CAPITAL CASE
No. _____
October Term, 2022

IN THE SUPREME COURT OF THE UNITED STATES

_____

WALTER RAGLIN,

***Petitioner*,**

v.

TIM SHOOP, WARDEN,

***Respondent*.**

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

November 21, 2022

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APPENDIX A

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No. 19-3361

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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WALTER RAGLIN, Petitioner-Appellant, v. TIM SHOOP, Warden, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO OPINION

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

KETHLEDGE, Circuit Judge. During an armed robbery, Walter Raglin pointed a gun at Michael Bany, looked him in the eye, and shot him in the neck, killing him. An Ohio jury convicted Raglin of aggravated murder and sentenced him to death. Ohio courts denied all of Raglin's challenges to his conviction and sentence. The district court likewise denied him habeas relief. We affirm.

I.

Late one night in December 1995, Walter Raglin and Darnell Lowery walked the streets of Cincinnati looking for someone to rob. Raglin carried a .380 caliber pistol. Lowery suggested they "hit" a drug runner or taxicab; Raglin disagreed, saying they should target someone less dangerous. Around 2 a.m., musician Michael Bany left a bar after his performance, walking from the bar to the parking lot, his bass guitar in one hand and his equipment in the other. As he reached his car, he set down his belongings, took out his keys, and began to unlock the car.

A voice behind Bany demanded all his money. He turned around and saw Raglin pointing a gun at him; Lowery stood watching nearby. Bany handed over the three $20 bills he had in his wallet. Raglin decided he wanted to steal Bany's car as well, but could not drive a stick shift—so he repeatedly asked Bany whether the car was automatic or manual. Bany said nothing and turned away from Raglin to pick up his equipment. As Bany turned back around, Raglin looked him in the eye and then shot him. Raglin and Lowery fled to a nearby house, where Raglin wiped his fingerprints off the gun and gave it to Lowery.

Five days later, an anonymous caller told Cincinnati police that Raglin had been involved in Bany's death. Police arrested Raglin, put him in an interview room, advised him of his *Miranda* rights, and began asking him questions. Raglin initially denied any involvement in Bany's killing. During a break in the questioning—during which the officers had left the room—Raglin broke down emotionally, called the officers back, and told them he had shot Bany. Raglin then repeated his confession on tape, saying "I looked at 'im in his eye an' he looked at me an' then I jus' shot 'im an' I ran."

A grand jury charged Raglin with aggravated murder with a death-penalty specification. A jury convicted Raglin and recommended the death penalty, which the trial court imposed. The Ohio Supreme Court affirmed Raglin's conviction and sentence. Raglin then moved to reopen that decision, arguing that his appellate counsel were ineffective. The Ohio Supreme Court summarily denied that motion.

Raglin thereafter filed a petition for a writ of habeas corpus in federal district court. The court stayed the case while Raglin pursued additional claims in state court; after those efforts failed, the district court reopened the case and allowed Raglin to amend his petition. There the case remained for another 13 years, as the district court denied Raglin's petition, certified several

questions therein for appeal, and denied Raglin's request to amend his petition to include a challenge to Ohio's lethal-injection protocol. In March 2018, the court entered judgment for the Warden, but overlooked Raglin's request for a certificate of appealability as to the denial of his method-of-execution claim. *See In re Campbell*, 874 F.3d 454, 461 (6th Cir. 2017); 28 U.S.C. § 2253(c). Raglin moved to alter or amend that judgment under Civil Rule 59(e), asking the court for a decision as to that request. The district court granted that certificate in March 2019. This appeal followed.

II.

A.

As an initial matter, the Warden argues that this appeal is untimely because Raglin filed it in April 2019—over a year after the district court denied him leave to amend his petition and entered judgment. Suffice it to say that we disagree: the district court's order granting Raglin's Rule 59(e) motion afforded him another 30 days to file a notice of appeal, which Raglin timely did. *See* Fed. R. App. P. 4(a)(4)(A)(iv).

B.

We review de novo the district court's denial of Raglin's habeas petition. *See Cowan v. Stovall*, 645 F.3d 815, 818 (6th Cir. 2011). To obtain habeas relief, as relevant here, Raglin must show that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). For purposes of habeas review, a state court's decision is "unreasonable" only when it is "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (internal quotation marks omitted).

1.

Raglin's first argument concerns his questioning by Cincinnati homicide detectives Bill Couch and Dan Argo. Specifically, he argues that, after he asked to see a lawyer, the detectives manipulated him to resume answering questions without one. *See generally Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

The detectives questioned Raglin on the night of January 3, 1996, five days after the murder. Initially the questioning was not recorded; later, as noted above, Raglin began to cry and called the officers back from a break to confess that he had shot Bany. Shortly thereafter, at 10:57 p.m., the officers began a recorded session of questioning, first reading Raglin his rights and expressly telling him that "[i]f you cannot afford a lawyer one will be appointed for you before any questioning if you wish"; that "[i]f you decide to answer questions now without an attorney present you still have the right . . . to stop answering at anytime until you talk to a lawyer"; and that "[i]f you want a lawyer you're allowed to have a lawyer at anytime that you want to." Raglin said, "can I jus' talk to one? I mean just for a minute?" Couch answered, "We can attempt to get a hold of an attorney, yes[,]" and assured Raglin that "it's no trouble at all, Walter." Raglin said, "I jus' wanna, yeah I wanted to talk to 'im"; Couch promptly ended the questioning and turned off the tape.

That was at 11:02 p.m. Three minutes later the officers turned the tape back on, explaining that Raglin wanted to resume answering questions. Then the officers again went over Raglin's rights with him and told him that "he can call an attorney" and that "he does not have to talk to us." Raglin said he understood those rights, and said that "ya'al didn' promise me nuttin'[,]" that "[n]obody tricked me, nuttin' like that[,]" and that "I don' want no attorney." Raglin then proceeded to confess that he shot Bany.

Raglin's claim now is that—when Couch told Raglin that he could "call an attorney" and when the officers apparently offered to provide him a phonebook—the officers implied that Raglin himself would need to pay for the lawyer. But that argument cherry-picks a sentence or two from the transcript and ignores the rest. The officers assured Raglin again and again that he could stop answering questions and be provided with a lawyer anytime he liked; and Couch specifically told him that "[i]f you cannot afford a lawyer one will be appointed for you[.]"

The Ohio Supreme Court looked at these same conversations and found "no evidence whatsoever that police said or did anything" to coerce Raglin into resuming the interview. *State v. Raglin*, 699 N.E.2d 482, 491 (Ohio 1998). That assessment of the record was reasonable, which means Raglin is not entitled to relief on this claim.

2.

Raglin argues that his trial counsel and his appellate counsel were constitutionally ineffective. To prevail on those claims, Raglin must show that his counsel's performance was constitutionally deficient and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). And as for the performance prong, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690.

a.

Raglin argues that his trial counsel was ineffective for several distinct reasons. We "cut to the merits" of those claims, since the unavoidably convoluted analysis as to whether those claims

are procedurally defaulted "adds nothing but complexity to the case." *Babick v. Berghuis*, 620 F.3d 571, 576 (6th Cir. 2010).

(i)

By way of background, trials in capital cases are divided into a guilt phase and penalty phase—the latter being where the jury hears aggravating and mitigating evidence and decides whether to recommend a sentence of death. Here, the principal reason why Raglin thinks his trial counsel was ineffective is that counsel largely conceded Raglin's guilt of aggravated murder in favor of a more vigorous defense in the penalty phase. We accept the premise of Raglin's argument: during voir dire, for instance, Raglin's counsel told the venire that "basically . . . we will get to the second phase in this case. We will get to the mitigation phase. Which will mean that you will have already found Walter guilty of aggravated murder and aggravated robbery." And counsel chose not to have Raglin himself testify at trial or otherwise to present evidence that he killed Bany accidentally.

But Raglin's conclusion—that his counsel was ineffective—does not follow. Raglin overlooks the difference between capital cases and other kinds of trials. The Supreme Court has explained:

> Although such a concession [*i.e.*, of guilt] in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. . . . Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared.

Florida v. Nixon, 543 U.S. 175, 190–91 (2004).

That is what Raglin's trial counsel did here. Indeed his counsel was candid with the venire about it:

> This involves an aggravated robbery and an aggravated murder during the course of the robbery. And you're going to hear testimony and part of that testimony will be a statement that was given by Walter Raglin to the police. And we can't dispute that. So what I was trying to explain to you is, and there is a kind of method to my madness, if you will, that I don't believe I lost my way, but we weren't going to try to say something that was just absurd, you know, and where you may be more offended, you know, after the fact and say, well, gosh, if you know all of these things why in the world are you doing this. Because that can be offensive. Can you see my point?

This decision was obviously strategic, which means that we strongly presume that it was reasonable. *Strickland*, 466 U.S. at 689. Raglin has not overcome that presumption. His counsel knew that the jury would hear the recording of Raglin himself saying that he had looked Bany in the eye and then shot him at near point-blank range. Hence counsel could reasonably conclude that the defense would only lose credibility with the jury by disputing the murder charge. Meanwhile, Raglin's conduct was less egregious than the conduct in other cases where Ohio prosecutors have sought the death penalty. *See, e.g.*, *In re Ohio Execution Protocol*, 860 F.3d 881, 884 (6th Cir. 2017) (en banc). And Raglin was only 18 years old at the time of the offense, after "an extremely difficult and troubled childhood." *Raglin*, 699 N.E.2d at 497–98. His trial counsel therefore could have "reasonably decide[d] to focus on the trial's penalty phase[.]" *Nixon*, 543 U.S. at 191. Raglin has shown no basis for relief on this ground.

(ii)

Raglin's remaining arguments concerning the effectiveness of his trial counsel are likewise meritless. Raglin argues that counsel should have struck from the venire a juror who had seen Bany perform on the night when Raglin later shot him. But that juror repeatedly and specifically stated that she would be impartial in considering the evidence at trial. Counsel therefore was not

ineffective in choosing not to strike her. *See Allen v. Mitchell*, 953 F.3d 858, 865 (6th Cir. 2020). Nor has Raglin shown any prejudice from that decision. Nor, for some of the same reasons recited above, do we think that the Constitution compelled Raglin's counsel to retain a firearms expert for trial. Nor has Raglin shown any prejudice from that decision. Raglin's claim that his trial counsel was constitutionally ineffective for failing to object to certain parts of the prosecution's closing argument is likewise meritless. Nor do we think that Raglin's trial counsel performed deficiently at the mitigation phase. The performance of Raglin's trial counsel affords him no basis for relief here.

b.

Raglin also argues that his appellate counsel was ineffective for failing to make all the arguments (regarding the putative ineffectiveness of his trial counsel) that we just rejected above. We reject this claim as well.

3.

Raglin argues that the trial court should have instructed the jury on the lesser-included charge of involuntary manslaughter. In a capital case, a court must instruct the jury about a lesser-included offense if the evidence leaves "some doubt" about an element of the capital offense. *See Beck v. Alabama*, 447 U.S. 625, 637 (1980). In Ohio, a jury can convict a defendant of aggravated murder only if the defendant acted with the "purpose to cause the death of another." *State v. Jackson*, 836 N.E.2d 1173, 1197 (Ohio 2005).

The Ohio Supreme Court rejected this argument on the ground that, "[u]nder any reasonable view of the evidence, the killing of Bany was purposeful." *Raglin*, 699 N.E.2d at 488. We think that, on this record, a fairminded jurist could agree with that assessment.

4.

Raglin argues that the prosecutors' comments during closing arguments at both phases of his trial violated due process. A prosecutor's remarks violate due process only if they render the trial "fundamentally unfair." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). And during closing argument a prosecutor may "argue the record, highlight any inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence." *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008).

Again we cut to the merits of this claim (as opposed to disputes as to which objections the trial court did or did not sustain). Raglin focuses on several comments in particular. First, the prosecutor told the jury that, when a person points a gun at another and demands all of the other person's money, "[t]he natural and reasonable inference from that is give me all your money or I'll kill you." That was simply an argument about what a jury might reasonably infer from the facts of the case, and thus does not amount to prosecutorial misconduct. *See id.* Second, the prosecutor suggested that if Raglin had fired the gun accidentally, he would have said as much in his recorded statement. That too was an argument about a reasonable inference from the other evidence in the case. Raglin also complains about a number of other comments by the prosecutor; but as to many of those comments, Raglin presents no developed argument; and the remaining arguments he makes in this vein are likewise meritless.

5.

Raglin also challenges the district court's dismissal of two of his claims as untimely. We review that decision de novo. *See Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012).

Raglin did not assert these claims until he filed his first amended petition—which he concedes made these claims facially untimely. *See* 28 U.S.C. § 2244(d). But Raglin contends that

these claims "relate back" to his original habeas petition, which was timely. For claims to relate back, however, they must share a "common core of operative facts" with a timely claim in the original petition. *Watkins v. Deangelo-Kipp*, 854 F.3d 846, 850 (6th Cir. 2017). A new claim meets that test when, for example, it arises from the same body "of facts supporting" a ground for relief in the original petition and the petitioner seeks to refine their legal theory by way of amendment. *See Mayle v. Felix*, 545 U.S. 644, 661 (2005). So too when a petitioner merely seeks to add factual detail through an amended petition, such that the facts in the two documents differ "not in kind, but in specificity." *Cowan*, 645 F.3d at 819. But when the original petition does not contain the "operative facts out of which the amended claim could also be deemed to have arisen," the new claim does not relate back. *Hill v. Mitchell*, 842 F.3d 910, 925 (6th Cir. 2016). Mere factual overlap between old and new claims is therefore insufficient. *See id.*

Here, both of the untimely claims were based on police reports that two witnesses—Natasha Lowery and Ronnell Mumphrey—had said that, on the night of the shooting, Raglin came to Lowery's sister's apartment and was crying, vomiting, and asking whether the Lord would forgive him. The first untimely claim was that Raglin's trial counsel had rendered ineffective assistance by failing to interview Lowery and Mumphrey and to present their testimony at trial. As a basis for relation back, Raglin cites claims 3 and 23 of his original petition. Those claims both concerned the prosecutor's comments—in closing argument during the penalty phase—that Raglin had been "bragging and laughing" after the murder. Claim 3 included allegations that Raglin's trial counsel rendered ineffective assistance when he failed to object to these comments because facts about Raglin "bragging and laughing" after the murder were not in evidence. Claim 23 included allegations that the prosecutor engaged in misconduct when he made those same comments because, in effect, he "asked the jury to speculate on facts not in evidence." Those

claims contained a "common core of operative facts" with each other, but they share no common facts with the failure-to-investigate claim. *Watkins*, 854 F.3d at 850. Claims 3 and 23 thus do not contain the "operative facts out of which the amended claim could also be deemed to have arisen." *Hill*, 842 F.3d at 925. Raglin counters that the new claim and the older ones all concern "the issue of Raglin's remorse." Br. at 34. But a new claim must share a common core of operative facts—not merely a common "issue" or theme—to relate back to an earlier claim. *See Watkins*, 854 F.3d at 850.

The same analysis holds for the second untimely claim, which alleged that the prosecutor knowingly made a false argument when he said Raglin was "bragging and laughing" after the shooting. Lowery's and Mumphrey's statements were in the trial file; thus, Raglin argues, the prosecutor knew that Raglin was in fact remorseful. As a basis for relation back, Raglin again identifies claims 3 and 23 from the original petition, and argues that the old and new claims have in common "that the prosecution had engaged in misconduct with respect to Raglin's remorse for Bany's death." Br. at 78. But the question is whether the new claim could have "arisen" out of the facts in the original petition. *Hill*, 842 F.3d at 925. A showing that the prosecutor knowingly made a false argument depends upon the statements by Lowery and Mumphrey, as well as the prosecutor's mental state, knowledge of those statements, and other contents of the trial file (including an interview with an individual who stated that Raglin was in fact "laughing" and "showing off" after the shooting). *See Giglio v. United States*, 405 U.S. 150, 153 (1972). None of those alleged facts are recited in the original petition. Although the new claim has in common with the old claims the prosecutor's same statement, the similarity ends there; a mere factual point in common between old and new claims is not enough for the new claim to relate back. *See Hill*,

842 F.3d at 924. We therefore affirm the district court's dismissal of Raglin's new claims as untimely.

6.

We also reject Raglin's remaining claims—that the trial court's jury instructions during the guilt phase were improper, that the admission of testimony by rebuttal witnesses for the prosecution denied Raglin a fair trial, and that "cumulative" error did the same—for substantially the reasons stated by the district court. Indeed, we doubt that any reasonable jurist would debate the district court's denial of those claims—which means that Raglin likely should not have been granted a certificate of appealability as to them. *See Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020).

C.

Raglin challenges the district court's denial of his motion to reopen discovery, which we review for an abuse of discretion. *See Cornwell v. Bradshaw*, 559 F.3d 398, 410 (6th Cir. 2009). A district court may permit discovery "if the petitioner presents specific allegations showing reason to believe that the facts, if fully developed, may lead the district court to believe that federal habeas relief is appropriate." *Johnson v. Mitchell*, 585 F.3d 923, 934 (6th Cir. 2009) (quotation marks omitted).

To prove that Raglin intended to fire the gun and kill Bany, the prosecution hired an expert to examine Raglin's gun. That expert testified that the gun lacked a hair trigger. Raglin now asserts that his trial counsel never saw two statements that, in his view, suggest that the prosecution's expert examined the wrong gun—which in turn would leave open the possibility that the murder weapon did have a hair trigger. Raglin thus argues that the actual gun and the witness

statements could be material evidence that the state should have disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963).

Evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75 (2012) (cleaned up). Raglin does not meet that standard because his assertions regarding these statements are speculative at best. One of the statements comes from a witness who saw someone in the parking lot outside the bar that night put down a silver handgun, pick it back up, and take off running, which matches the story Raglin told to police. The other statement is from a then seventh-grader, who told police that Darnell Lowery gave him a gun after the murder. That statement lines up with the testimony of a Cincinnati policeman at trial, who found a .380 revolver that the youth had thrown aside while running from police. Raglin has not explained how these statements establish a "reasonable probability" that the prosecution's expert examined the wrong gun. Nor is there reason to think such a mistake would have made a difference at trial. Raglin never claimed to have shot Bany accidentally; instead, he repeatedly said that he looked Bany in the eye and shot him. The district court did not abuse its discretion when it denied Raglin additional discovery.

D.

Finally, Raglin argues that the district court should have granted him leave to amend his petition to include a claim challenging the method of his execution. We review that denial for an abuse of discretion. *Coe v. Bell*, 161 F.3d 320, 341 (6th Cir. 1998).

