated evidence be admitted if offered, but does not provide what weight must be given to it.

Chinn also complains that, in rejecting residual doubt as a mitigating factor, the court of appeals was improperly applying standards of professional conduct which were adopted after the trial, rather than those prevailing at the time of the trial (Objections, Doc. No. 63, PageID 1026–27). That is not what the court of appeals did. Rather, that court recognized that the Ohio Supreme Court had allowed residual doubt evidence in mitigation prior to 1997, but had begun excluding it as of its decision in *State v. McGuire,* 80 Ohio St.3d 390, 686 N.E.2d 1112 (1997). What changed in *McGuire* was not professional standards for attorneys litigating capital cases, but the evidence which is relevant in mitigation in those cases. Moreover, the timing of *McGuire* reinforces the correctness of the court of appeals' decision: while *McGuire* was decided after this case was tried, it was decided well before this case was decided on direct appeal by the Ohio Supreme Court in 1999. Thus had defense counsel presented the proffered residual doubt evidence in mitigation at trial, it would have been disregarded as irrelevant when the case reached the Ohio Supreme Court. It was thus not ineffective assistance of trial counsel to fail to present it.

Sixteenth Ground for Relief: Chinn's Absence During a Critical Stage of the Trial

In his Sixteenth Ground for Relief, Chinn claims he was absent when the trial court clarified instructions with the jury. The Ohio Supreme Court denied this claim on the merits, finding that the record did not show he or his attorney was absent and Ohio law required an affirmative showing of absence to justify a new trial. *State v. Chinn,* 85 Ohio St.3d 548, 568, 709 N.E.2d 1166 (1999). The Original Report recommended this claim be denied on the merits, noting that there was no record evidence that Chinn or his attorney was absent at the asserted times (Doc. No. 60, PageID 911–15).

Chinn objects that "[t]here is absolutely no indication in the record that either Chinn or his attorneys were present when this exchange between the judge and the jury took place" (Objections, Doc. No. 63, PageID 1031). However, Chinn also cites to no direct evidence that he or his lawyers were absent at the relevant time. He asks this Court instead to infer his absence from the silent record. *Id.*

***30** The Ohio rule followed by the Ohio Supreme Court in this case is that error will not be presumed from a silent record. That rule is not esoteric; in fact it is followed by the Supreme Court. *Walker v. Johnston,* 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941). Chinn presents no authority requiring this Court to presume he was absent from a silent record.

Moreover, if it were the case that Chinn was absent, he has access to evidence *dehors* the record which he could have presented in post-conviction, to wit, his own affidavit and/or that of his defense counsel. The absence of any such evidence strengthens the conclusion that he was in fact present.

But Chinn asserts the Ohio Supreme Court decision is contrary to clearly established Supreme Court law, to wit, *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In *Johnson,* the Supreme Court held that the waiver of a fundamental right could not be presumed from a silent record; *Johnson* is the fundamental precedent which leads to careful examination of defendants and recording of their responses any time a waiver is involved.

But *Johnson* is not applicable to this case because the Ohio Supreme Court did not presume Chinn had waived his right to be present and have his counsel present at every critical stage of the proceedings. Instead, it presumed he and his attorney(s) were present because the record did not show the contrary. The State has not claimed that Chinn waived his right to be

present with counsel. Waiver of the right is not in question. Rather the question is one of fact: were they present? Because he had a constitutional right that they both be present, the proceedings would have been "irregular" if he had not been present. But no Supreme Court precedent holds that facts supporting the regularity of trial court proceedings cannot be presumed from a silent record. And *Johnson* itself says that the regularity of a state court judgment is to be presumed. *Id.* at 468

Chinn also objects that the Ohio Supreme Court never made a factual finding that Chinn and his lawyers were present and so the decision of the state court is not entitled to the presumption of correctness provided by 28 U.S.C. § 2254(e)(1). The Magistrate Judge agrees that there is no factual finding that they were present, but no such finding is necessary where they were presumed to be present in the absence of evidence to the contrary and no rule of constitutional law prohibits that presumption.

Seventeenth Ground for Relief: Biased Trial Judge

In his Seventeenth Ground for Relief, Chinn asserts he was denied his constitutional rights when he was tried by a biased judge. The Original Report concluded this claim had been dismissed by Judge Sargus and no objections have been made to that conclusion.