Here, the district court applied *In re Campbell*, 874 F.3d 454 (6th Cir. 2017) (per curiam), to hold that it could not hear Raglin's proposed method-of-execution challenge on habeas review. Raglin does not challenge the court's application of *Campbell*; instead, he says that we should

revisit *Campbell* after the Supreme Court's decision in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). But *Bucklew* did not decide what claims a petitioner can bring on habeas review. Indeed, the Court's only mention of habeas was a single statement: that, "if the relief sought in a 42 U.S.C. § 1983 action would foreclose the State from implementing the [inmate's] sentence under present law, then recharacterizing a complaint as an action for habeas corpus might be proper." 139 S. Ct. at 1128 (cleaned up). That dicta as to what the Court "might" do does not permit us to depart from our precedent. The district court did not abuse its discretion when it denied Raglin leave to amend his petition.

* * *

The district court's judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Walter Raglin,

Petitioner,

v.

Betty Mitchell, Warden

Respondent.

Case No.: 1:00-cv-767

Judge Michael R. Barrett

OPINION & ORDER

This capital habeas case is before the Court on the Magistrate Judge's November 13, 2017 Decision and Order Vacating Prior Decision and Denying Motion to Amend. (Doc. 287). Petitioner filed objections to the Decision and Order (Doc. 289), and Respondent filed a Response in Opposition to those objections (Doc. 291). Following an order recommitting the matter, the Magistrate Judge entered his December 29, 2017 Supplemental Opinion on Motion to Amend. (Doc. 292). Petitioner filed objections to the Supplemental Opinion. (Doc. 293), and Respondent filed a Response in Opposition to those objections (Doc. 294).

This Court shall consider objections to a magistrate judge's order on a nondispositive matter and "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b) (explaining that a judge of the court may reconsider any pretrial ruling by the magistrate judge "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.").

In his November 13, 2017 Decision and Order (Doc. 287), the Magistrate Judge *sua sponte* corrected a previous order pending on objections. The Magistrate Judge concluded that in light of the Sixth Circuit's decision in *In re Campbell*, 874 F.3d 454 (6th Cir. 2017), the Magistrate Judge's prior Decision and Order allowing Petitioner to file a Third Amended Petition pleading lethal injection invalidity claims (Doc. 275) is clearly mistaken as a matter of law and vacated that Order. The December 29, 2017 Supplemental Opinion on Motion to Amend (Doc. 292) reaches the same conclusion.

The Magistrate Judge's November 13, 2017 Decision and Order and December 29, 2017 Supplemental Opinion address two issues: (1) whether *In re Campbell*, 874 F.3d 454 (6th Cir. 2017), *cert. den. sub nom. Campbell v. Jenkins*, 199 L.Ed. 2d 350 (2017) bars lethal injection invalidity claims to be pleaded in habeas corpus cases; and (2) whether Petitioner's claim under *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) is barred by *In re Coley*, 871 F.3d 455 (6th Cir. 2017).

With regard to the first issue, this Court has already adopted the Magistrate Judge's analysis in dismissing similar claims in two other capital habeas cases. *McKnight v. Bobby*, No. 2:09-cv-059, 2018 WL 524872, at *2 (S.D. Ohio Jan. 24, 2018); *Bays v. Warden, Ohio State Penitentiary*, No. 3:08-cv-76, 2017 WL 6731493, *1 (S.D. Ohio Dec. 29, 2017). The Court finds no reason for a different outcome in this case, and concludes there is no error in the Magistrate Judge's ruling.

As to the second issue, the Magistrate Judge explained that the analysis in *Teague v. Lane*, 489 U.S. 288 (1989) governs whether *Hurst* applies retroactively. The Magistrate Judge concluded that *Hurst* does not apply retroactively, and explains that this conclusion is confirmed by *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017). The

Magistrate Judge acknowledges that the main issue in *Coley* was whether another Ohio death row inmate should be permitted to file second-or-successive habeas petition raising a claim under *Hurst* -- an issue which is not present in this case because this is Petitioner's first habeas application. However, the Magistrate Judge notes that in denying the inmates application under 28 U.S.C. § 2244(b)(2)(A), the Sixth Circuit noted that the Supreme Court had not made *Hurst* retroactive to cases on collateral review. *See In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) ("But even if we assume that Hurst announced 'a new rule of constitutional law,' the Supreme Court has not 'made [Hurst] retroactive to cases on collateral review.'") (quoting *Tyler v. Cain*, 533 U.S. 656, 662-63, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)). The Magistrate Judge also noted that this conclusion was in keeping with other decisions within this district. *See*, *e.g.*, *Gapen v. Robinson*, No. 3:08-cv-280, 2017 WL 3524688, at *4 (S.D. Ohio Aug. 15, 2017) ("Amendment would also be futile because *Hurst* does not apply retroactively to cases on collateral review."); *Davis v. Bobby*, No. 2:10-CV-107, 2017 WL 4277202, at *4 (S.D. Ohio Sept. 25, 2017) (finding amendment based on *Hurst* would be futile). The Court sees no error in the Magistrate Judge's conclusion that *Hurst* does not apply retroactively to cases on collateral review.

Based on the foregoing, Petitioner's objections to the Magistrate Judge's November 13, 2017 Decision and Order Vacating Prior Decision and Denying Motion to Amend (Doc. 287); and December 29, 2017 Supplemental Opinion on Motion to Amend (Doc. 292) are **OVERRULED**. Accordingly, Petitioner is denied leave to add lethal injection invalidity claims, but that denial is without prejudice to Petitioner pursuing them in *In re Ohio Execution Protocol Litig.*, Case No. 2:11-cv-1016, where he is a plaintiff.

Based on this Court's decision of September 29, 2013 (Doc. 198), this matter is **CLOSED** and **TERMINATED** from the active docket of this Court.

IT IS SO ORDERED.

/s/ Michael R. Barrett
JUDGE MICHAEL R. BARRETT

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Walter Raglin,

Petitioner, Case No. 1:00cv767

v. Judge Michael R. Barrett

Betty Mitchell,

Respondent.

ORDER & OPINION

This matter is before the Court upon a number of Report and Recommendations ("R&Rs") and a Decision of the Magistrate Judge. These documents can be grouped in three categories.

The first category contains those documents related to the Magistrate Judge's R&R regarding Petitioner's First Amended Petition. (Doc. 89). Petitioner filed objections to that R&R (Doc. 95), and Respondent filed a Response to the Objections (Doc. 98). The Magistrate Judge then entered an Amended Supplemental R&R. (Doc. 100). Petitioner filed objections to the Amended Supplemental R&R, and Respondent filed a Response to the Objections (Doc. 102). Later, Petitioner was permitted to file Supplemental Objections (Doc. 142), to which Respondent filed a Response (Doc. 145).

The second category contains documents related to the Magistrate Judge's R&R regarding Petitioner's Certificate of Appealability. (Doc. 169). Petitioner filed Objections. (Doc. 170). The Magistrate Judge then filed a Supplemental R&R. (Doc. 176). Petitioner filed Objections to the Supplemental R&R (Doc. 182), to which the

Respondent filed a Response (Doc. 186).

The third category contains documents related to the Magistrate Judge's Decision and Order granting Petitioner's Motion for Leave to File a Second Amended Petition. (Doc. 177). This Order allows Petitioner to add new claims to his Petition in which Petitioner argues that his execution under Ohio's lethal injection protocol will violate the Eighth and Fourteenth Amendment. Respondent filed Corrected Objections. (Doc. 180). Petitioner filed a Response. (Doc. 185). The Warden then filed a Notice of Supplemental Authority. (Doc. 195). This Court recommitted the matter to the Magistrate Judge (Doc. 187), who then issued a Supplemental Opinion and Recommendations (Doc. 188). The Warden filed Objections to the Supplemental Opinion and Recommendations (Doc. 191), to which Petitioner filed a Response (Doc. 192).

I. BACKGROUND

Petitioner Walter Raglin was convicted in Hamilton County, Ohio, and sentenced to death for the murder and robbery of Michael Bany. A more detailed description of the factual background of this case has been covered elsewhere and for the sake of brevity will not be repeated here.

Following the conclusion of his direct appeals and exhaustion of his state avenues for post-conviction relief, Petitioner filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

II. ANALYSIS

A. Standard of Review

If a party files timely objections to a magistrate judge's report and recommendation, the Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). With regard to orders on non-dispositive matters, Federal Rule of Civil Procedure 72(a) provides that a district judge shall consider a party's objections to a magistrate's order and "shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law." The "clearly erroneous" standard applies to the magistrate judge's factual findings and the "contrary to law" standard applies to the legal conclusions. *Sheppard v. Warden, Chillicothe Corr., Inst.*, 1:12-CV-198, 2013 WL 146364, *5 (S.D. Ohio Jan. 14, 2013). Legal conclusions should be modified or set aside if they "contradict or ignore applicable precepts of law, as found in the Constitution, statutes, or case precedent." *Gandee v. Glaser*, 785 F.Supp. 684, 686 (S.D. Ohio 1992).

The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA") governs the standards or review for state court decisions. Petitioner filed his Petition for Habeas Corpus (Doc. 14) on September 13, 2000, and therefore it is subject to the Act's provisions. The AEDPA provides that federal courts cannot grant a habeas petition for any claim that the state court adjudicated on the merits unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon

an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254(d); *see also Miller v. Francis,* 269 F.3d 609, 614 (6th Cir. 2001).

B. First Amended Petition

In his First Amended Petition, Petitioner raises thirty-eight grounds for relief. In his R&R (Doc. 89) and Amended Supplemental R&R (Doc. 100), the Magistrate Judge recommends dismissing all grounds for relief in Petitioner's First Amended Petition.[1]

Petitioner does not object to the Magistrate Judge's R&R as to Grounds Three, Five, Seven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Eighteen, Nineteen, Twenty, Twenty-One, Twenty-Two, Twenty-Five, Twenty-Seven, Twenty-Nine, and Thirty-Four. Therefore, the Court will not discuss those grounds in detail here. The Grounds which are at issue are as follows:

> **First Ground for Relief:**
>
> Walter Raglin was denied his right to the effective assistance of counsel at the pretrial and trial phases of his capital trial in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.
>
> . . .
>
> B. Trial counsel was ineffective for failing to conduct voir dire in a manner sufficient to choose a fair and impartial jury
>
> . . .
>
> 4. Failure to adequately voir dire and remove Juror Veesart

[1]The Magistrate Judge explained that in his First Amended Petition Petitioner abandoned Claims A.1, A.2, A.3, A.4, B.1, B.2, B.3, and D.2.b from the First Ground for Relief, Claims A, B, and C from the Second Ground for Relief and the Fifth, Seventh, Tenth, Eleventh, Twentieth, Twenty-Second, Twenty-Fourth, Twenty-Sixth, Twenty-Eighth, Thirty-First, Thirty-Third, and Thirty-Fifth Grounds for Relief in their entirety. (Doc. 89, at 12-13). The Magistrate Judge also explained that Petitioner added subpart D of the Second Ground for Relief and Grounds for Relief Thirty-Seven and Thirty-Eight, but those newly-added claims were dismissed as barred by the statute of limitations. (Id. at 13).

C. Trial counsel was ineffective for repeatedly conceding Mr. Raglin's guilt and then after such concession presenting conflicting arguments to the jury

1. Trial counsel's concession of Mr. Raglin's guilt

2. Conflicting arguments presented to the jury

D. Trial counsel was ineffective for failing to adequately present a defense, including failing to support counsel's request for a manslaughter instruction with evidence sufficient to warrant the instruction, failing to secure the assistance of experts, and failing to object to prosecutorial misconduct.

1. Failure to put on evidence in support of manslaughter instruction

2. Failure to secure the assistance of experts

a. Firearms expert
. . .

3. Failure to object to prosecutorial misconduct

Second Ground for Relief:

Walter Raglin was denied his right to the effective assistance of counsel at the mitigation phase of his capital trial in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

. . .

D. Trial counsel failed to adequately investigate and present significant evidence of remorse.

Third Ground for Relief:

Walter Raglin was denied his right to the effective assistance of counsel under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

Fourth Ground for Relief:

Walter Raglin was denied his right to the effective assistance of counsel on his direct appeals in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Sixth Ground for Relief:

Walter Raglin's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated when the trial court failed to suppress his statement made to members of the Cincinnati Police Department on January 3, 1996, because his statement was made during a custodial interrogation following an unfulfilled request for counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 489 U.S. 146 (1990).

Eighth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment Rights were violated when the judge refused to instruct the jury at the end of the trial phase that it could find Mr. Raglin guilty of involuntary manslaughter, a lesser included offense of aggravated murder.

Ninth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment rights were violated when the judge erroneously instructed the jury at the end of the trial phase on the issues of causation, forseeability [sic], intent, and purpose.

Seventeenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase in such a manner that the jury could conclude that it had to consider and reject a recommendation as to the imposition of death before it could consider either life sentence option.

Twenty-Third Ground for Relief:

Walter Raglin was denied his constitutional rights to a fair and impartial trial under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments as a result of prosecutorial misconduct during both phases of his capital proceedings.

Thirtieth Ground for Relief:

Walter Raglin was denied his constitutional rights under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments during the mitigation phase because the trial court permitted the prosecutor to introduce

inadmissable rebuttal evidence that was unfairly prejudicial to Mr. Raglin's rights to a fair trial and impartial jury.

Thirty-Second Ground for Relief:

Walter Raglin's rights as guaranteed by the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments were violated when the trial court committed multiple errors during the pretrial, trial and mitigation phases of his capital case.

Thirty-Sixth Ground for Relief:

Walter Raglin's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, and gross misconduct of state officials in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Thirty-Seventh Ground for Relief:

Brady Claim

Thirty-Eighth Ground for Relief:

Giglio Claim

For the reasons that follow, the Court finds that Petitioner's Objections to the Magistrate Judge's R&Rs regarding Petitioner's First Amended Petition are not well taken and are overruled.

1. <u>First Ground for Relief</u>

Petitioner argues that the Magistrate Judge erred in concluding that his claims of ineffective assistance of counsel were procedurally defaulted.

In the Sixth Circuit, a four-part analysis is used to determine whether a claim has been procedurally defaulted: (1) whether there is a state procedural rule that is applicable to the petitioner's claim; (2) whether the petitioner failed to comply with that rule; (3) whether the rule was actually enforced in the petitioner's case; and (4) whether

the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

In applying this analysis, the Magistrate Judge explained that Petitioner's claims of ineffective assistance of counsel were not raised in the state courts until Petitioner filed for post-conviction relief. The Magistrate Judge explained that the state courts applied Ohio's doctrine of *res judicata*, which barred consideration of the ineffective assistance of counsel claims by the state courts because the claims could have been raised on direct appeal. *See State v. Cole*, 443 N.E.2d 169 (1982) (syllabus) ("Where a defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief.").[2] The Magistrate Judge concluded that Ohio's doctrine of *res judicata* is an adequate and independent state ground, and therefore the ineffective assistance of counsel claims were procedurally defaulted.

In his Objections, Petitioner cites *Greer v. Mitchell*, 264 F.3d 663, 674-75 (6th Cir. 2001), *cert. denied*, 535 U.S. 940 (2002), which states that "when the record reveals that the state court's reliance on its own rule of procedural default is misplaced, we are reluctant to conclude categorically that federal habeas review of the purportedly defaulted claim is precluded." Petitioner argues that the Ohio courts misapplied the *res judicata* doctrine because when he presented his ineffective assistance of counsel

[2]Petitioner had new counsel appointed on appeal. (Doc. 15, Vol. VI, Tr. 768).

claims in the post-conviction proceedings, his claims were supported with evidence *dehors* the record which was not available to support the claims on direct appeal.

The Magistrate Judge addressed this same argument, and began by explaining that when the Ohio First District Court of Appeals addressed Petitioner's ineffective assistance of counsel claims during the post-conviction proceedings, the court explained in "meticulous detail" why the ineffective assistance of counsel claims could have been raised on direct appeal by Petitioner's new attorneys and why the additional evidence submitted with the post-conviction petition did not materially change the case which could have been presented on appeal. *See State v. Raglin*, 1999 WL 420063 at *3-6 (Ohio Ct. App. June 25, 1999). The Magistrate Judge then explained that Petitioner has not demonstrated that the court's reliance on *res judicata* was misplaced, and therefore distinguished this case from the situation described by the Sixth Circuit in *Greer*. The Court finds no error in this conclusion.

Under Ohio law, "[t]he presentation of competent, relevant, and material evidence *dehors* the record may defeat the application of *res judicata*." *State v. Lawson*, 659 N.E.2d 362, 367 (Ohio 1995). However, in this case, as the Magistrate Judge explained, the Ohio Court of Appeals found that the issue of trial counsel's incompetence could have been fairly determined without evidence *dehors* the record because the claimed errors were evident from the record, and therefore Petitioner's proffered evidence *dehors* the record was of no consequence. *See*, *e.g.*, *State v. Raglin*, 1999 WL 420063 at *5 ("Because this claim challenged conduct that was evident in the record, it should have been brought on direct appeal. Raglin's attempt to support the claim with evidence *dehors* the record, such as Porter's affidavit and

newspaper articles, did not change this fact."). Accordingly, the Court finds the state court's reliance on Ohio's *res judicata* rule was not misplaced.

Next, Petitioner asserts that Ohio's *res judicata* rule is not applicable because his ineffective assistance of counsel claims were raised on direct appeal by filing an application to re-open his direct appeal in the Ohio Supreme Court. However, as the Magistrate Judge pointed out, under Ohio law an application to reopen is not part of a direct appeal. *See Morgan v. Eads*, 818 N.E. 2d 1157, 1162 (2004) (holding that the parallel rule found in Ohio R. App. P. 26(B) "represents a collateral postconviction remedy and is not part of the original appeal."); *see also Lopez v. Wilson*, 426 F.3d 339, 352 (6th Cir. 2005) (application to reopen under Rule 26(B) is a collateral matter rather than part of direct review). Because an application to reopen is a collateral matter rather than part of direct review, there is no federal constitutional right to assistance of counsel at that stage. *Lopez*, 426 F.3d at 352. Absent a constitutional right, dismissal of the federal habeas claim is proper. *Id*. at 353.

Finally, Petitioner argues that even if he did violate a state procedural rule, there was cause and prejudice sufficient to excuse the alleged procedural defect. However, as the Magistrate Judge pointed out in his Amended Supplemental R&R, Petitioner only raised this argument in his Objections to the initial R&R:

> Petitioner argues he can excuse his procedural default in presenting these claims on direct appeal by showing of cause and prejudice and that the ineffectiveness of his appellate counsel can constitute such cause (Objections, Doc. 95, at 6-7). He fails to mention that he had asserted he would need an evidentiary hearing to show such cause and prejudice (Traverse, Doc. No. 16, at 51), but then never moved for a hearing. It was for this reason that the Report treated the cause and prejudice claim as abandoned (Report, Doc. No. 89, at 17).

(Doc. 100, at 5). Petitioner did not address this point in his Objections to the Amended Supplemental R&R,[3] and the Court finds no error in the Magistrate Judge's recommended disposition.

However, even if the Court were to address Petitioner's argument, the Court would find that Petitioner has not established cause for the procedural default. The ineffective assistance of appellate counsel may constitute cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish ineffective assistance of counsel, the petitioner must show both that his counsel made errors that were so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, as explained below under the Fourth Ground, Petitioner has failed to establish that he was denied the right to effective assistance of appellate counsel based on appellate counsel's failure to raise trial counsel's errors.