Eighteenth Ground for Relief: Victim Impact Statement

After the jury was discharged, the victim's mother made a statement to the trial judge in open court but before sentence was pronounced. In his Eighteenth Ground for Relief, Chinn asserts that this statement violated his constitutional rights. Mrs. Jones' statement in full is as follows:

> ***31** First of all, I want to say this is very hard and very difficult for us. We are here for our son, Brian Jones, who cannot be here to speak for himself, so we're here to speak on his behalf and for the rest of our family. First of all, we would like for you and everyone to know what a great loss that we have suffered, the pain has been and will be beyond what words could describe. Only another person that has lost a child to such a tragedy could begin to feel the empty, lonely feelings. Needless to say, we have suffered the greatest loss of our entire life. We know that nothing or no one is going to replace that empty and void feeling and that part of our lives are gone. Now, we must begin to try to pick up the pieces and put our lives back together as good as we can. I really don't feel that this will ever be possible because, first of all, we feel very threatened by this Defendant and his family. We have not done or said anything, your Honor, about them; but yet, we are afraid for our safety and we feel very threatened by them. I'm afraid to leave my home alone. I'm afraid for my daughter to leave her home alone; and regardless of what I'm doing, if I know that she's leaving, I will quit whatever I'm doing and go and be with her because I fear what could happen to her. I fear of the morning when my husband leaves for work. I stand at the window. He leaves just before daylight. I stand at the window and watch him until he gets in his car and pulls out our driveway. Never in my life have I ever done this before, I've been doing this ever since our son has been killed. Your Honor, this terrible, threatening fear that we are living with is not a good feeling. We really do feel- We really do feel very threatened by this Defendant and what he might do our family. With his previous record, if he had been put away where he should have been, my son may be living today. Your Honor, this makes me feel very ill inside to think that if this Defendant had not been out there on the streets, on January 30th, that my

> son would be with us. We would not be going through all of this pain that we're feeling. We would not be afraid and feel threatened as we do today. Your Honor, we feel that this Defendant has been given every opportunity that there is. He's been on shock probation, and by his own actions, has chosen not to accept any of them; and now we feel that the time has come for him to be punished according to the law of Ohio. My family and I thank you and the Courts for being kind to us, and for everything you have done. Thank you a lot.

(Return of Writ, Trial Tr. Vol. V, pp. 740–42)

This claim was Chinn's twenty-first proposition of law before the Ohio Supreme Court which decided the claim as follows:

> Proposition of Law No. XXI
>
> Appellant's twenty-first proposition of law concerns alleged victim-impact evidence that was heard by the trial judge after the jury was discharged but immediately before the trial court pronounced sentence on all of the crimes appellant was found guilty of committing. Appellant claims that the evidence included an expression of opinion by Brian Jones's mother that appellant should be sentenced to death. However, Mrs. Jones never specifically stated her opinion as to the appropriate punishment. Rather, she stated that "now we feel that the time has come for [appellant] to be punished according to the law of Ohio." Appellant also complains that Mrs. Jones stated or implied that appellant was incapable of rehabilitation. However, the record does not fully support appellant's claims in this regard. Moreover, and in any event, there is absolutely nothing in the record to suggest that the trial court was influenced by irrelevant factors in sentencing appellant for the capital crime. Therefore, we find no reversible error here.

***32** *State v. Chinn,* 85 Ohio St.3d 548, 575–76, 709 N.E.2d 1166 (1999). In the Original Report the Magistrate Judge agreed with this decision and found no constitutional violation had been proved.

In his Objections, Chinn relies on *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), for the proposition that "[t]he Eighth Amendment prohibits the introduction of victim impact statements consisting of the 'victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence.' " (Doc. No. 63, PageID 1039, *citing Payne,* 501 U.S. at 830, n. 2).

In *Payne,* while allowing some victim impact evidence, the Supreme Court left standing the prohibition from *Booth v. Maryland,* 482 U.S. 496, 509, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), of victim statements about "the crime, the defendant, or the appropriate sentence." *Payne,* 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720. Mrs. Jones' statement does not speak about the crime. As to Chinn, she says she and her family feel threatened by him and his prior opportunities for rehabilitation had not been successful, which certainly constitute comments on the defendant. As to sentence, Mrs. Jones does not advocate for the death penalty, but rather that he should now be punished "according to the law of Ohio," which at the time allowed sentence of death, life with possible parole at thirty years, and life with possible parole at twenty years.