In a Supplemental R&R on Petitioner's Motion for Certificate of Appealability, the Magistrate Judge concluded that the Supreme Court's recent decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) did not permit Petitioner to rely on ineffective assistance of post-conviction counsel as cause for procedural default. (Doc. 176). The Magistrate Judge noted that the only claim of ineffective assistance of trial counsel which was not

[3]However, Petitioner does raise an objection on the issue of cause and prejudice under Ground Three, which the Court will discuss below.

raised in the post-conviction proceedings was the claim in Ground One, subpart D.3 (the failure to object to prosecutorial misconduct).[4]

In *Martinez*, the Supreme Court analyzed Arizona law, which expressly required a defendant to raise a claim of ineffective assistance of counsel in an initial collateral review proceeding. The Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S.Ct. at 1315. The Court explained that this holding is a "limited qualification" to its prior decision, *Coleman v. Thompson*, 501 U.S. 722 (1991), in which the Court held that an attorney's negligence in a post-conviction proceeding does not establish cause to excuse procedural default. The Court explained the exception to *Coleman* was narrow:

> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. at 1320 (citations omitted).

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[4]There is no dispute that Petitioner's failure to present his ineffective assistance of counsel claim in Ground One, subpart D.3 to the Ohio courts in a timely fashion has resulted in a procedural default of this claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). However, Petitioner's ineffective assistance of post-conviction counsel was never presented to the Ohio courts. As the Ninth Circuit has observed in applying *Martinez*, "the Supreme Court did not find the claim barred for not being presented to the state courts. Therefore, there seems to be no requirement that the claim of ineffective assistance of P[ost-]C[onviction]R[elief] counsel as cause for a ineffective-assistance-of-sentencing-counsel claim be presented to the state courts." *Dickens v. Ryan*, 688 F.3d 1054, 1072 (9th Cir. 2012); *but see Martinez v. Schriro*, CV 08-785-PHX-JAT, 2012 WL 5936566, *4, n.5 (D. Ariz. Nov. 27, 2012) (recognizing in dicta the argument that "*Dickens* is mistaken on the facts of *Martinez* because in *Martinez* Petitioner did present his ineffective-assistance-of-first-PCR-counsel claim to the state court arguing it was cause to overcome the untimeliness of his second PCR petition (which argued that trial counsel was ineffective).").

After the Magistrate Judge issued the Supplemental R&R, the Sixth Circuit addressed the applicability of *Martinez* to a federal habeas case arising out of Ohio. *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013). The Sixth Circuit declined to expand *Martinez,* noting that the Supreme Court "repeatedly emphasized the 'limited nature' of its holding, which 'addresse[d] only the constitutional claims' present where the state has banned a defendant from raising his ineffective assistance of trial counsel claim on direct appeal." *Id*. at 784-85 (quoting *Martinez*, 132 S.Ct. at 1320). The Sixth Circuit found that *Martinez* did not apply under the circumstances of the case: "Not only does Ohio permit ineffective assistance of trial counsel claims to be made on direct appeal, [the petitioner] raised this claim on direct appeal and the Ohio Supreme Court rejected it on the merits." *Id*.

However, the Supreme Court recently clarified that the exception to *Coleman* allows a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where:

> (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.'

Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013) (quoting *Martinez*, 132 S.Ct. at 1318).

In *Trevino*, the Court analyzed Texas law, which on its face appeared to permit—but not require—the defendant to raise a claim of ineffective assistance of trial counsel on direct appeal. After analyzing the Texas procedural system, the Court concluded that Texas procedure does not offer most defendants a meaningful opportunity to

present an ineffective assistance of counsel claim on direct review. *Id*. at 1921. The Court held that in such an instance, *Martinez* applies and "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id*. (quoting *Martinez*, 132 S. Ct. at 1320).[5]

This Court has found that the *Martinez* exception applies to "a case where, because of the way Ohio post-conviction review law is structured, the ineffective assistance of trial counsel claim had to be brought in post-conviction." *Henness v. Bagley*, 2:01-CV-043, 2013 WL 4017643 * 3 (S.D. Ohio Aug. 6, 2013). This Court has explained that under Ohio law, there are two categories of ineffectiveness claims which must be raised in post-conviction proceedings: (1) ineffective assistance claims that rely on evidence outside the trial record or (2) ineffective assistance claims where trial counsel also served as appellate counsel, as counsel is not expected to assert his or her own ineffectiveness. *Sheppard v. Robinson*, 1:00-CV-493, 2013 WL 146342 *12 (S.D. Ohio Jan. 14, 2013). Here, Petitioner's trial counsel did not serve as appellate counsel.[6] Therefore, Petitioner can only make an ineffective assistance claim within the first category.[7]

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[5]Petitioner was represented by counsel in his post-conviction proceedings. (Doc. 15, Vol. VII, Tr. 1080). Therefore, this is not a situation described in *Martinez* and *Trevino* where there was "no counsel."

[6]At trial, Petitioner was represented by attorneys John Keller and Robert Ranz. (See Doc. 15, Vol. I). On appeal, Petitioner was represented by attorney Fred Hoefle. (See Doc. 15, Vol.VI, at 774).

[7]As to the first category, Magistrate Judge Merz has explained:

> Ohio requires—mandates—that ineffective assistance of trial counsel claims dependent on evidence *dehors* the appellate record be brought in post-

In this case, the only possible application of the *Martinez* exception would be to Petitioner's claim in Ground One, subpart D.3, which is based on trial counsel's failure to object during the prosecutor's closing argument in which the prosecutor re-enacted the shooting using the alleged murder weapon. All of Petitioner's other claims were presented in his initial collateral review proceedings. However, as this Court has explained elsewhere, under Ohio law Petitioner was barred from litigating his claim of ineffective assistance of trial counsel in post-conviction if he could have litigated it on direct appeal. *Sheppard v. Robinson*, 1:00-CV-493, 2012 WL 3583128, *6 (S.D. Ohio Aug. 20, 2012) report and recommendation adopted, 1:00-CV-493, 2013 WL 146342 (S.D. Ohio Jan. 14, 2013) (citing *State v. Perry*, 226 N.E.2d 104, 105 (Ohio 1967)). As the Magistrate Judge pointed out, Petitioner has not made any actual argument as to how this claim falls within the *Martinez* exception.[8] Without more, this Court must conclude that direct appeal counsel could have argued ineffective assistance of trial counsel based on the record. Therefore, Ohio's doctrine of *res judicata* would have barred Petitioner from raising it in his initial-review collateral proceeding. "Because it would have been barred from consideration, it cannot have been ineffective assistance

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> conviction. For a petitioner who can only establish his ineffective assistance of trial counsel claims with evidence *dehors* the record, the constitutional guarantee of effective assistance of counsel on direct appeal is of no assistance. It was avowedly to close this gap between guaranteed effective assistance on direct appeal and possible complete default of a substantial ineffective assistance of trial counsel claim in post-conviction by incompetent counsel that the Court decided in *Martinez* to create the exception to *Coleman*.

Turner v. Hudson, 2:07-CV-595, 2013 WL 55660, *4 (S.D. Ohio Jan. 3, 2013).

[8]Instead, Petitioner argues that *Martinez* supports his argument that Ohio's *res judicata* rule is not an adequate and independent state ground as applied to claims of ineffective assistance of counsel. This argument is rejected, but will be addressed within the context of Petitioner's Certificate of Appealability.

in the *Martinez*-incorporating-*Strickland* sense for initial post-conviction counsel to have failed to raise it." *Sheppard*, 2012 WL 3583128, at *6.

Therefore, the Court concludes that Petitioner has procedurally defaulted these ineffective assistance of counsel claims and federal habeas review is precluded.

2. Second Ground for Relief

In the First Amended Petition, Petitioner added subpart D of the Second Ground for Relief. Petitioner argues that the Magistrate Judge erred in determining that this claim is barred by the statute of limitations. However, this Court has already adopted the Magistrate Judge's recommendation on this claim, without objection by Petitioner. (See Doc. 87). Nevertheless, because the Magistrate Judge has addressed Petitioner's argument that his claim is timely filed, the Court will also reconsider the issue.

In subpart D of the Second Ground for Relief, Petitioner claims ineffective assistance of counsel during the mitigation phase of his capital trial. Petitioner claims that trial counsel failed to adequate investigate and present significant evidence of his remorse in the hours immediately following the shooting. Petitioner argues that this claim relates back to the Third and Twenty-Third Grounds for Relief in his original Petition.

In *Mayle v. Felix*, the Supreme Court held that claims raised in an amendment to a habeas petition did not automatically relate back merely because they arose out of the same trial and conviction. 545 U.S. 644, 650 (2005). The Court explained that amendments do not relate back if they assert "a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id*.

In the original Petition, Petitioner set forth the following grounds for relief in the Third and Twenty-Third Grounds for Relief:

> **Third Ground for Relief:**
>
> Walter Raglin was denied his right to the effective assistance of counsel under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments when his attorneys failed to object and properly preserve numerous errors.
>
> **Twenty-Third Ground for Relief:**
>
> Walter Raglin was denied his constitutional rights to a fair and impartial trial under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments as a result of prosecutorial misconduct during both phases of his capital proceedings.

(Doc. 14). The Magistrate Judge found that the original Petition does not include any facts relative to lack of investigation about remorse, failure to disclose evidence, or a claim of false argument by the prosecutors—facts which are used to support the subpart D claim in the Amended Petition. (Doc. 86. at 4). This Court finds no error in this conclusion.

In the original Petition, under the Third Ground for Relief, Petitioner argued that counsel was ineffective because counsel failed to object at several critical stages. (Doc. 14, at 54). As one example, Petitioner explained that counsel failed to object during the prosecutor's closing argument during the mitigation phase when the prosecutor invited the jury to look at Petitioner and see him bragging and laughing about Bany's murder in the hours after it occurred. As another example, the prosecutor invited the jury to speculate where Petitioner would have gone or what he would have done if he had

successfully escaped from the Hamilton County Justice Center.[9] The prosecutor told the jury:

> [I]s he going to the Baneys [sic] to apologize? Is that why he jumped out that window? He's back on the streets. Back to hustling again. He's going to get some more and he's going to do what he has to do to take it.

(Id. at 55).

In the Twenty-Third Ground for Relief in the original Petition, Petitioner argues that the same facts demonstrate prosecutorial misconduct which resulted in a violation of his constitutional rights.

The Court finds that while these facts address the issue of remorse, these facts are not the same type of facts used to support Petitioner's claim in subpart D. The facts in subpart D were based on newly discovered testimony of two witnesses who were with Petitioner immediately after the shooting. These witnesses described Petitioner as crying, vomiting and asking for God's forgiveness. Petitioner argued that counsel was ineffective for failing to investigate because counsel failed to talk to these witnesses, who were listed in the State's discovery.

A claim based on the failure to investigate and discover evidence of remorse is different from a claim based on counsel's failure to object to statements the prosecutor made about Petitioner's remorse, or prosecutorial misconduct based on those same statements. Because the claims do not share a "common core of operative facts," the claim in subpart D does not relate back to the Third or Twenty-Third Grounds for Relief in the original Petition. Accordingly, the Court finds that subpart D of the Second Ground for Relief is barred by the statute of limitations.

[9]While incarcerated Petitioner attempted to escape from the fifth floor of the Hamilton County Justice Center by jumping out of a window that had been temporarily removed by workers. *State v. Raglin*, 699 N.E.2d 482, 489-90 (Ohio 1998).

3. Third Ground for Relief

To repeat, in his Third Ground for Relief, Petitioner claims ineffective assistance of trial counsel based on the failure to object and properly preserve critical errors for appeal. In his R&R, the Magistrate Judge concluded that this claim was procedurally defaulted on the same basis as the First Ground: it was not presented on direct appeal, but was only presented in the petition for post-conviction relief, where it was held barred by Ohio's criminal *res judicata* rule. (Doc. 89, at 18). However, in the briefing of Petitioner's Motion for Certificate of Appealability, Petitioner points out for the first time that this claim was first raised in his second petition for post-conviction relief. (Doc. 165). Petitioner explains that the trial and appeals court denied the claim because he failed to satisfy the requirements of Ohio Revised Code § 2953.23 for a successive post-conviction petition, and not based on *res judicata*. The Magistrate Judge found that this argument was waived because Petitioner failed to previously object on this basis. Petitioner objects to this conclusion. (Doc. 170, at 11).

The Sixth Circuit has explained: "As long as a party was properly informed of the consequences of failing to object, the party waives subsequent review by the district court and appeal to this court if it fails to file an objection." *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995) (citing *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981)). There is no dispute that Petitioner was properly informed of the consequences of failing to object. With regards to the Third Ground, the Magistrate Judge gave notice in both the R&R (Doc. 89, at 29) and the Amended Supplemental R&R (Doc. 100, at 21). Petitioner filed objections to the R&R and the Amended Supplemental R&R, and

was later permitted to file Supplemental Objections. At no time did Petitioner raise this factual error.

However, even if the Court were to consider Petitioner's objection, the Court would still reach the same conclusion after the correction of the factual error.

Under *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), Petitioner's Third Ground remains procedurally defaulted, albeit for a different reason. Ohio Revised Code § 2953.23 bars successive petitions for post-conviction relief unless certain criteria have been met. The Sixth Circuit has recognized that Ohio Revised Code § 2953.23 is an adequate and independent state procedural rule. *Davie v. Mitchell*, 547 F.3d 297, 311 (6th Cir. 2008) (citing *Broom v. Mitchell*, 441 F.3d 392, 399-401 (6th Cir. 2006)).

However, Petitioner argues that Respondent failed to raise Ohio Revised Code § 2953.23 as a basis for finding procedural default and this Court should not raise it *sua sponte*.[10]

The Supreme Court has explained: "Our precedent establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition." *Wood v. Milyard*, 132 S. Ct. 1826, 1835, (2012) (citing *Granberry v. Greer*, 481 U.S. 129, 134 (1987) (exhaustion defense); *Day v. McDonough*, 547 U.S. 198, 202 (2006) (statute of limitations defense)). The Supreme Court has recognized that "the Courts of Appeals have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's

[10]Respondent did not raise any arguments with regard to the Third Ground in the Amended Return of Writ.

procedural default."[11] *Day v. McDonough*, 547 U.S. 198, 206 (2006); *see*, *e.g.*, *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004).

However, the Supreme Court has instructed that a federal habeas court "does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood*, 132 S.Ct. at 1834. Instead, a federal court may only consider a defense on its own initiative where the State has not strategically withheld the defense or chosen to relinquish it; and the petitioner is accorded a fair opportunity to present his position. *Wood*, 132 S.Ct. at 1834-35 (citing *Day*, 547 U.S. at 210–211). "Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the [affirmative defense] issue, and 'determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition [ ].'" *Day*, 547 U.S. at 210 (quoting *Granberry*, 481 U.S. at 136).

Here, it does not appear from the record that Respondent strategically withheld the procedural bar defense or chose to relinquish it. Instead, the failure to raise the defense in the Amended Return of Writ stemmed from "inadvertent error." *See Day*, 547 U.S. at 211. Petitioner has not been prejudiced by the delayed focus on the procedural bar issue. The issue of the procedural bar to the claim raised in the Third Grounds has been repeatedly addressed by the Magistrate Judge and the parties. Petitioner himself has filed three rounds of objections on the issue. While this discussion was grounded on a procedural bar stemming from *res judicata*, Petitioner has not argued that his response would have been any different had there been a

[11]However, the Supreme Court has not decided the issue. 547 U.S. 206 (citing *Trest v. Cain*, 522 U.S. 87, 89, 90 (1997) (holding that Court of Appeals was not obliged to raise procedural default on its own initiative, but declined to decide whether courts have discretion to do so).

clarification that the procedural bar stemmed from a failure to satisfy the requirements of Ohio Revised Code § 2953.23.

The Court will address those arguments now. Petitioner repeats the same arguments he made with respect to the First Ground for Relief: (1) Petitioner did present this claim on direct appeal by presenting the claim in his application to re-open his direct appeal in the Ohio Supreme Court; and (2) there was cause and prejudice to excuse the alleged procedural default.

As to the first argument, as stated above, under Ohio law an application to reopen is not part of a direct appeal. *See Morgan v. Eads*, 818 N.E. 2d 1157, 1162 (2004); *Lopez v. Wilson*, 426 F.3d 339, 352 (6th Cir. 2005). Therefore, Petitioner has not presented this claim on direct appeal.

As to the second argument, the Court once again notes that Petitioner claimed that he could demonstrate cause and prejudice to excuse this procedural default, but stated he would need an evidentiary hearing in which to do so. However, no motion for evidentiary hearing was ever filed. The Court finds that the Magistrate Judge correctly concluded that the cause and prejudice argument should be treated as abandoned.

However, in his Objections to the Amended Supplemental R&R, for the first time, Petitioner argues that a failure to request an evidentiary hearing on a claim cannot be deemed an abandonment of a claim. Petitioner also argues that his claim of ineffective assistance of appellate counsel is supported by the affidavits of attorneys Laney Hawkins and Joseph E. Wilhelm. (See Doc. 15, Vol. XI, at 2809 & 2884).

The ineffective assistance of appellate counsel may constitute cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, as

explained below, Petitioner has failed to establish that he was denied the right to effective assistance of appellate counsel. Therefore, regardless of whether the procedural default was based on *res judicata* or failure to satisfy the requirements of Ohio Revised Code § 2953.23, the Court concludes that Petitioner's claim of ineffective assistance of trial counsel in the Third Ground was procedurally defaulted and Petitioner has not demonstrated cause and prejudice to excuse this procedural default.

4. Fourth Ground for Relief

Petitioner claims he was denied his right to the effective assistance of appellate counsel because counsel failed to raise the following issues in his direct appeal:

1. Trial counsel failed to challenge a prospective juror for cause or utilize a pre-emptory challenge to remove a juror who had personal knowledge of the crime alleged and personal relationships with those affected by the crime alleged.

2. Trial counsel repeatedly conceded the issue of guilt at the trial phase of his capital trial.

3. Trial counsel repeatedly conceded the issue of guilt during *voir dire* and opening statement, but then argued in closing that the State had failed to prove the element of purpose beyond a reasonable doubt.

4. Trial counsel failed to procure reasonable and necessary experts to present forensic evidence, including evidence as to the operability of the murder weapon.

5. Trial counsel failed to put on a defense case-in-chief targeting a lesser included offense.

6. Trial counsel failed to investigate and present substantial mitigating evidence of remorse during the sentencing phase hearing.

7. Trial counsel failed to raise as error trial instructions which undermined the State's burden of proof beyond a reasonable doubt and shifted the burden of proof to the defendant.

> 8. Trial counsel failed to object to the prosecutor's closing argument which was presented in a manner to inflame the jurors against the defendant.

Petitioner does not object to the Magistrate Judge's conclusion that the sixth assignment of error is barred by the statute of limitations. However, Petitioner does object to the Magistrate Judge's recommendation that the remaining seven assignments of error should be dismissed with prejudice.

As to these seven, the Magistrate Judge explained in the R&R:

> Petitioner makes no argument as to why these omitted assignments of error are meritorious or how they are more meritorious than the assignments of error which actually were presented on direct appeal. In other words, Petitioner merely asserts these were meritorious without making any argument.

(Doc. 89, at 22). In his Objections, Petitioner argued that the affidavits of attorneys Laney Hawkins and Joseph E. Wilhelm supported his claims.[12]

In his Amended Supplemental R&R, the Magistrate Judge reviewed the affidavits of Hawkins and Wilhelm to determine whether the affidavits would support Petitioner's claim of ineffective assistance of appellate counsel.[13] (See Doc. 100, at 10-12). The Magistrate Judge noted that to the extent that Hawkins addressed the performance of appellate counsel, Hawkins' statements are set forth in a conclusory fashion. The Sixth Circuit has explained that conclusory assertions fall far short of showing actual prejudice. *Cross v. Stovall*, 238 Fed. App'x 32, 39-40 (6th Cir. 2007). In addressing Wilhelm's affidavit, the Magistrate Judge noted that Petitioner failed to argue why the

[12]In his Amended Supplemental R&R, the Magistrate Judge notes that this is the first time that Petitioner has cited to these affidavits. (Doc. 100, at 10). These affidavits were part of Petitioner's application for reopening filed with the Ohio Supreme Court.

[13]The Court notes that the Magistrate Judge inadvertently referred to Hawkins as "Haney" in several places in the R&R.

issues identified by Wilhelm were stronger than the issues actually raised or why it would have likely changed the outcome. *See McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004) (explaining that counsels' failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal); *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (a petitioner must show that appellate counsel ignored issues which are clearly stronger than those presented).

Moreover, as the Magistrate Judge explained, the Ohio Supreme Court rejected Petitioner's ineffective assistance of appellate counsel claim on the merits by refusing to reopen. *See State v. Raglin*, 706 N.E.2d 789 (Ohio 1999) (table) (denying application for reopening under Ohio S. Ct. Prac. R. XI). When a state court adjudicates on the merits a claim which is later presented to a federal habeas court, the federal court must defer to the state court decision unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011). As the Supreme Court has explained, "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id*. (citations omitted). However, this Court will "apply only modified deference because the Ohio Supreme Court's adjudication of the ineffective assistance claim provided 'little analysis on the substantive constitutional issue.'" *Moore v. Mitchell*, 708 F.3d 760, 792 (6th Cir. 2013) (quoting *Davie v. Mitchell*, 547 F.3d 297, 315 (6th Cir. 2008)). Under this

modified approach, this Court must "conduct a careful and independent review of the record and applicable law, but cannot reverse unless the state court's decision is contrary to or an unreasonable application of federal law." *Id*.

The Magistrate Judge noted that Wilhelm's affidavit identifies three ways in which appellate counsel provided ineffective assistance: (1) failure to claim error in the trial court's definition of reasonable doubt; (2) failure to claim error in the trial court's instructing the jury that it had to decide Petitioner's guilt or innocence; and (3) failure to claim error in the trial court's instruction on "purpose."

To begin, the Court notes that even though Petitioner's claim of ineffective trial counsel has been procedurally defaulted, "an examination of trial counsel's performance [i]s required in order to determine whether appellate counsel had been constitutionally ineffective." *See Greer v. Mitchell*, 264 F.3d 663, 675-76 (6th Cir. 2001) (citing *Mapes v. Coyle*, 171 F.3d 408, 419 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999)). The Sixth Circuit has compiled a non-exhaustive list of "considerations that ought to be taken into account in determining whether an attorney on direct appeal performed reasonably competently:"

A. Were the omitted issues "significant and obvious?"

B. Was there arguably contrary authority on the omitted issues?

C. Were the omitted issues clearly stronger than those presented?

D. Were the omitted issues objected to at trial?

E. Were the trial court's rulings subject to deference on appeal?

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

G. What was appellate counsel's level of experience and expertise?

> H. Did the petitioner and appellate counsel meet and go over possible issues?
>
> I. Is there evidence that counsel reviewed all the facts?
>
> J. Were the omitted issues dealt with in other assignments of error?
>
> K. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Mapes v. Coyle, 171 F.3d at 427–28.

In light of these considerations, the Court finds that the claimed errors do not demonstrate that Petitioner suffered from ineffective assistance of appellate counsel. The Court notes that the Magistrate Judge addressed the merits of Petitioner's underlying claim regarding the instruction on purpose. In his Ninth Ground for Relief, Petitioner claimed that the trial court gave an erroneous instruction on the issue of the issues of causation, foreseeability, intent and purpose. The Magistrate Judge concluded that the claim has no merit, and as discussed below, the Court finds that this conclusion is not in error. As to the claim that the trial court erred by instructing the jury that it had to decide Petitioner's guilt or innocence, the Supreme Court has rejected similar claims that such an instruction improperly shifts the burden of proof. *State v. Diar*, 900 N.E.2d 565, 590 (Ohio 2008). As to the claim that the instruction regarding reasonable doubt was unconstitutional, Petitioner raised that claim in his Tenth Ground for Relief, but later abandoned that claim.

The Sixth Circuit has instructed that "[i]f the underlying substantive claims have no merit, the applicant cannot demonstrate that counsel was ineffective for failing to raise those claims on appeal." *Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008). Therefore, the Court concludes that Petitioner has not met the burden of establishing

that the Ohio Supreme Court's decision is contrary to or an unreasonable application of federal law. Ground Four is dismissed with prejudice.

5. Sixth Ground for Relief

Petitioner claims that his Fifth, Sixth and Fourteenth Amendment Rights were violated when the trial court failed to suppress his statement made to members of the Cincinnati Police Department on January 3, 1996 because his statement was made during a custodial interrogation following an unfulfilled request for counsel. The Magistrate Judge recommends dismissing this claim because Petitioner has not shown that the Ohio Supreme Court's decision to uphold the denial of the motion to suppress is an unreasonable application of *Edwards v. Arizona*, in which the Supreme Court held that an accused "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. 477, 484-85 (1981). The Magistrate Judge explained:

> Mr. Raglin, given his *Miranda* warnings, made a complete confession to the police before any audiotaping occurred. Once the police evinced a desire to put the confession on tape, he hesitated about getting an attorney. However, once the police brought him a telephone book to enable him to do that, he changed his mind and said he wanted to go ahead and put the confession on tape.[14] The interchange between Mr. Raglin and the interrogating police officer which Petitioner's counsel characterize as "hounding" is just as reasonably read as conversation about what Mr. Raglin wanted to do. There is no evidence of any effort by the police to talk Mr. Raglin out of calling an attorney nor evidence to

[14]Petitioner argues that there is evidence in the record that the officers never brought Petitioner a phone book. (Doc. 142, at 9) (citing Doc. 15, Vol. I, at 66). The Court finds that this error in the recitation of facts has no effect on the determination as to whether the Ohio Supreme Court's adjudication of Petitioner's claim was an unreasonable application of clearly established federal law.

> contradict the state court findings that it was Mr. Raglin who re-initiated the audiotaping.
>
> Moreover, no evidence has been offered which suggests that there are any material differences in the content of the taped and untaped confessions. While the audiotape would probably be more persuasive to a jury and would forestall attempts to repudiate the confession, which otherwise would only have come to the jury through an officer's testimony, that does not eliminate the fact that the police had a *Mirandized* confession before any talk of an attorney occurred. Thus a full confession would have been admissible entirely apart from the audiotape.

(Doc. 89, at 26).

In his Supplemental Objections (Doc. 142), Petitioner argues that the Magistrate Judge's conclusion is in error because evidence presented to the state court shows that the officers never ceased custodial interrogation after Petitioner requested counsel. In the alternative, Petitioner argues that even if interrogation ceased, Petitioner did not evince a willingness to discuss the investigation without influence by authorities. *See Davie v. Mitchell*, 547 F.3d 297, 305 (6th Cir. 2008) (explaining the general rule that "an *Edwards* initiation occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case.") (quoting *United States v. Whaley*, 13 F.3d 963 (6th Cir. 1994)). Petitioner relies on the following testimony from one of the officers during the suppression hearing:

> Q [Defense counsel Keller]: All right. And, in fact, he – you asked him on more than one occasion whether he wanted an attorney?
>
> A [Officer Argo]: On tape is that?
>
> Q: Yes, on tape?
>
> A: Yes, clarifying the fact that he wanted an attorney.
>
> Q: And at that point you turned the tape off?
>
> A: That is correct.

> Q: And that was at approximately 11:02 p.m. on January 3rd?
>
> A: Yes, it was.
>
> Q: But at that point you didn't stop talking with him, did you?
>
> A: No, we did not.

(Doc. 15, App. Vol. I at 61-62). However, the same officer also testified that after Petitioner requested an attorney:

> A: We advised Mr. Raglin that he would be able to call any attorney that he wished, that we would get the phone book for him and he could find one of his choosing. He - - at that point he - - Mr. Raglin was very talkative that evening and he kept talking about not wanting to inconvenience us, put us to any trouble. We assured him that it was no trouble as far as we were concerned. At that point he said he changed his mind and stated he wanted to go ahead and put it on tape so that we would have his words.
>
> . . .
>
> Q. Did you ever ask him to change his mind or did he just say, I change my mind, I don't want an attorney?
>
> A. He stated he wanted to change his mind and put it on tape.
>
> Q. And how did you respond to that?
>
> A. We advised him at that point that we would do it, but we would have to go through the rights again to make sure that he understood that he could have an attorney and he agreed to do that.
>
> Q. And at that point is the tape turned back on?
>
> A. Yes, it is …

(Id. at 48-49). Therefore, while the officers continued to talk to Petitioner, the Ohio Supreme Court made a reasonable determination that the record revealed that the officers ceased questioning and that:

> it was appellant himself who, after invoking the right to counsel, initiated further conversations or communications with police concerning his wish

> to confess, and that appellant fully understood his right to counsel and voluntarily, knowingly, and intelligently abandoned that right before the custodial interrogation resumed.

State v. Raglin, 699 N.E.2d 482, 491 (Ohio 1998). In support of this conclusion, the Ohio Supreme Court noted that:

> When asked to repeat his statement on tape, appellant agreed and was once again advised of his *Miranda* rights. However, at that point, appellant informed police that he wished to speak to an attorney before proceeding further. Therefore, police ceased questioning appellant and turned the recorder off. The record indicates that police offered to get appellant a telephone book and to assist him in obtaining counsel. Appellant told police that he did not want to "put [the police officers] to any trouble," but the officers assured him that his request for counsel was no trouble. Appellant then told police that he had changed his mind concerning counsel and that he wanted to "put it [his confession] on tape," and "get it off his chest." There is no evidence whatsoever that police said or did anything to change appellant's mind, and appellant changed his mind after only two or three minutes. Police then turned the recorder on and proceeded to ask appellant a series of questions regarding his waiver of the right to counsel. In response to these questions, appellant indicated that he fully understood his rights, that no threats or promises had been made to induce or coerce him into confessing, and that he wanted to put his confession on tape without talking to an attorney or having one present during questioning.

699 N.E.2d at 491. Accordingly, the Court concludes that Petitioner has not met the burden of establishing that the Ohio Supreme Court's decision is contrary to or an unreasonable application of federal law. Ground Six is dismissed with prejudice.

6. <u>Eighth Ground for Relief</u>

Petitioner claims that his Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment Rights were violated when the judge refused to instruct the jury at the end of the trial phase that it could find Petitioner guilty of involuntary manslaughter, a lesser included offense of aggravated murder. Petitioner argues that there is evidence that he did not intend to cause Bany's death, but that the killing resulted from the commission of

an aggravated robbery. Petitioner points to evidence that he had been drinking and smoking marijuana the day of the shooting. Petitioner also relies on the manner of death, arguing that the single gunshot wound to the neck shows that he did not intend to kill Bany.

In finding that the trial court properly refused Petitioner's request for an instruction on involuntary manslaughter, the Ohio Supreme Court explained:

> The facts of this case are clear. Appellant and his accomplice, Darnell Lowery, wandered the streets of Cincinnati looking for a victim to rob. Appellant was carrying a loaded .380 caliber semiautomatic pistol. The men considered two potential classes of victims to rob, but decided to search for easier prey. While appellant and Lowery were searching for a defenseless person to rob, appellant's unfortunate victim, Michael Bany, arrived on the scene. Appellant approached Bany and demanded money. Bany complied with appellant's demands. The record clearly indicates that Bany presented no threat to appellant and that appellant and Bany never argued. Bany never spoke a single word to appellant. While appellant was asking questions concerning Bany's car, Bany bent down and picked up what appellant referred to as a "suitcase," *i.e.*, either the guitar case or the case containing Bany's music equipment. Bany turned to look at appellant, and appellant looked at Bany. Appellant then pointed the pistol at Bany and shot him in the neck in a manner that was certain to (and did) cause Bany's death.
>
> Appellant told police, "I, I fired the gun at [Bany]. I didn't know where I hit [him] at. I wasn'[t] tryin' to kill [him]." Appellant also claimed to have "panicked" at the time he shot and killed Bany. Appellant told police that he had been "scared" by Bany's movements because appellant "didn'[t] know what * * * was in the suitcase." However, appellant never claimed that the shot had been accidentally or unintentionally fired, and the evidence clearly establishes that the shooting was not accidental or unintentional. Appellant's claims of panic and fright are not reasonably supported by the evidence. Appellant had a loaded weapon, he was pointing that weapon at Bany, and he fired that weapon into the neck of his defenseless victim. Appellant told police that he had fired the weapon directly at Bany. He told police that Bany was not trying to "fiddle" with the suitcase or anything of that nature and that Bany had simply "picked it up." Appellant also admitted to police, "I didn'[t] have to shoot that man." The direct and circumstantial evidence in this case, and all reasonable inferences to be drawn therefrom, lead to one inescapable conclusion, to wit, appellant purposely killed Bany during the commission of an

> aggravated robbery when he pointed the gun at Bany and pulled the trigger.

State v. Raglin, 699 N.E.2d at 488. The Magistrate Judge found that the Ohio Supreme Court properly applied the Supreme Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the Court held that a defendant is entitled to "'an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *Id*. at 635 (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). The Supreme Court later clarified *Beck* by explaining that that "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper v. Evans*, 456 U.S. 605, 610 (1982) (emphasis in original). Accordingly, no lesser included offense instruction is required where the evidence not only supported the claim that the defendant intended to kill the victim, "but affirmatively negated any claim that he did not intend to kill the victim." *Id*. at 613.

In this case, based on the above recitation of the facts, the Ohio Supreme Court found "no evidence in this case to reasonably suggest that appellant lacked the purpose to kill his victim." 699 N.E.2d at 488. This Court finds that this was not an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, and therefore Ground Eight is dismissed with prejudice.

7. Ninth Ground for Relief

Petitioner claims that his Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment rights were violated when the judge erroneously instructed the jury at the end of the trial phase on the issues of causation, forseeability, intent, and purpose. Specifically, Petitioner objects to the following portions of the jury instructions:

> . . .when the death is the natural and foreseeable result of the act. . . .
>
> "Result" occurs when the death is naturally and foreseeably caused by the act. . . .
>
> The causal responsibility of the defendant for an unlawful act is not limited to its most obvious result. The defendant is responsible for the natural, logical and foreseeable results that follow, in the ordinary course of events, from an unlawful act.

As part of Petitioner's direct appeal, the Ohio Supreme Court addressed these jury instructions, and explained:

> Appellant contends that the trial court's instructions to the jury in the guilt phase that defined "causation" in terms of foreseeability permitted a conviction for aggravated murder without proof of purpose to kill. Appellant makes a similar argument with respect to the trial court's instruction to the jury that "[i]f a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to cause the death may be inferred from the use of the weapon." Appellant's arguments are not persuasive. The trial court's instructions to the jury, viewed as a whole, made it clear that a finding of purpose (and specific intent) to kill was necessary in order to convict appellant on the charge of aggravated murder. The jury in this case returned its verdicts in accordance with the overwhelming evidence on the issue. Accordingly, we find no reversible error here.

State v. Raglin, 699 N.E.2d at 492.

The Magistrate Judge concluded that this decision was not an unreasonable application of federal law under *Francis v. Franklin*, 471 U.S. 307 (1985), explaining:

> the trial judge told the jury that purpose to cause death was an essential element and twice in the same paragraph told them that proof of purpose required proof of specific intent to cause death. Then he went on to define purpose in terms of intention. Because, as he told the jury, we never have direct proof of someone's purpose, purpose being an internal mental state, purpose must be determined from circumstantial evidence. The Court agrees with Petitioner that the language the trial judge used – "is determined" – told the jury that it must decide Petitioner's *mens rea* from circumstantial evidence. But that is accurate. In criminal cases as in life in general, we never have direct evidence of another's person's state of mind, even when that person declares openly what his or her state of mind is.

(Doc. 89, at 34-35).

The Sixth Circuit recently reviewed a habeas claim based upon a trial court's causation instruction in an Ohio aggravated murder trial which was similar to the one given in this case. That instruction read as follows:

> The State charges that the act of the defendant caused the death of Peter Copas. Cause is an act which in a natural and continuous sequence directly produces the death of Peter Copas and without which it would not have occurred.
>
> The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act. The defendant is also responsible for the natural and foreseeable results that follow, in the ordinary course of events from the act.

Hanna v. Ishee, 694 F.3d 596, 621 (6th Cir. 2012). The Sixth Circuit noted that "the causation instruction stands in isolation when compared to the multiple points where the trial court properly instructed the jury on specific intent." *Id*. The Sixth Circuit cited multiple examples where the trial court advised the jurors that they could not convict the petitioner of aggravated murder unless they found that the state met its burden to prove the petitioner's specific intent to kill beyond a reasonable doubt. *Id*. The court explained that the instructions, read in their totality, clearly place the burden of proof on the state. *Id*. The court distinguished the instructions from the intent instruction in *Francis*, which "specifically called upon the jury to presume that the defendant *intended* the natural and probable consequences of his acts." *Id*. at 622 (citing 471 U.S. at 309) (emphasis in original). The court also noted that in *Francis*, "the overall instructions did not cure this error because they charged the defendant with rebutting the inference that he intended the foreseeable consequences of his actions." *Id*. (citing 471 U.S. at 315). The court explained:

> If anything, *Francis* underscores our conclusion that the state courts properly analyzed Supreme Court precedent in this case. The challenged instruction here is clearly distinguishable from the one in *Francis* because Petitioner's jury was only told that it could infer causation from the defendant's actions; the jury was not instructed to infer anything about Petitioner's intent from this conduct. Moreover, the error in describing causation, to the extent there was any, was attenuated from the essential element in dispute at trial. Finally, and in contrast to *Francis*, the overall instructions provided at Petitioner's trial were curative because they properly charged the jury as to specific intent, whereas the broader instructions in *Francis* only underscored the constitutional error.