The Original Report held that, "even if we find a violation [of *Booth* and *Payne*], the statements must be so prejudicial as to render the trial fundamentally unfair." (Doc. No. 60, PageID 918). Chinn concedes that this is the proper standard for evaluating a Due Process claim relating to victim impact statements, but claims the proper standard for an Eighth Amendment claim is whether the statements had "a substantial and injurious effect on the penalty phase verdict." (Objections, Doc. No. 63, PageID 1041, *citing Hooper v. Mullins,* 314 F.3d 1162, 1174 (10th Cir.2002). The Tenth Circuit's opinion does not indicate it is addressing an Eighth as opposed to Fourteenth Amendment claim. In any event, the victim impact statement in that case expressly told the jury "that they believed Petitioner deserved to die." *Id.* The Tenth Circuit found a constitutional error, but held it was harmless under *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Hooper provides no precedential support for Chinn's argument on what prejudice must be shown.

The Original Report relied on *Fautenberry v. Mitchell,* 515 F.3d 614 (6th Cir.2008), for the proposition that the risk of any improper influence on the sentence is severely diminished when it is heard only by the judge. Chinn claims *Fautenberry* is "an incorrect statement of the law," but the claim is purely conclusory: Chinn cites no Sixth Circuit or Supreme Court law to the contrary (Objections, Doc. No. 63, PageID 1040). *Fautenberry* is consistent with the usual rule that judges, as opposed to juries, are presumed to disregard irrelevant or immaterial evidence. Inadmissible evidence is presumed to be ignored by a judge in a bench trial. *Harris v. Rivera,* 454 U.S. 339, 346, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (per curiam); *Wickline v. Mitchell,* 319 F.3d 813, 823–24 (6th Cir.2003). Similarly, a three judge panel in an Ohio death penalty case may be presumed to ignore inflammatory argument and inadmissible evidence. *Smith v. Mitchell,* 348 F.3d 177 (6th Cir.2003).

***33** In *Post v. Bradshaw,* 621 F.3d 406 (6th Cir.2010), the court held error in admission of victim impact statements could be cured on reweighing. Chinn again claims this is an "incorrect statement of the law" and quotes from Judge Merritt's dissenting opinion in *Baston v. Bagley,* 420 F.3d 632 (6th Cir.2005), that the Ohio Supreme Court does not understand its role in capital cases. However, neither the United States Supreme Court nor any published majority opinion of the Sixth Circuit has held that Ohio Supreme Court decisions are not entitled to AEDPA deference in appropriate circumstances. And of course in this case, where the crime occurred before January 1, 1995, reweighing occurred at both the intermediate appellate and supreme court levels.

Chinn claims no AEDPA deference is due to the Ohio Supreme Court's conclusion that Chinn's allegation that Mrs. Jones had said or implied he was incapable of rehabilitation was not what she had said. Actually, the Ohio Supreme Court said this allegation was "not fully supported by the record." 85 Ohio St.3d at 575, 709 N.E.2d 1166. That conclusion is, in the Magistrate Judge's opinion, a fair reading of her statement. She says Chinn has been given opportunities and shock probation which he has not taken advantage of. That statement partially supports Chinn's allegation, but she did not draw the conclusion that he could never be rehabilitated. In particular, she stated that if he had been incarcerated for his prior offenses, he would not have been on the street to commit this murder.

Finally Chinn complains the Ohio Supreme Court improperly placed on Chinn the burden of proving that a *Payne* violation did not prejudice his position instead of requiring the State to prove the error was harmless beyond a reasonable doubt (Objections, Doc. No. 63, PageID 1044). Of course, *Brecht* has replaced the harmless beyond a reasonable doubt standard of under *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). And if *Fautenberry* is followed, no Eighth or Fourteenth Amendment violation occurred.

Nineteenth Ground for Relief: Vagueness of the Ohio Death Penalty Statute

In his Nineteenth Ground for Relief, Chinn asserts the Ohio capital statute is vague and therefore its application to him violates his Eighth Amendment rights (Petition, Doc. No. 3 at 62.) The Original Report found that Judge Sargues had dismissed this claim as procedurally defaulted (Doc. No. 60 at PageID 919). Chinn has not objected to this conclusion.