Id. Accordingly, the court held that state courts' rulings were not unreasonable applications of clearly established federal law, and habeas relief was not warranted. *Id*.

In this case, as in *Hanna*, the jury was instructed: (1) that aggravated murder is "purposely causing the death of another;" (2) to find Petitioner guilty, the jury must find beyond a reasonable doubt that "the defendant purposely caused the death of Michael Baney [*sic*];" (3) that "[a] person acts purposely when it is his or her specific intention to cause a certain result;" (4) that "[i]t must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to cause the death of Michael Baney [*sic*];" (5) that "[p]urpose is a decision of the mind to do an act with a conscious objective of producing a specific result or engaging in specific conduct;" (6) that "[t]o do an act purposely is to do it intentionally and not accidentally;" and (7) that "no person may be convicted of Aggravated Murder unless he or she is specifically found to have intended to cause the death of another." (Doc. 15, Vol. III, at 1473, 1474, 1475). As such, the Court finds little to distinguish this case from *Hanna*, and therefore concludes that the Ohio Supreme Court's ruling is not contrary to, or an unreasonable application of, clearly established federal law. Ground Nine is dismissed with prejudice.

8. Seventeenth Ground for Relief

Petitioner claims that his Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase in such a manner that the jury could conclude that it had to consider and reject a recommendation as to the imposition of death before it could consider either life sentence option.

The Magistrate Judge found that this claim was procedurally defaulted because when Petitioner was before the Ohio Supreme Court, the claim was phrased entirely as a matter of state law.

"As a necessary component of the exhaustion of state remedies doctrine, a petitioner's claim must be "fairly presented" to the state courts before seeking relief in the federal courts." *Whiting v. Burt*, 395 F.3d 602, 612 (6th Cir. 2005) (citing *Baldwin v. Reese*, 541 U.S. 27 (2004)). The Sixth Circuit has identified four actions a petitioner can take which are significant to the determination of whether a petitioner has "fairly presented" a claim to the state courts:

> (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law.

Whiting v. Burt, 395 F.3d 602, 613 (6th Cir. 2005) (citing *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)).

Here, on appeal to the Ohio Supreme Court, Petitioner argued under Proposition of Law No. 9:

> Where jury instructions at the penalty phase of capital proceedings misstate the law to the jury, fail to define mitigation factors, exclude

> relevant mitigation, and is otherwise erroneous and misleads the jury, the resulting death sentence violates the Eighth and Fourteenth Amendments, and Art. I, secs. 9 and 16 of the Ohio Constitution, and must be reversed.

(Doc. 15, Vol. VI at 863). Then Petitioner specifically argued:

> F. The trial court in effect instructed the jury that it had to consider, and reject, the death sentence before considering either life option (R.1917). While not stating expressly that the jury was required to consider death before considering life, that is the clear import of the instruction. This is error sufficient to warrant reversal of the death sentence, *State v. Brooks* (1996), 75 Ohio St.3d 148, 159-160, 661 N.E.2d 1030, 1042. Furthermore, the trial court failed to instruct that one juror could prevent the imposition of the death penalty, as required by *Brooks* henceforth from that decision (which preceded Appellant's trial by several months), although the trial court did instruct the jury that any verdict it returned had to be unanimous, and the jury verdict forms also reflected the requirement of unanimity (R.1917-1919).

(Doc. 15, Vol. VI, at 865-66).

As the Magistrate Judge noted, Petitioner's argument before the Ohio Supreme Court included a reference to the United State Constitution, but did not phrase any arguments in terms of federal constitutional law or cite any federal cases. The Magistrate Judge also reviewed, in great detail, the Ohio Supreme Court case cited by Petitioner in his argument, *State v. Brooks*, and determined that while the court cited to *Mills v. Maryland*, 486 U.S. 367 (1988) and *Kubat v. Thieret*, 867 F. 2d 351 (7th Cir. 1989), the court did not reverse the defendant's death sentence because it found that such a result was compelled by federal constitutional law. Accordingly, the Court concludes that Petitioner did not fairly present these grounds to the state courts, and therefore the claim is procedurally defaulted.

In the alternative, Petitioner argues that *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), which was decided five years after the Ohio Supreme Court decided his direct appeal, should be applied to the merits of his claim. However, even if *Davis* is

applicable, that decision is not "clearly established Federal law." As the Sixth Circuit has explained:

> In *Mills v. Maryland*, 486 U.S. 367, 380–81, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), the Supreme Court held a jury instruction unconstitutional that told the jury that it could not consider a particular mitigating circumstance unless all 12 jurors agreed that the circumstance had been proved to exist. Under *Mills*, then, courts have recognized that " 'each juror [must] be permitted to consider and give effect to all mitigating evidence in deciding whether aggravating circumstances outweigh mitigating circumstances.'" *Smith v. Spisak*, 558 U.S. 139, 130 S.Ct. 676, 682, 175 L.Ed.2d 595 (2010) (edits omitted) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 442–43, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)). The Supreme Court has never extended that rule to jury instructions that suggest a jury must first unanimously reject the death penalty before considering a life sentence. Notably, though, this circuit has done so, thereby adopting the "acquittal-first" doctrine for habeas cases. *See Davis v. Mitchell*, 318 F.3d 682, 689 (6th Cir. 2003).
>
> But the Supreme Court has rejected this circuit's approach. In the recent *Spisak* case, which arose from this circuit, the Supreme Court reviewed acquittal-first jury instructions that are very similar to the ones [the defendant] raises in this case. The Supreme Court explained that it had never held such jury instructions unconstitutional and that "[w]hatever the legal merits of the [acquittal first] rule ... [such] jury instructions [a]re not contrary to clearly established Federal law." 130 S.Ct. at 684. Thus, even in 2010—when *Spisak* was decided—the acquittal-first rule was not "clearly established federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). And the Supreme Court still has not adopted that rule. *See*, *e.g.*, *Bobby v. Mitts*, —– U.S. ——–, 131 S.Ct. 1762, 1765, 179 L.Ed.2d 819 (2011) (affirming *Spisak*-like Ohio jury instructions as "not contrary to clearly established Federal law" (internal quotation marks omitted)).

Moore v. Mitchell, 708 F.3d 760, 792-93 (6th Cir. 2013). Accordingly, the Court finds that this alternative argument does not entitled Petitioner to habeas relief, and the Seventeenth Ground for relief is dismissed with prejudice.

9. <u>Twenty-Third Ground for Relief</u>

Petitioner argues that he was denied his constitutional rights to a fair and impartial trial under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments as a result of prosecutorial misconduct during both phases of his capital proceedings.

The Magistrate Judge found that only the claims of prosecutorial misconduct occurring during the penalty phase of the trial were presented on direct appeal to the Ohio Supreme Court. Petitioner initially argued that he preserved some of the remaining claims by raising them in his post-conviction proceedings, but later conceded in his Supplemental Objections that these claims were procedurally defaulted. (Doc. 142, at 20). However, Petitioner still maintains that certain instances of prosecutorial misconduct were raised in his direct appeal, and were therefore preserved for review. Petitioner relies on following instances, which were raised in Proposition of Law Nos. 5 and 16:

(1) "The prosecutors frequently stated their opinion as to Mr. Raglin's state of mind during the shooting, without any evidentiary foundation. (Tr. 1450, 1457);"

(2) "The prosecutors also sarcastically mis-characterized [sic] Mr. Raglin's statement that the gun went off accidentally. (Tr. 1451.);"

(3) "[t]he prosecutors made impermissible statements of personal opinion to the jury (Tr. 1900, 1901, 1904)"

As the Magistrate Judge noted, in the Ohio Supreme Court, Petitioner's claim in Proposition of Law No. 5 was limited to alleged misconduct in the penalty phase of the trial. Respondent points out that the first two instances listed above occurred during the guilty phase of the trial, and therefore could not be used to support Petitioner's claim. However, Petitioner instead relied on these two instances in Proposition of Law No. 16, which read as follows:

> A prosecutor's argument which goes beyond the facts in evidence is improper and, even where defense objections are sustained, violates the right of the accused to due process under the U.S. and Ohio Constitutions.

(Doc. 15, Vol. VI, at 915). Under Proposition of Law No. 16, Petitioner argued:

> Here, during the guilt phase argument, the prosecutor frequently stated his opinion as to the Appellant's state of mind during the shooting, without any evidentiary foundation, and defense objections were sustained (R. 1450, 1457), and also sarcastically mischaracterized Appellant's statement as stating the gun went off accidentally, to which argument the defense objection was also sustained (R. 1451).
>
> . . .
>
> It has been recognized that, some arguments are so prejudicial that event the sustaining of defense objections cannot "unring the bell," and do not attenuate the prejudicial error, *Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620. Appellant's right to a fair trial under the Fourteenth Amendment to the U.S. Constitution and the Ohio Constitution was violated by the prosecutor's argument.

(Id. at 915-16). Therefore, Petitioner did in fact preserve his claims as to the first two instances. However, as to the third instance, the statements referenced were made during the mitigation phase of the trial (See Doc. 15, Vol. IV, at 1900, 1901, 1904) and not raised as part of his claim under Proposition of Law No. 16 in the Ohio Supreme Court.

Petitioner argues that because the Ohio Supreme Court failed to address the actions of the prosecutor to determine whether they constituted prosecutorial misconduct as a matter of federal constitutional law, Petitioner's claim should be reviewed *de novo*.

The Ohio Supreme Court's ruling on Petitioner's Proposition of Law No. 16, in its entirety, was as follows:

> Appellant argues in Proposition of Law No. 16 that the prosecutor improperly referred to facts not in evidence during closing argument in the

> guilt phase. However, as appellant acknowledges, defense objections to these alleged incidents of prosecutorial misconduct were sustained. The prosecution was admonished by the court, and the jury was instructed to disregard the prosecutor's remarks. The jury is presumed to have followed the court's instructions. *State v. Goff* (1998), 82 Ohio St.3d 123, 135, 694 N.E.2d 916, 926. Appellant's argument is rejected.

State v. Raglin, 699 N.E.2d at 492. Therefore, while Petitioner raised a federal due process claim, the Ohio Supreme Court did not specifically address the constitutional issue. Where the "state court adjudicated the claim but with little analysis on the substantive constitutional issue," the Sixth Circuit applies a "modified AEDPA deference" standard of review. *Vasquez v. Jones*, 496 F.3d 564, 569 (6th Cir. 2007). Under this standard, "a 'careful' and 'independent' review of the record and applicable law," is required, but reversal is not warranted unless "'the state court's decision is contrary to or an unreasonable application of federal law.'" *Id*. at 570 (quoting *Maldonado v. Wilson*, 416 F.3d 470, 476 (6th Cir. 2005)).

To prove a claim of prosecutorial misconduct, a habeas petitioner must demonstrate that the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The prosecutor's remarks must be considered within the context of the entire trial to determine whether any improper remarks resulted in prejudicial error. *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008). The petitioner must demonstrate that the prosecution's conduct was "both improper and so flagrant as to warrant reversal." *Bates v. Bell*, 402 F.3d 635 (6th Cir. 2005) (citing *Mason v. Mitchell*, 320 F.3d 604, 635 (6th Cir. 2003)). Once a court finds that a statement is improper, four factors are considered in determining whether the challenged conduct is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2)

whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial. *Bowling v. Parker*, 344 F.3d 487, 512-13 (6th Cir. 2003) (citing *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000)).

> During closing arguments, the prosecutor made the following comments:
>
> . . . Let me ask you this: I want you to think about this somewhat. What is not said is just as significant as what is said. If this gun that's in evidence, and that you'll see it, it's somehow accidentally or inadvertently fired, wouldn't he have said that to those police officers? In fact isn't that the first thing he would have said when he turned on that tape and when he [*sic*] started to interview him. Wouldn't he have said something like I did the robbery, but I didn't mean to fire the gun? Or it accidentally went off or wouldn't he have said I don't know why I fired?
>
> Mr. Ranz: Objection, Your Honor.
>
> The Court: Objection sustained. Let's confine ourselves to what's in evidence, sir.
>
> Mr. Gibson: Listen to the tape. He gave the police a taped statement. . . . You'll have it in evidence. . . . Not once did he ever say in that statement that he didn't mean to shoot that gun. Wouldn't he have – wouldn't he have said that if it somehow inadvertently fired or that gun accidentally went off –
>
> Mr. Ranz: Object, Your Honor.
>
> The Court: Let's confine to what's in evidence.
>
> Mr. Gibson: Well, Judge, this is in evidence. This tape is what I'm commenting on.
>
> The Court: Go ahead, sir.

(Doc. 15, Vol. III, Tr. 1449-451). The prosecutor also stated in closing arguments:

> . . . Ask yourself this: What does a person say when he points a loaded gun? There are spoken words in the commission of a robbery. The very word he uttered when he approached Michael Baney and give me your

> money. [*sic*] But that's only half because there are unspoken words. There are actions as well. What's a person say when he says give me all your money and then points a gun? The pointing of the gun and pointing it at you and what does that say? The natural and reasonable inference from that is give me all your money or I'll kill you.
>
> Mr. Ranz: Objection, Your Honor.
>
> The Court: Ladies and gentleman of the jury, please disregard the last conclusion.
>
> Mr. Gibson: I think that's a reasonable conclusion for these jurors to draw. The pointing of the gun says something. What does the person say when he points a gun during an armed robbery? Isn't that the reasonable inference to be drawn from a person's act in pointing a loaded gun when he's taking someone's property?
>
> Mr. Ranz: Object, Your Honor.
>
> The Court: Overruled.

(Id., Tr. 1456-457).

As a general rule, the prosecutor has "wide latitude" during closing arguments to respond to the defendant's strategies, evidence and arguments. *Bedford v. Collins*, 567 F.3d 225, 233 (6th Cir. 2009). However, it is well-established law that "a prosecutor cannot express his personal opinions before the jury." *Bates*, 402 F.3d at 644 (quoting *United States v. Galloway*, 316 F.3d 624, 632-33 (6th Cir. 2003)). Therefore, in this case, because the prosecutor expressed his personal opinions in his closing argument, those remarks were improper. However, "'the touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor.'" *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000) (quoting *Serra v. Michigan Dep't of Corrections*, 4 F.3d 1348, 1355 (6th Cir. 1993)).

In ruling on Petitioner's direct appeal, the Ohio Supreme Court acknowledged that the prosecutor improperly referred to facts not in evidence during closing argument,

but noted that defense objections to these remarks were sustained. *State v. Raglin*, 699 N.E.2d at 492. The court also noted that the prosecutor was admonished by the court, and the jury was instructed to disregard the prosecutor's remarks. *Id*. The court explained that jury is presumed to have followed the court's instruction. *Id*.

This Court concludes that this decision is not contrary to or an unreasonable application of federal law. The Supreme Court has held: "We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions . . ." *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (internal quotation marks and citation omitted) (finding habeas relief not warranted where the prosecutor asked a single question, there was an immediate objection, and the court gave two curative instructions). There is no evidence that the jury was unable to follow the court's instructions and therefore, the likelihood that the remarks would mislead the jury or prejudice the accused is low.

In addition, the remarks were not extensive. The prosecutor's remark about Petitioner's failure to make a statement about the gun accidentally firing was only made once. After the court sustained the defense objection, the prosecutor did review the transcript of the taped confession in detail to illustrate this omission. Regarding the prosecutor's statement about the inference to be drawn from the pointing of a loaded gun, the initial defense objection was sustained, but after the prosecutor explained the basis for his statement, the court overruled the second defense objection. Based on the context in which these statements were made—closing argument—it does not appear that the improper statements were made intentionally. Finally, other evidence against

Petitioner was substantial. Petitioner did not dispute that he approached Bany, robbed him at gun point, and then shot and killed him. Therefore, the Court concludes that the remarks did not rise to a level which rendered Petitioner's trial fundamentally unfair. Accordingly, the Ohio Supreme Court's ruling is not contrary to, or an unreasonable application of, clearly established federal law. Ground Twenty-three is dismissed with prejudice.

10. Thirtieth Ground for Relief

Petitioner argues that he was denied his constitutional rights under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments during the mitigation phase because the trial court permitted the prosecutor to introduce inadmissable rebuttal evidence that was unfairly prejudicial to Petitioner's rights to a fair trial and impartial jury. The evidence was a death threat Petitioner made to a corrections officer after being asked to move to another area and Petitioner's attempt to escape out a window of the Hamilton County Justice Center while awaiting trial. The evidence was introduced to rebut Petitioner's unsworn statement expressing remorse for killing Bany.

On this issue, the Ohio Supreme Court ruled as follows:

> Appellant contends that he was unfairly prejudiced by the state's presentation of the rebuttal witnesses and that testimony of the corrections officers "injected evidence of a nonstatutory aggravating circumstance, future dangerousness," into the penalty phase. We disagree. The prosecution was entitled to introduce relevant evidence rebutting the existence of any statutorily defined or other mitigating factor first asserted by the defense. *Gumm*, 73 Ohio St. 3d 413, 653 N.E.2d 253, syllabus. Here, that is precisely what occurred. The testimony of the state's rebuttal witnesses was indeed relevant to rebut mitigating evidence that had been offered by the defense that appellant was remorseful for the killing, that he would help or benefit others while serving a term of life imprisonment, and that his life should therefore be spared. The testimony of the state's rebuttal witnesses was not unfairly prejudicial to appellant, was not offered

> for an improper purpose, and did not inject a "nonstatutory aggravating factor" into the mix.

State v. Raglin, 83 Ohio St.3d at 261.

The Magistrate Judge found there was no constitutional error in this ruling, explaining:

> In essence, the Ohio Supreme Court decided that this evidence was relevant to rebut Mr. Raglin's unsworn statement that he was remorseful or that he would help or benefit others while in prison. The death threat to a corrections officer who had asked him to move to another area was indeed relevant to rebut a claim of remorse. The escape attempt was relevant to his claim he would help or benefit others while imprisoned. Petitioner attempted to characterize these as the introduction of an invalid aggravating circumstance – future dangerousness. If that were a an [*sic*] aggravating circumstance under Ohio law, which it is not, this evidence might have been relevant to prove it. But the fact that evidence might be relevant to prove one proposition does not make it irrelevant to prove another. One might expect that a person who was sincerely remorseful for killing another human being would be slow to threaten death to others; the fact that Petitioner readily threatened death to a corrections officer for what was at most a minor inconvenience casts doubt on the sincerity of his claim of remorse and thus was properly admitted as rebuttal to that claim.

(Doc. 89, at 55).

The Sixth Circuit has explained that no constitutional claim is stated where a state's highest court concludes that no extra-statutory factors were considered at the trial level or independently reweighs the aggravating and mitigating circumstances without reference to the extra-statutory factor improperly relied upon by the lower state courts. *Fox v. Coyle*, 271 F.3d 658, 667 (6th Cir. 2001) (citing *Barclay v. Florida*, 463 U.S. 939 (1983) and *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam)); *see also Slagle v. Bagley*, 457 F.3d 501, 521 (6th Cir. 2006) ("consideration of a non-statutory aggravating circumstance, even if contrary to state law, does not violate the [Federal] Constitution."). Accordingly, the Ohio Supreme Court's ruling is not contrary to, or an

unreasonable application of, clearly established federal law. Ground Thirty is dismissed with prejudice.

11. Thirty-Second and Thirty-Six Ground for Relief

Petitioner argues that his rights as guaranteed by the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments were violated when the trial court committed multiple errors during the pretrial, trial and mitigation phases of his capital case. Similarly, Petitioner also argues that his conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, and gross misconduct of state officials in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

When presented with the argument regarding the cumulative effect of errors at the trial court level, the Ohio Supreme Court ruled that Petitioner received a fair trial and a fair and reliable sentencing determination. *State v. Raglin*, 83 Ohio St.3d at 266.

In ruling on these claims, the Magistrate Judge explained that post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief. In his Supplemental Objections, Petitioner has cited examples of instances where the Supreme Court has considered certain errors in the context of the entire proceedings. There are certainly some instances where the Supreme Court has instructed courts to view errors during the course of trial to make a determination regarding fundamental fairness. *See*, *e.g.*, *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (explaining that the relevant question is whether the

prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."). However, as the Sixth Circuit has explained, "the Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief." *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002), *cert. denied*, 538 U.S. 947 (2003).

Accordingly, the Ohio Supreme Court's ruling is not contrary to, or an unreasonable application of, clearly established federal law. Ground Thirty-Two and Thirty-Six are dismissed with prejudice.

12. Thirty-Seventh Ground for Relief

Petitioner argues that the trial prosecutors violated *Brady v. Maryland*, 373 U.S. 83 (1963) in failing to inform defense counsel that statements taken by investigating police indicated that Petitioner expressed remorse for his involvement in the shooting death of Michael Bany.

This claim was added by Petitioner in the First Amended Petition. Petitioner argues that the Magistrate Judge erred in determining that this claim is barred by the statute of limitations. However, this Court has already adopted the Magistrate Judge's recommendation on this claim, without objection by Petitioner. (See Doc. 87). Nevertheless, because the Magistrate Judge has addressed Petitioner's argument that his claim is timely filed, the Court will also reconsider the issue.

As was the case with the Second Ground, the Court must apply the Supreme Court's decision in *Mayle v. Felix*, 545 U.S. 644, 650 (2005), which held that amendments do not relate back if they assert "a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." As part of

this analysis, the Magistrate Judge explained that Petitioner's *Brady* claim did not relate back to Petitioner's Third claim (ineffective assistance for failure to object to closing arguments about lack of remorse) and Twenty-Third claim (prosecutorial misconduct for asking the jury to imagine Petitioner laughing and bragging about the killing):

> The facts on which Petitioner relies for his Brady claim must be about when the evidence he claims was withheld was known the prosecution, whether in fact it was turned over, whether Petitioner knew the relevant facts without disclosure, whether there is a reasonable probability the evidence would have affect the outcome, etc. Those are different litigative facts from the facts necessary to support the ineffective assistance and prosecutorial misconduct claims.

(Doc. 100, at 20). The Court finds no error in the Magistrate Judge's conclusion. Accordingly, the Court finds that the Thirty-Seventh Ground for Relief is barred by the statute of limitations.

13. Thirty-Eighth Ground for Relief

Petitioner argues that the trial prosecutors violated *Giglio v. United States*, 405 U.S. 150 (1972) by allowing false testimony that Petitioner had no remorse for his crimes. Petitioner argues that the prosecutors knew the testimony was false because they had the statements of two witnesses who were with Petitioner immediately after the shooting which demonstrated that Petitioner was remorseful.

Like the Thirty-Seventh Ground, this claim was added by Petitioner in the First Amended Petition. Petitioner again argues that the Magistrate Judge erred in determining that this claim is barred by the statute of limitations. While this Court has already adopted the Magistrate Judge's recommendation on this claim (See Doc. 87), the Court will reconsider the issue.

The Magistrate Judge concluded that under *Mayle v. Felix*, 545 U.S. 644 (2005), this claim did not relate back to the original Petition for the same reasons set forth under the Thirty-Seventh Ground. The Court finds no error in the Magistrate Judge's conclusion. Accordingly, the Court finds that the Thirty-Eighth Ground for Relief is barred by the statute of limitations.

C. Certificate of Appealability

Petitioner seeks a certificate of appealability on his First, Second, Third, Fourth, Sixth, Eighth, Ninth, Twenty-Third, Thirtieth, Thirty-Second, Thirty-Sixth and Thirty-Eighth Grounds for Relief and on his claim that he should have been allowed to reopen discovery on firearms issues. The Magistrate Judge recommends issuing a certificate of appealability on the Fourth, Sixth, Eighth,[15] Ninth, Twenty-Third, Thirtieth, Thirty-Second, and Thirty-Six Grounds for Relief. (Docs. 169, 176). The Magistrate Judge also recommends issuing a certificate of appealability on the question of reopening discovery. The Magistrate Judge recommends denying a certificate of appealability on all remaining grounds.

Petitioner objects to the denial of a certificate of appealability on the First, Second (subpart D), Third, Thirty-Second, Thirty-Sixth, and Thirty-Eighth Grounds for Relief.

The Magistrate Judge fully set forth the standards applicable to the granting of a certificate of appealability, and the same will not be repeated here.

[15]In the R&R, the Magistrate Judge inadvertently labeled this Ground for Relief as the "Seventh" Ground for Relief. (Doc. 169, at 25).

1. First Ground for Relief

To summarize the Magistrate Judge's conclusions as to the First Ground: (1) after considering the impact of *Massaro v. United States*, 538 U.S. 500 (2003), jurists of reason would not find it debatable as to whether the Ohio criminal *res judicata* rule is an adequate and independent state ground; (2) certificates of appealability should not issue on the questions of whether the First District Court of Appeals misapplied Ohio's *res judicata* doctrine to the sub-claims of ineffective assistance of trial counsel; (3) reasonable jurists would not find it debatable as to whether Petitioner has shown ineffective assistance of appellate counsel as cause and prejudice to cure the procedural default of his ineffective assistance of counsel claims; and (4) Petitioner cannot rely on ineffective assistance of post-conviction counsel to excuse cause for procedural default.

To begin, the Court concludes that jurists of reason would not find it debatable as to whether the Ohio criminal *res judicata* rule as an adequate and independent state ground. Petitioner relies on *Massaro v. United States*, 538 U.S. 500 (2003), which held that a federal defendant could raise an ineffective-assistance-of-counsel claim in a collateral proceeding under 28 U.S.C. § 2255, even though the petitioner could have raised the claim on direct appeal. As the Magistrate Judge explained, *Massaro* addressed the post-conviction process for federal defendants. The Supreme Court distinguished its holding from that which would be followed by states, by acknowledging that a "growing majority of state courts now follow the rule we adopt today." *Massaro*, 538 U.S. at 508.

While the Sixth Circuit has not specifically addressed whether *Massaro* sets forth a constitutional rule applicable to the States, other federal circuit courts have concluded that *Massaro* only applies to federal convictions. *See Hayes v. Battaglia*, 403 F.3d 935, 937 (7th Cir. 2005) (explaining that *Massaro* "is a rule of practice for federal judges in federal criminal cases . . . "); *Sweet v. Bennett*, 353 F.3d 135, 140 (2d Cir. 2003) (stating that "*Massaro* is not a constitutional decision, and by its own language it did not extend its rule beyond § 2255"). Moreover, after *Massaro*, the Sixth Circuit has repeatedly held that Ohio's doctrine of *res judicata* in criminal cases is an adequate and independent state ground. *See*, *e.g*, *Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012). Therefore, the Court concludes that it is not debatable as to whether *Massaro* is applicable in the § 2254 context.

In addition, the Court rejects Petitioner's argument that the Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) casts doubt on whether Ohio's *res judicata* rule is not an adequate and independent state ground. As the Magistrate Judge explained in the Supplemental R&R on Petitioner's Motion for Certificate of Appealability, *Martinez* actually lends support for Ohio's procedural framework, which allows evidence *dehors* the record to be supplied on ineffective assistance of counsel claims in the trial court. (See Doc. 176, at 4).

Next, Petitioner argues that the Magistrate Judge did not address his argument that Ohio's *res judicata* rule violates *Strickland v. Washington*, 466 U.S. 668 (1984) because it deprives post-conviction petitioners of the opportunity to demonstrate that the cumulative prejudice resulting from all of counsel's errors warrants relief. This Court has previously rejected a similar argument:

> Bays next claims "[t]here is no indication that the Ohio Court of Appeals ever considered *Strickland's* prejudice requirement in cumulative terms." (COA Objections, Doc. No. 139, PageID 2299.) As proof of this proposition, Bays criticizes the appellate court for splitting its consideration of Bays' ineffective assistance of trial counsel claims into those based on the trial court record and those dependent on evidence *dehors* the record when it decided his direct appeal and his first post-conviction appeal on the same day. *Id*. at PageID 2300. That is, of course, precisely what Ohio law requires: claims which can be decided based on the direct appeal record must be raised on direct appeal or they are forfeited under Ohio's criminal *res judicata* doctrine. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). That doctrine has been repeatedly held to be an adequate and independent state basis of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521–22 (6th Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160–61 (6th Cir. 1994) (citation omitted); *Van Hook v. Anderson*, 127 F.Supp.2d 899, 913 (S.D. Ohio 2001).

Bays v. Warden, Ohio State Penitentiary, 3:08-CV-076, 2012 WL 6728346, *6 (S.D. Ohio Dec. 28, 2012) report and recommendation adopted, C-3:08-CV-076, 2013 WL 361062 (S.D. Ohio Jan. 29, 2013).

Moreover, Petitioner's case is distinguishable from the Tenth Circuit case upon which he relies: *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003). In *Cargle*, the state court rejected one of the petitioner's ineffective assistance of counsel claims on the merits. *Id*. at 1212. While the state court found that counsel's performance fell below acceptable levels of professionalism, the court denied relief because the petitioner could not show that this error would likely have had an effect on the outcome of the proceeding. *Id*. Upon habeas review, the Tenth Circuit found that this prejudice determination was neither contrary to nor an unreasonable application of *Strickland*, but that "[g]iven the [state appeal court's] procedural rejection of nearly all of petitioner's allegations of ineffectiveness, an adequate assessment of prejudice arising from the

ineffectiveness of petitioner's counsel has never been made in the state courts, so we have no state decision to defer to under § 2254(d) on this issue." *Id*.

Here, in contrast, there was no finding of deficient performance. On collateral review the Ohio Court of Appeals held that all of Petitioner's ineffective assistance of counsel claims were barred by *res judicata* and did not reach the merits of any claim. *State v. Raglin*, 1999 WL 420063, at *3-6. Petitioner argued to the court that "the cumulative effect of his counsel's ineffective representation rendered his trial unconstitutional." *Id*. at *6. However, the Ohio Court of Appeals held: "Insofar as we have rejected each of Raglin's claims of ineffective assistance of counsel, we also reject this claim." *Id*.

The Court concludes that jurists of reason would not find it debatable as to whether this is an unreasonable application of *Strickland*. As the Sixth Circuit has explained, the two-part test for evaluating ineffective assistance of counsel under *Strickland*, is not a set of "mechanical rules, [but] rather principles to guide the process of deciding whether the challenged proceeding was fundamentally fair." *Smith v. Mitchell*, 348 F.3d 177, 199 (6th Cir. 2003) (citing *Strickland*, 466 U.S. at 696). "Thus, the court deciding an ineffective assistance claim need not approach the inquiry in the same order or even address both prongs if the defendant fails to establish one." *Id*. at 199-200. Therefore, it was not unreasonable for the Ohio Court of Appeals reject the claim that cumulative prejudice resulted from the claimed errors.

Next, Petitioner argues that the Ohio Court of Appeals misapplied the *res judicata* doctrine, because Petitioner supported his claims with evidence outside the record and thus could not have raised the claims in his direct appeal. However, the

Magistrate Judge addressed this argument for each of the subclaims and concluded that no certificate should be issued because Petitioner has not shown that the Ohio Court of Appeals misapplied Ohio's doctrine of *res judicata*.

Turning to Petitioner's arguments regarding ineffective assistance of appellate counsel as cause and prejudice to cure the procedural default of his ineffective assistance of trial counsel claims, the Magistrate Judge noted that Petitioner effectively abandoned this claim by failing to move for an evidentiary hearing. Petitioner points out that the Magistrate Judge has recommended granting a certificate of appealability on his freestanding claim of ineffective assistance of appellate counsel. The Court recognizes that this argument has some merit. *See Martin v. Mitchell*, 280 F.3d 594, 606 (6th Cir. 2002) ("Inasmuch as the merits of the ineffective assistance of appellate counsel arguments are hopelessly intertwined with the procedural default arguments regarding the merit claims upon which we granted review, our grant of review on procedural default encompasses these claims."). The Court finds that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the Court grants a certificate of appealability on the decision finding the First Ground, subparts B.4, C.1, C.2, D.1, and D.2.a are procedurally defaulted.

As to the claim of ineffective assistance of trial counsel in subpart D.3 (the failure to object to prosecutorial misconduct), which was not raised in any state court proceeding, the Court concludes that it is not debatable as to whether *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) permits Petitioner to rely on ineffective assistance of post-

conviction counsel as cause for procedural default of his claim of ineffective assistance of trial counsel.

Therefore, the Court grants a certificate of appealability on the decision finding the First Ground, subparts B.4, C.1, C.2, D.1, and D.2.a as procedurally defaulted, but does not grant a certificate of appealability on the decision finding the First Ground, subpart D.3 is procedurally defaulted.

2. Second Ground for Relief, subpart D

The Magistrate Judge recommended dismissing this claim as being barred by the statute of limitations under *Mayle v. Felix*, 545 U.S. 644 (2005). Without objection from Petitioner, the Court adopted that recommendation. However, in the alternative, the Court found that this claim does not relate back to the Third and Twenty-Third Grounds. Petitioner argues that both the conclusion that he waived review and whether the claim relates back to the original Petition are debatable among reasonable jurists.[16]

In support of his argument that a certificate of appealability should issue on the issue of whether his waiver should be excused, Petitioner points to the strained relationship between himself and his former counsel. Petitioner also explains that while he initially failed to object, on subsequent occasions, he has filed objections and the issue has been fully briefed.

The Court adopts the Magistrate Judge's conclusion that it is not debatable among reasonable jurists that Petitioner waived his objections; but also adopts the Magistrate Judge's conclusion that a certificate of appealability should issue on the question of whether the claim in Second Ground, subpart D shares a "common core of

[16]Petitioner also argues that the merits of subpart D are debatable among reasonable jurists, but there has not been a ruling on the merits of the claim.

operative facts" with the claims in the Third or Twenty-Third Grounds. The Court finds that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

3. Third Ground for Relief

The Magistrate Judge recommended dismissing this claim as being procedurally defaulted. While Petitioner objects to the Court raising the defense of procedural default *sua sponte*, the Court finds that jurists would not find it debatable as to whether the Court properly considered Petitioner's procedural default.

However, as with the First Ground, the Court recognizes that the procedural default argument is intertwined with the merits of Petitioner's ineffective assistance of counsel claim in the Fourth Ground. Because the Court has granted a certificate of appealability in the Fourth Ground, the Court also grants a certificate of appealability as to whether Petitioner has established cause and prejudice to excuse the procedural default. The Court finds that "jurists of reason would find it debatable as to whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether this Court was correct in its procedural ruling." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

4. Thirty-Eighth Ground for Relief

Along with the Second Ground, subpart D, the Magistrate Judge recommended dismissing this claim as being barred by the statute of limitations under *Mayle v. Felix*, 545 U.S. 644 (2005). Like the Second Ground, subpart D, the Court adopts the

Magistrate Judge's conclusion that reasonable jurists would find it debatable as to whether the Thirty-Eighth Ground shares a "common core of operative facts" with the claims in the Third or Twenty-Third Grounds.

D. Second Amended Petition

In his Motion to Amend, Petitioner seeks to add the following Grounds to the First Amended Petition:

> **Thirty-Ninth Ground for Relief:** Raglin's execution will violate the Eighth Amendment because Ohio's lethal injection protocol will result in cruel and unusual punishment.
>
> **Fortieth Ground for Relief:** Raglin's execution will violate the Fourteenth Amendment because Ohio's lethal injection protocol will deprive him of equal protection of the law.

(Doc. 172). The Magistrate Judge granted Petitioner's Motion. (Doc. 177). Respondent objects to that ruling, arguing that Petitioner's claims are not cognizable in habeas and any claims are barred by the statute of limitations.

The Court finds that the Magistrate Judge's decision is not contrary to law. The Sixth Circuit has held that challenges to Ohio's legal injection procedures are cognizable in a habeas petition. *Adams v. Bradshaw*, 644 F.3d 481, 482-83 (6th Cir. 2011); *see also Shank v. Mitchell*, 2:00-CV-17, 2013 WL 3208554 (S.D. Ohio June 24, 2013) (concluding that petitioner's claims properly sound in habeas corpus); *but see Treesh v. Robinson*, 1:12cv2322, 2012 WL 5617072 (N.D. Ohio Nov. 15, 2012) (finding claims not cognizable in habeas). This Court has also recognized that "[t]he Sixth Circuit has taken the position that the statute of limitations governing method-of-execution challenges brought via § 1983 begins anew any time Ohio adopts a new written protocol." *Chinn v. Bradshaw*, 3:02-CV-512, 2012 WL 2674518 (S.D. Ohio July 5,

2012) (citing *Cooey v. Strickland*, 604 F.3d 939, 942 (6th Cir. 2010)). This Court has applied this reasoning to method-of-execution challenges brought in habeas. *Id*. Here, Petitioner claims that his claims could not have been raised previously because Ohio adopted its latest written execution policy on September 18, 2011. This Court concludes that because Petitioner's Motion to Amend was filed on March 8, 2012, Petitioner filed his claims within the one-year statute of limitations found at 28 U.S.C. § 2244(d)(1)(D). Accordingly, Respondent's Objections to the Magistrate Judge's Decision and Order (Doc. 177) and Supplemental Opinion and Recommendations (Doc. 188) granting Petitioner's Motion for Leave to File a Second Amended Petition are OVERRULED.