Twentieth Ground for Relief: Ineffective Assistance of Appellate Counsel

In his Twentieth Ground for Relief, Chinn claims he received ineffective assistance of appellate counsel in that his appellate attorneys failed to assign as error on his first appeal of right [7] the following matters:

> A. Counsel failed to assign as error the vagueness defect in Ohio's sentencing scheme. O.R.C. § 2929.03(D)(1) incorporates the nature and circumstances of the offense, a statutory mitigating factor under O.R.C. § 2929.04(B), into the aggravating circumstance. Accordingly, petitioner's death sentence is arbitrary. *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Stringer v. Black,* 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1993).
>
> ***34** B. Counsel failed to assign as error the trial court's failure to define "principal offender," which was an essential element of the O.R.C. § 2929.04(A)(7) aggravating circumstance in this case. See *Cabana v.*

Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

C. Counsel failed to assign as error, the trial court's erroneous instruction on both the "principal offender" and "prior calculation and design" components of the O.R.C. § 2929.04(A)(7) aggravating circumstance. Only one of those statutory alternative applied to this case and it was improper to instruct the jury on both. *State v. Penix,* 32 Ohio St.3d 369, 513 N.E.2d 744 (Ohio 1987). Counsel's failure to assign this issue as error was certainly prejudicial to petitioner because the court of appeals vacated his death sentence, inter alia, because the trial court considered both components in its original sentencing calculus. *State v. Chinn,* No.1991 WL 289178, 15–17 (Ohio App. 2nd Dist.1991).

D. Last, appellate counsel were ineffective because they failed to assign as error trial counsel's failure to object to the errors in paragraphs A–C, supra. *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

(Petition, Doc. No. 3 at 65.)

The Ohio Supreme Court summarily denied this claim on the merits on the basis that, because appellate counsel had obtained two reversals of the death sentence, they must have been effective and "[n]one of the instances of alleged ineffective assistance of appellate counsel compels reversal here." *State v. Chinn,* 85 Ohio St.3d 548, 576, 709 N.E.2d 1166 (1999).

The Original Report found that Judge Sargus had effectively found no merit to the first sub-claim when he held the Nineteenth Ground for Relief procedurally defaulted (Doc. No. 60, PageID 921). The same analysis applied to the second sub-claim by virtue of Judge Sargus' conclusion that the Seventh Ground for Relief was procedurally defaulted. *Id.* at 921–22, 709 N.E.2d 1166. The third sub-claim had been similarly decided in Judge Sargus' dismissal of sub-claim c of the Eleventh Ground for Relief. *Id.* As to the last sub-claim, Judge Sargus had decided that the underlying claim, Ground Nine, sub-claim d, was without merit. *Id.* at PageID 923.

Chinn objects to the proposed disposition of Ground Twenty, but does not object to the Original Report's conclusion that Judge Sargus has already decided these claims (Doc. No. 63, PageID 1046–1049.

Chinn further asserts that the Ohio Supreme Court's decision on these claims is not entitled to AEDPA deference because it failed to consider the cumulative effect of appellate counsel's errors (Objections, Doc. No. 63, PageID 1049–1051). That argument ignores the fact that the Ohio Supreme Court found no appellate counsel errors to cumulate. A state appellate court need not write at length to be entitled to AEDPA deference. *Harrington v. Richter,* 562 U.S. ——, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

Conclusion

Chinn's Objections are unpersuasive. The Magistrate Judge accordingly again respectfully recommends that the Petition be dismissed with prejudice, but that Chinn be granted a certificate of appealability on Grounds One, Three, Five A, and Thirteen.

All Citations

Not Reported in F.Supp.2d, 2013 WL 3288375

Footnotes

1 Because the crime in suit occurred before January 1, 1995, Chinnn was entitled to direct appellate review at both the intermediate court of appeals and in the Ohio Supreme Court.

2 This observation in no way implies that there was not a good faith basis for the question.

3 The permissible scope of cross-examination under Ohio law is "all relevant matters and matters affecting credibility." Ohio R. Evid. 611(B).

4 The Ohio Rule is not esoteric. See Fed.R.Evid. 801(d)((1) (C).

5 Dr. Fulero, resident in the Dayton area until his untimely death April 29, 2011, was a nationally-recognized expert on the potential fallacies of eyewitness testimony and frequently appeared as an expert witness and continuing legal education lecturer on that subject.

6 The Magistrate Judge passes over without comment Chinnn's claim that "*Bush v. Gore,* 531 U.S. 98, 104–105, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), is instructive ." (Objections, Doc. No. 63, PageID 987.) *Bush v. Gore* was decisive, but has never again been cited by the Supreme Court, and drawing any "instruction" from it is extremely hazardous.

7 As noted above, because the murder in this case occurred before January 1, 1995, the direct appeal was in the first instance to the Second District Court of Appeals.

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