E. Conclusion

Pursuant to 28 U.S.C. 636(b) and Fed. R. Civ. P. 72(b) the Court has conducted a review of the record in this case and finds that Petitioner's and Respondent's Objections are not well taken. Accordingly, it is hereby **ORDERED** that:

1. The Magistrate Judge's R&R (Doc. 89) and Amended Supplemental R&R (Doc. 100) regarding Petitioner's First Amended Petition are **ADOPTED**;

2. The Magistrate Judge's R&R (Doc. 169) and Supplemental R&R (Doc. 176) regarding Petitioner's Certificate of Appealability is **ADOPTED in PART**. Upon Petitioner's objections, a Certificate of Appealability shall issue as follows:

    a. a certificate of appealability shall issue on the decision finding the First Ground, subparts B.4, C.1, C.2, D.1, and D.2.a is procedurally defaulted;

    b. a certificate of appealability shall not issue on the decision finding the First Ground, subpart D.3 is procedurally defaulted;

    c. a certificate of appealability shall issue on the decision finding that the claim in the Second Ground, subpart D does not share a "common core of operative facts" with the claims in the Third or

Twenty-Third Grounds;

d. a certificate of appealability shall issue on the decision finding the Third Ground as procedurally defaulted;

e. a certificate of appealability shall issue on the Fourth, Sixth, Eighth, Ninth, Twenty-Third, Thirtieth, Thirty-Second and Thirty-Six Grounds

f. a certificate of appealability shall issue on the decision finding that the claim in the Thirty-Eighth Ground does not share a "common core of operative facts" with the claims in the Third or Twenty-Third Grounds;

g. a certificate of appealability shall issue on the question of reopening discovery;

3. Respondent's Objections to the Magistrate Judge's Decision and Order (Doc. 177) and Supplemental Opinion and Recommendations (Doc. 188) granting Petitioner's Motion for Leave to File a Second Amended Petition are **OVERRULED**; and

4. Petitioner shall file his Second Amended Petition within **fourteen (14) days** of entry of this Order. The Second Amended Petition shall only include those claims previously identified as:

   Thirty-Ninth Ground for Relief: Raglin's execution will violate the Eighth Amendment because Ohio's lethal injection protocol will result in cruel and unusual punishment.

   Fortieth Ground for Relief: Raglin's execution will violate the Fourteenth Amendment because Ohio's lethal injection protocol will deprive him of equal protection of the law.

5. All other grounds for relief are **DISMISSED**.

IT IS SO ORDERED.

s/Michael R. Barrett
JUDGE MICHAEL R. BARRETT

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

WALTER RAGLIN,

Petitioner, : Case No. 1:00-cv-767

: District Judge Walter Herbert Rice

-vs- Chief Magistrate Judge Michael R. Merz

BETTY MITCHELL, Warden,

Respondent. :

AMENDED SUPPLEMENTAL REPORT AND RECOMMENDATIONS

Because of the Magistrate Judge's error in the Supplemental Report and Recommendations in characterizing Petitioner's Objections as untimely filed,[1] the Supplemental Report and Recommendations are withdrawn and the following substituted. The time for objection to this Amended Supplemental Report and Recommendations will run from its date of filing.

This capital habeas corpus case is before the Court for decision on the merits. On February 2, 2006, the undersigned filed a Report and Recommendations recommending that the First Amended Petition be dismissed on the merits (Doc. No. 89). Petitioner has now objected (Doc. No. 95) and Respondent has replied to those Objections (Doc. No. 98). The General Order of Assignment and Reference for the Dayton location of court permits the magistrate judges to

[1] The Magistrate Judge is advised by the Clerk of Courts that Petitioner's Objections were timely filed on May 26, 2006, but stricken and re-filed on May 30, 2006, because counsel had used the incorrect CM/ECF filing event on May 26, 2006. Because the original filing was deleted, the Magistrate Judge has been unable to examine it.

reconsider decisions or reports and recommendations when objections are filed.

Ground One: Ineffective Assistance of Trial Counsel

Many subportions of the first Ground for Relief were abandoned when the First Amended Petition was filed. As finally briefed:

> In his First Ground for Relief as amended, Petitioner asserts he was denied effective assistance of counsel in that counsel failed to adequately voir dire and remove Juror Tara Veesart (Claim B.4), conceded Petitioner's guilt and then made conflicting arguments to the jury (Claim C), failed to put on evidence which would have justified a jury instruction on manslaughter (Claim D.1), failed to procure the assistance of a firearms expert (Claim D.2.a), and failed to object to prosecutorial misconduct (Claim D.3).

(Report and Recommendations, Doc. No. 89, at 15.)

These claims were not raised in the state courts until Petitioner filed for post-conviction relief, whereupon the state courts enforced the *res judicata* rule of *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967), against Petitioner. The undersigned concluded that was an adequate and independent state ground and that Ground One was therefore procedurally defaulted. (Report and Recommendations, Doc. No. 89, at 17.)

Petitioner asserts this analysis is wrong for three reasons.

First, he asserts, the Ohio courts misapplied the Ohio criminal *res judicata* doctrine in this case. He argues that Ohio courts allow ineffective assistance of trial counsel claims to be brought initially on petitions for post-conviction relief if those petitions are supported by substantial

evidence *dehors* the record which was not available to support the claim on direct appeal and asserts he did precisely that (Objections, Doc. No. 95, at 3-5).

The First District Court of Appeals began its discussion of the ineffective assistance of counsel claims raised on post-conviction as follows:

> A postconviction petition may also be dismissed without a hearing where the claims raised are barred by res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. The doctrine of res judicata precludes a hearing where the claims raised in the petition were raised or could have been raised at trial or on direct appeal. *Id.* at paragraph nine of the syllabus. Res judicata bars a hearing on the petition even where a claim relies on evidence dehors the record, unless that evidence shows that the petitioner could not have appealed the constitutional claim based upon information in the original trial record. The evidence dehors the record must be more than that evidence which was in existence at the time of trial and which should and could have been submitted at trial if the defendant wished to make use of it. State v. Mills (Mar. 15, 1995), Hamilton App. No. C-930817, unreported; State v. Hill, supra.

* * *

> Generally, the introduction of evidence dehors the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of res judicata. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169. An ineffective-assistance-of-counsel claim, however, may be dismissed as res judicata where the petitioner was represented by new counsel on direct appeal, that counsel failed to raise the issue of trial counsel's incompetence, and the issue could fairly have been determined without evidence dehors the record. State v. Sowell (1991), 73 Ohio App.3d 672, 598 N.E.2d 136.

State v. Raglin, 1999 WL 420063 at *2-3 (Ohio App. 1 Dist. 1999).

It then proceeded to discuss in meticulous detail why each of these claims of ineffective assistance of trial counsel could have been raised on direct appeal by the new attorneys who represented Petitioner on direct appeal and why the additional evidence submitted with the post-

conviction petition did not materially change the case which could have been presented on appeal. *Id*. at 3-6.

Petitioner asserts that this Court can review the correctness of the Ohio courts' application of Ohio *res judicata* doctrine, relying on *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001). Judge Norris found the Ohio Court of Appeals *res judicata* analysis unpersuasive because "[t]he petition for post-conviction relief includes forty-six exhibits, the majority of which were affidavits from individuals who allegedly had information favorable to petitioner but who were not contacted by trial counsel." *Id*. at 675. He concluded "it seems that the Ohio Court of Appeals may have mistakenly relied upon procedural default in denying petitioner's ineffective assistance of trial counsel claim." *Id*. Nevertheless, the Sixth Circuit did not actually reverse on this basis. Judge Norris went on to write:

> Despite these reservations, the procedural default rule delineated by Perry and Cole is a matter of state law. Generally, a federal habeas court sitting in review of a state-court judgment should not second guess a state court's decision concerning matters of state law. Gall v. Parker, 231 F.3d 265, 303 (6th Cir. 2000) ("Principles of comity and finality equally command that a habeas court can not revisit a state court's interpretation of state law, and in particular, instruct that a habeas court accept the interpretation of state law by the highest state court on a petitioner's direct appeal."). Nevertheless, when the record reveals that the state court's reliance upon its own rule of procedural default is misplaced, we are reluctant to conclude categorically that federal habeas review of the purportedly defaulted claim is precluded. As explained below, however, we need not decide the extent to which, if any, federal courts may reach the merits of constitutional claims that a state court improperly found to be procedurally defaulted because petitioner's ineffective assistance of appellate counsel claim necessarily forces us to review the performance of trial counsel.

Id. Thus, although it does so in dictum, *Greer* leaves open the possibility that a federal court could

find a state court's reliance on that State's procedural default is misplaced.

Greer is not finally helpful to Petitioner, however, because he has not demonstrated that the Hamilton County Court of Appeals' reliance on *res judicata* was misplaced. Indeed, he does not even make an attempt at such a demonstration. In contrast to *Greer*, where there were forty-six exhibits to the post-conviction petition and the Court of Appeals' analysis was a one-paragraph conclusion, here the Court of Appeals considered each ineffective assistance of counsel claim against the evidence for it on direct appeal and the asserted additional evidence. This is a more appropriate case for following *Gall v. Parker*, *supra*, and allowing the state court's application of its own law to stand.

Petitioner's second argument against procedural default on the First Ground for Relief is that he did in fact present those claims on direct appeal by including them in his application to re-open the direct appeal (Objections, Doc. No. 95, at 4-5.) Petitioner makes no response to the analysis in the Report and Recommendations that an application to reopen is not part of direct appeal. *See Morgan v. Eads*, 104 Ohio St. 3d 142, 818 N.E. 2d 1157 (2004), and *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005)(*en banc*)(overruled *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), cited in Report (Doc. 89, at 16-17.)

Lastly, Petitioner argues he can excuse his procedural default in presenting these claims on direct appeal by showing of cause and prejudice and that the ineffectiveness of his appellate counsel can constitute such cause (Objections, Doc. 95, at 6-7). He fails to mention that he had asserted he would need an evidentiary hearing to show such cause and prejudice (Traverse, Doc. No. 16, at 51), but then never moved for a hearing. It was for this reason that the Report treated the cause and prejudice claim as abandoned (Report, Doc. No. 89, at 17).

It is therefore again respectfully recommended that Petitioner's Ground One for Relief be dismissed with prejudice as procedurally defaulted.

Ground Two: Ineffective Assistance of Counsel During Mitigation

Petitioner pled three sub-claims under this Ground for Relief in the original Petition. When he filed the First Amended Petition, he abandoned those three sub-claims and added a new sub-claim. On July 12, 2005, the undersigned recommended that the new sub-claim be dismissed as barred by the statute of limitations as recently interpreted by the Supreme Court in *Mayle v. Felix*, ___ U.S. ___, 125 S. Ct. 2562; 162 L. Ed. 2d 582 (2005)(Report and Recommendations, Doc. No. 86). Petitioner never objected to that Report and it was adopted by the Court on August 5, 2005 (Doc. No. 87).[2] Petitioner now argues at some length (Objections, Doc. No. 95, at 7-11) that the claim should not be barred under *Mayle*. However, he forfeited the right to raise that argument when he failed to object to the prior Report and Recommendations. *United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

Moreover, the argument that this newly-pled claim relates back under *Mayle* is not well taken on the merits. As pled in the First Amended Petition, the second ground for relief reads:

> Ground Two: "Walter Raglin was denied his right to the effective assistance of counsel at the mitigation phase of his capital trial in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments [in that] Trial Counsel failed to adequately investigate

[2] In fact, Petitioner never responded either to Respondent's Motion to Dismiss on statute of limitations grounds or to the Magistrate Judge's Order that he show cause why the Motion to Dismiss should not be granted. (See Doc. No. 85).

and present significant evidence of remorse."

(Amended Petition, Doc. No. 76, at 30). Petitioner claims (for the first time in the Objections) that this relates back to (1) his Third Ground for Relief which alleged ineffective assistance of counsel in failing to object to alleged prosecutorial misconduct in closing argument when the prosecutor referred to evidence that Petitioner was laughing and bragging about the shooting shortly afterward and (2) his Twenty-Third Ground for Relief which alleged ineffective assistance of counsel in failing to object to alleged prosecutorial misconduct in asking the jury in closing argument to imagine that Petitioner was laughing and bragging about the shooting shortly afterward. (Objections, Doc. No. 95, at 9.)

Prior to the Supreme Court's decision in *Mayle*, the undersigned believed the amendments made by the First Amended Petition did relate back because they referred to the same trial and conviction (See Report and Recommendations, Doc. No. 77, recommending denial of motion to dismiss). In other words, the undersigned was reading Fed. R. Civ. P. 15(c)(2) broadly as it applied to habeas cases. This was the same reading the Ninth Circuit had given to 15(c)(2) in *Mayle*, but the Supreme Court reversed and required a narrow reading. The Court held that the relation back doctrine will only apply to newly-added claims which share a "common core of operative facts" with claims which have been timely made. It interpreted the "conduct, occurrence, or transaction" language of Rule 15(c)(2) to refer to the facts giving rise to a particular habeas corpus claim, rather than to the trial and eventual conviction which are being attacked in the habeas proceeding. It expressly held that "[a]n amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Here, the facts relied upon in the

Third and Twenty-Third Grounds were trial counsel's failure to object at two points in the closing argument which argued lack of remorse. The new second ground alleges failure to investigate and present other evidence which would have shown remorse. While all three claims are ineffective assistance of trial counsel claims and relate to the issue of remorse or lack of it, they rely on different trial facts – what the trial attorneys did not do at different stages of the case – and different evidentiary facts – purported evidence from some witnesses of remorse versus purported evidence from other witnesses of lack of remorse.

Petitioner's amended second Ground for Relief has already been dismissed. The Objections do not provide a sufficient basis to reconsider that decision.

Ground Three: Ineffective Assistance of Trial Counsel for Failure to Object and Preserve Errors

In the Report and Recommendations, the undersigned recommended this Ground for Relief be dismissed with prejudice on the same basis as the First Ground for Relief, to wit, that the state court of appeals had concluded it was barred by *res judicata* because it was not raised on direct appeal (Report and Recommendations, Doc. No. 89, at 18).

Petitioner asserts this is error for two reasons.

First of all, he claims he did present these claims on direct appeal by presenting them in an application to reopen the direct appeal in the Ohio Supreme Court. This argument complete ignores the holdings in *Morgan v. Eads*, 104 Ohio St. 3d 142, 818 N.E. 2d 1157 (2004), and *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005)(*en banc*)(overruled *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), cited in Report (Doc. 89, at 16-17.) Presentation of claims on a motion to reopen does not

constitute raising them on direct appeal because the motions to reopen are collateral proceedings for the purpose of raising ineffective assistance of appellate counsel, not for presenting in the first instance claims omitted on direct appeal. *Morgan, supra.* As to Petitioner's assertion that this Ohio procedural sanction has not been applied to him, *see State v. Raglin*, 1999 WL 420063 at *2-3 (Ohio App. 1 Dist. 1999).

Secondly, Petitioner claims he can show excusing cause and prejudice to his procedural default, to wit, ineffective assistance of appellate counsel (Objections, Doc. No. 95, at 16-17.) As with the First Ground for Relief, this cause and prejudice assertion was deemed abandoned because Petitioner had said he needed an evidentiary hearing to establish it, but he never sought an evidentiary hearing.

Petitioner's objections to the Report and Recommendations as to the Third Ground for Relief should be overruled.

Ground Four: Ineffective Assistance of Appellate Counsel

In Ground Four of his First Amended Petition, Petitioner asserted he received ineffective assistance of appellate counsel when that counsel failed to raise eight particular assignments of error. In the Report and Recommendations, the undersigned recommended the claim should be dismissed as to the sixth omitted assignment of error because it had been added by the First Amended Petition after the statute of limitations had expired and did not relate back under *Mayle v. Felix, supra.* Petitioner concedes this ruling was corrected (Objections, Doc. No. 95, at 19.)

As to the remaining seven assignments of error, the undersigned recommended the Fourth

Ground for Relief be dismissed with prejudice because

> Petitioner makes no argument as to why these omitted assignments of error are meritorious or how they are more meritorious than the assignments of error which actually were presented on direct appeal. In other words, Petitioner's Traverse merely asserts these were meritorious without making any argument (See Traverse, Doc. No. 16 at 106-109).

(Report and Recommendations, Doc. No. 89, at 22.)

In his Objections, Petitioner claims that these assignments of error are supported by affidavits of attorneys Laney Hawkins and Joseph E. Wilhelm[3] and asserts "[t]his evidence was never challenged by the Respondent either in state court or in this Federal Habeas Proceeding." (Objections, Doc. No. 95, at 20.) Even though the Ohio Supreme Court did not discuss the affidavits, it presumably found them unpersuasive since it denied reopening. *State v. Raglin*, 85 Ohio St. 3d 1407, 706 N.E. 2d 789 (1999).

Prior to these Objections, Petitioner never called this Court's attention to these affidavits. In particular, in the 317-page Traverse, the sole pertinent reference is as follows: "In his Application for Reopening and supporting Exhibits, Mr. Raglin painstakingly explains how appellate counsel was ineffective and how he was prejudiced by appellate counsels' ineffectiveness. Application for Reopening and Exhibits thereto. JA Vol. XI pp. 002799-003000." (Traverse, Doc. No. 16, at 108). Those page references encompass the entire Application for Reopening.

Mr. Haney, an Assistant Ohio Public Defender, was one of Petitioner's post-conviction counsel (Haney Affidavit, JA Vol. XI at 2809. ¶1.) In the Affidavit he recites in completely conclusory fashion that direct appeal counsel failed to meet the standards of *Strickland v.*

[3] In the Objections, these Affidavits are cited as appearing in Volume **IX** of the Joint Appendix; they are in fact in Volume **XI.**

Washington, 466 U.S. 668(1984), and then proceeds to analyze the deficiencies in performance of **trial** counsel. See *Id*. at 2814, ¶ 13. The Affidavit goes on at great length essentially reciting "boilerplate" from various Supreme Court opinions in capital cases. *Id*. at ¶¶14-76. Even in conclusion Mr. Haney makes no comment about the standards for ineffective assistance of appellate counsel. He writes "[i]n sum, the errors and omissions set forth above and outlined in the Application for Reopening reveal that Walter Raglin received the ineffective assistance of counsel in all phases of his capital **trial**." *Id*. at ¶76, emphasis added.

Mr. Willhelm was also an Assistant Ohio Public Defender, supervisor of the appellate section of that office, and therefore presumably of Mr. Haney. Mr. Willhelm opines that direct appeal counsel rendered ineffective assistance in the following ways:

1. Failure to claim error in the trial court's definition of reasonable doubt. (JA Vol. XI at 2886, ¶14A-F.)
2. Failure to claim error in the trial court's instructing the jury that it had to decide Petitioner's guilt or innocence. *Id*. at ¶ 14G-K.
3. Failure to claim error in the trial court's instruction on "purpose." *Id*. at 14L-R.

Mr. Willhelm concluded that these issues were meritorious and should have been raised on direct appeal. *Id*. at 15.

Although Mr. Willhelm's Affidavit is at least directed to the performance of appellate counsel rather than trial counsel, it makes no argument as to why these issues were stronger than the issues actually raised or why it would likely have changed the outcome. Counsels' failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *McFarland v. Yukins*, 356 F.3d

688 (6th Cir. 2004) *citing Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001) *cert. denied*, 535 U.S. 940 (2002). To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show that appellate counsel ignored issues [which] are clearly stronger than those presented. *Smith v. Robbins*, 528 U.S. 259, 288 (2000), quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

Because the Ohio Supreme Court rejected this claim on the merits by refusing reopening, the question before this Court is whether that Ohio Supreme Court ruling was contrary to or an unreasonable application of the holding of an United States Supreme Court precedent. *Brown v. Payton*, ___ U.S. ___, 125 S. Ct. 1432 (2005); *Bell v. Cone*, 535 U.S. 685 (2002), *citing Williams v. Taylor*, 529 U.S. 362, 403-404 (2000). Petitioner has not even made an argument that attempts to satisfy that standard.

It is therefore again respectfully recommended that the Fourth Ground for Relief be denied.

Sixth Ground for Relief: Failure to Suppress Confession.

Petitioner has made no objection to the recommendation on this Ground for Relief.

Eighth Ground for Relief: Failure to Instruct on Involuntary Manslaughter.

In his Eighth Ground for Relief, Petitioner asserts he was denied due process when the trial court refused to instruct on the lesser included offense of involuntary manslaughter. Petitioner relies on *Beck v. Alabama*, 447 U.S.625 (1980). The undersigned concluded the Ohio Supreme Court's decision on this point was not an unreasonable application of *Beck*. (Report and Recommendations,

Doc. No. 89, at 29-30.) The relevant question under *Beck* and under *Hopper v. Evans*, 456 U.S. 605 (1982)(cited in the Objections), is whether the evidence would have supported conviction on the lesser included offense. The Ohio Supreme Court's opinion on this point is quoted at length in the Report and Recommendations. The undersigned continues to find that analysis persuasive.

Ninth Ground for Relief: Erroneous Jury Instructions on Causation, Forseeability, Intent, and Purpose.

The undersigned has no additional analysis to offer on this Ground for Relief beyond that in the original Report and Recommendations which concluded it was without merit.

Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth, Grounds for Relief: Mitigation Phase Jury Instructions.

Petitioner makes no objection to the recommended disposition of these Grounds for Relief.

Seventeenth Ground for Relief: Error in Instructing the Jury to Consider the Death Sentence First.

In the Report and Recommendations, the undersigned concluded this claim should be dismissed with prejudice because it had not been fairly presented to the Ohio Supreme Court as a federal constitutional claim, but only as an Ohio state law claim (Report and Recommendations, Doc. No. 89, at 44.) Petitioner asserts that this conclusion is "simply wrong."

The entire argument on this claim, as quoted in the Report and Recommendations, is as follows:

> The trial court in effect instructed the jury that it had to consider, and

> reject, the death sentence before considering either life option (R.1917). While not stating expressly that the jury was required to consider death before considering life, that is the clear import of the instruction. This is error sufficient to warrant reversal of the death sentence, *State v. Brooks* (1996), 75 Ohio St.3d 148, 159-160, 661N.E.2d 1030, 1042. Furthermore, the trial court failed to instruct that one juror could prevent the imposition of the death penalty, as required by *Brooks* henceforth from that decision (which preceded Appellant's trial by several months), although the trial court did instruct the jury that any verdict it returned had to be unanimous, and the jury verdict forms also reflected the requirement of unanimity (R.1917-1919). (Appellant's Brief, Joint Appendix, Vol. VI at 865-66.)

(Quoted in Report and Recommendations, Doc. No. 89, at 44.)

The Report noted that this claim was argued purely in terms of the Ohio Supreme Court's decision in *Brooks* and that no federal law was cited. Petitioner objects that *Brooks* relied on *Mills v. Maryland*, 486 U.S. 367 (1988) and *Kubat v. Thieret*, 867 F. 2d 351 (7th Cir. 1989). He also notes that he adverted to the Eighth and Fourteenth Amendments to the United States Constitution, as well as to Article I, §§ 9 and 16 of the Ohio Constitution (Objections, Doc. No. 95, at 28-29).

The Supreme Court has held that a state prisoner ordinarily does not 'fairly present' a federal claim to a state court if that court must read beyond a petition, a brief, or similar papers to find material that will alert it to the presence of such a claim. *Baldwin v. Reese*, 541 U.S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004). Here, to have understood Petitioner's argument as going beyond *Brooks*, the Ohio Supreme Court would have had to examine its prior decision in *Brooks* to find the case law Petitioner now says it relied on in that earlier case. Thus the federal claim was not fairly presented within the meaning of *Baldwin, supra*.

Furthermore, the Ohio Supreme Court's decision in Brooks, while it cites Mills and Kubat, does not stand as a direct application of those cases. In other words, it does not reverse Brooks

death sentence because it finds such a result compelled by federal constitutional law. Instead, the *Brooks* court held

> In regard to the present case, R.C. 2929.03(D)(2) facially seems to require the jury to recommend a life sentence even if only one juror finds the death penalty inappropriate. There is some dispute in the case law, however, as to how much power a solitary juror has to nullify a death sentence. In State v. Jenkins (1984), 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473 N.E.2d 264, paragraph ten of the syllabus, this court held that in returning a sentence of life imprisonment under R.C. 2929.03(D), the jury's verdict must be unanimous. In State v. Springer (1992), 63 Ohio St. 3d 167, 586 N.E.2d 96, syllabus, this court held that HN17"when a jury becomes irreconcilably deadlocked during its sentencing deliberations in the penalty phase of a capital murder trial and is unable to reach a unanimous verdict to recommend any sentence authorized by R.C. 2929.03(C)(2), the trial court is required to sentence the offender to life imprisonment * * * ." Thus, practically speaking, a lone juror could prevent the imposition of the death penalty.
>
> Jenkins defines what the jury's job is -- to render a unanimous verdict. Springer simply explains what a trial court must do if a jury is deadlocked, that is, when the jury does not properly do its job. We believe that Jenkins and Stringer may be harmonized, and made consistent with the policy behind R.C. 2929.03(D), through a jury instruction which requires HN18the jury, when it cannot unanimously agree on a death sentence, to move on in their deliberations to a consideration of which life sentence is appropriate, with that determination to be unanimous. That instruction would reflect the policy behind the statute noted by this court in Springer:
>
> > "We believe that the requirement of Ohio's death penalty statute that a life sentence be recommended and imposed under circumstances where the death penalty cannot be recommended or imposed represents a clear statement of policy that an offender be sentenced to a term of life imprisonment where the trial jury is unable to unanimously agree that the penalty of death is appropriate."
>
> Springer, 63 Ohio St. 3d at 172, 586 N.E.2d at 100.

In Ohio, a solitary juror may prevent a death penalty recommendation

> by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. Jurors from this point forward should be so instructed.

75 Ohio St. 3d at 161-162. The analysis here does not employ the federal constitutional analysis relied upon by Petitioner; instead, it analyzes the proper interpretation of the Ohio death penalty statute. Thus when Petitioner cited Brooks in his own appeal, he did not fairly present his federal claim to the Ohio Supreme Court.

Petitioner notes that the Sixth Circuit has now held that an Ohio death penalty instruction must include the language from *Springer* and *Brooks*. *Davis v. Mitchell*, 318 F.3d 682, 689 (6th Cir. 2003)(Objections, Doc. No. 95, at 29). *Davis* was, however, decided five years after the Ohio Supreme Court decided this case.

Eighteenth Ground for Relief: Error in the Penalty Phase Jury Instructions

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Nineteenth Ground for Relief: Failure to Instruct on Remorse, Residual Doubt, and Cooperation with Law Enforcement.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Twenty-First Ground for Relief: Service of Juror Tara Veesart Deprive Petitioner of a Fair

Trial.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Twenty-Third Ground for Relief: Prosecutorial Misconduct.

With respect to this claim for relief, the undersigned concluded that only claims of prosecutorial misconduct occurring in the penalty phase of the trial had been presented on direct appeal to the Ohio Supreme Court (Report and Recommendations, Doc. No. 89, at 48-49.) In his Objections, Petitioner essentially admits that is correct, but says he preserved these claims by raising them in his Eighteenth Claim for Relief in post-conviction. However, because the claims of prosecutorial misconduct all appear of record, they could have been raised on direct appeal and were dismissed for that reason, to wit, *res judicata*, in the post-conviction proceeding. Based on the analysis set forth above as to the First Ground for Relief, that is an adequate and independent state ground for decision.

With respect to those claims preserved for review, the undersigned concluded the Ohio Supreme Court had applied the correct federal constitutional standard as announced in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and that its application was not unreasonable (Report and Recommendations, Doc. No. 89, at 51). Petitioner faults both this Court and the Ohio Supreme Court for "fail[ing] to make a finding that misconduct actually occurred." (Objections, Doc. No. 95, at 31). Apparently Petitioner believes that he is entitled to have both the Ohio Supreme Court and this Court examine each alleged instance of prosecutorial misconduct individually, decide whether it is misconduct, then consider them together. Petitioner cites no authority for this

proposition. If the complained-of conduct must meet all the elements of the *DeChristoforo* test to warrant relief and a court – this Court or the Ohio Supreme Court – determines that even if each alleged act of misconduct happened and each constituted misconduct, taken together they did not make the trial unfair, it has performed the analysis required by *DeChristoforo*.

The Magistrate Judge again recommends that the Twenty-Third Ground for Relief be dismissed with prejudice, partially on procedural default grounds and partially on the merits.

Twenty-Fifth Ground for Relief: Racial and Gender Bias in Selection of Jury Persons.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Twenty-Seventh Ground for Relief: Improper Sentencing Opinion by the Trial Judge.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Twenty-Ninth Ground for Relief: Consideration of Guilt Phase Evidence at the Penalty Phase.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Thirtieth Ground for Relief: Improper Rebuttal Evidence.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Thirty-Second Ground for Relief: Cumulative Trial Error.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Thirty-Fourth Ground for Relief: General Objections to the Death Penalty in Ohio and as Administered in Hamilton County.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Thirty-Sixth Ground for Relief: Cumulative Error.

Petitioner makes no objection to the recommended disposition of this Ground for Relief.

Thirty-Seventh Ground for Relief: *Brady* Claim.

In his Thirty-Seventh Ground for Relief, Petitioner claims he is entitled to the writ because the prosecution withheld evidence that he clearly expressed remorse to the investigating officers.

As with the portion of Ground Two analyzed above, this claim was added to the case by the First Amended Petition. On Respondent's Motion, the undersigned recommended that the claim be dismissed as barred by the statute of limitations, relying on the analysis under *Mayle v. Felix*, *supra*, which is set out above (Report and Recommendations, Doc. No. 86). Petitioner made no objection

and the Court adopted that Report (Doc. No. 87). By not timely objecting, Petitioner has waived his right to object. *See United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

Moreover, reconsidered on the merits, Petitioner's relation back argument is without merit. He states his Thirty-Seventh Ground for Relief is related to the same core of operative facts relating to evidence of remorse as his Third claim (ineffective assistance for failure to object to closing arguments about lack of remorse) and Twenty-Third claim (prosecutorial misconduct for asking the jury to imagine Petitioner laughing and bragging about the killing). As noted above, the undersigned was inclined to allow the amendment until *Mayle* was decided, but the Supreme Court analyzes relation back in that case very narrowly. The facts on which Petitioner relies for his Brady claim must be about when the evidence he claims was withheld was known the prosecution, whether in fact it was turned over, whether Petitioner knew the relevant facts without disclosure, whether there is a reasonable probability the evidence would have affect the outcome, etc. Those are different litigative facts from the facts necessary to support the ineffective assistance and prosecutorial misconduct claims.

Thirty-Eighth Ground for Relief: *Giglio* Claim.

The Thirty-Eighth Ground for Relief was also added to the case by the First Amended Petition and has also previously been dismissed as barred by the statute of limitations on Respondent's Motion. (Report and Recommendations, Doc. No. 86; Order, Doc. No. 87.) Because he did not timely object, Petitioner has waived his objections to this claim as well. Petitioner's

relation back argument, made for the first time in his instant Objections, is no more persuasive here than on the Thirty-Seventh Ground.

Conclusion

Having reconsidered the case in light of Petitioner's Objections, it is again respectfully recommended that the First Amended Petition be dismissed with prejudice.

June 29, 2006.

s/ Michael R. Merz
Chief United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

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

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

WALTER RAGLIN,

Petitioner, : Case No. 1:00-cv-767

-vs- : District Judge Walter Herbert Rice
Chief Magistrate Judge Michael R. Merz

BETTY MITCHELL, Warden,

Respondent. :

REPORT AND RECOMMENDATIONS

This capital habeas corpus case is before the Court for decision on the merits.

Procedural History in this Court

This action was commenced February 24, 2000, by the filing of a Notice of Intent to seek habeas corpus relief (Doc. No. 1). The Court thereupon appointed counsel (Doc. No. 5) and the original Petition was filed September 13, 2000, raising thirty six grounds for relief (Doc. No. 14). In February, 2002, the Court granted in part Petitioner's Third Motion to Conduct Discovery and ordered discovery completed by June 15, 2002, with a later extension to October 30, 2002 (Doc. Nos. 37, 64). In April, 2003, the Court set a deadline of July 1, 2003, for an amended petition and a motion for evidentiary hearing[1] (Doc. No. 66).

[1] No motion for evidentiary hearing was ever filed.

In August, 2003, the Court granted Petitioner leave to file his amended petition *instanter* and stayed proceedings pending exhaustion of newly-raised and unexhausted claims in a successive post-conviction petition in the Ohio courts (Doc. No. 70). In March, 2005, the Court determined that the successive state proceedings had been completed and vacated the abeyance order (Doc. No. 75). The First Amended Petition was actually filed March 8, 2005 (Doc. No. 76). On August 5, 2005, Judge Rice dismissed the second, thirty-seventh, and thirty-eighth grounds for relief as barred by the statute of limitations (Doc. No. 87) and the case became ripe for decision on the remaining claims.

Petitioner's Claims

In his original Petition (Doc. No. 14), Petitioner pled the following grounds for relief:

> **First Ground for Relief:**
>
> Walter Raglin was denied his right to the effective assistance of counsel at the pretrial and trial phases of his capital trial in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.
>
> A. Trial counsel was ineffective for failing to file, renew and conduct hearings on appropriate motions
>
> 1. Failure to file Motion to Suppress Statements obtained through Mr. Raglin's illegal arrest
>
> 2. Failure to appropriately renew Motion for Change of Venue after voir dire clearly indicated that potential jurors were biased as a result of media exposure
>
> 3. Failure to adequately present Motion for New Trial on issue of juror media exposure
>
> 4. Failure to adequately conduct hearing on Motion to Suppress Statements

B. Trial counsel was ineffective for failing to conduct voir dire in a manner sufficient to choose a fair and impartial jury

1. Failure to adequately voir dire on racial basis

2. Failure to adequately voir dire regarding media exposure

3. Failure to adequately voir dire regarding mitigating factors

4. Failure to adequately voir dire and remove Juror Veesart

C. Trial counsel was ineffective for repeatedly conceding Mr. Raglin's guilt and then after such concession presenting conflicting arguments to the jury

1. Trial counsel's concession of Mr. Raglin's guilt

2. Conflicting arguments presented to the jury

D. Trial counsel was ineffective for failing to adequately present a defense, including failing to support counsel's request for a manslaughter instruction with evidence sufficient to warrant the instruction, failing to secure the assistance of experts, and failing to object to prosecutorial misconduct.

1. Failure to put on evidence in support of manslaughter instruction

2. Failure to secure the assistance of experts

a. Firearms expert

b. toxicologist

1. assistance with respect to behavior on the night of the offense

2. assistance with respect to behavior at time of arrest and during statement to police

3. assistance with respect to victim's intoxication

3. Failure to object to prosecutorial misconduct

Second Ground for Relief:

Walter Raglin was denied his right to the effective assistance of counsel at the mitigation phase of his capital trial in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

A. Trial counsel failed to present psychological information critical to mitigation

B. Trial counsel failed to adequately secure expert assistance and present information critical to the mitigation defense with respect to homeless, or "street" culture

C. Trial counsel failed to adequately prepare Mr. Raglin for his unsworn statement

Third Ground for Relief:

Walter Raglin was denied his right to the effective assistance of counsel under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments when his attorneys failed to object and properly preserve numerous errors.

Fourth Ground for Relief:

Walter Raglin was denied his right to the effective assistance of counsel on his direct appeals in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Fifth Ground for Relief:

Walter Raglin's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were violated when the trial court admitted into evidence at the trial phase of the capital proceedings his inculpatory statement made to members of the Cincinnati Police Department on January 3, 1996, because his statement was the fruit of an illegal arrest.

Sixth Ground for Relief:

Walter Raglin's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated when the trial court failed to suppress his statement made to members of the Cincinnati Police Department on January 3, 1996, because his statement was made during a custodial interrogation following an unfulfilled request for counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 489 U.S. 146 (1990).

Seventh Ground for Relief:

Walter Raglin's rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the trial court failed to suppress his statement made to members of the Cincinnati Police Department on January 3, 1996, because his statement was involuntarily given.

Eighth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment Rights were violated when the judge refused to instruct the jury at the end of the trial phase that it could find Mr. Raglin guilty of involuntary manslaughter, a lesser included offense of aggravated murder.

Ninth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment rights were violated when the judge erroneously instructed the jury at the end of the trial phase on the issues of causation, forseeability [sic], intent, and purpose.

Tenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment rights were violated when the judge failed to properly instruct the jury at the end of the trial phase as to the definitions for reasonable doubt, beyond a reasonable doubt and circumstantial evidence.

Eleventh Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase that its verdict of death merely constituted a recommendation to the bench and that the Judge would make the final decision with respect to the imposition of the death penalty

Twelfth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge failed to properly instruct the jury at the end of the mitigation phase as to the definition of reasonable doubt.

Thirteenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase that it should consider all the evidence admitted during the trial phase of the proceedings with respect to its deliberations following the mitigation phase of the trial.

Fourteenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth

Amendment rights were violated when the judge failed to properly instruct the jury at the end of the mitigation phase as to the definition of the mitigating circumstances that the jury should consider during its deliberations.

Fifteenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase that it could consider any other factors that are relevant to the issue of whether it should recommend that Walter Raglin by sentenced to death.

A. The trial court's mitigation phase instructions violated Mr. Raglin's rights by permitting the jury to consider any factor it desired in determining the appropriate penalty in his case.

B. The trial court's mitigation phase instructions violated Ohio's statutory death penalty scheme.

Sixteenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase that it could consider the killing itself as a factor relevant to the issue of whether it should recommend that Walter Raglin be sentenced to death and by instructing the jury that the killing itself was an aggravating circumstance.

Seventeenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase in such a manner that the jury could conclude that it had to consider and reject a recommendation as to the imposition of death before it could consider either life sentence option.

Eighteenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge instructed the jury at the end of the mitigation phase that it could consider the nature and circumstances of the offense as a mitigating factor in its determination of whether it should recommend that Walter Raglin be sentenced to death.

Nineteenth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge refused to instruct the jury at the end of the mitigation phase that it could consider Walter Raglin's remorse, residual doubt and cooperation with law enforcement as mitigating factors it could consider in its determination of whether it should recommend that Walter Raglin be sentenced to death.

Twentieth Ground for Relief:

Walter Raglin's Fifth, Sixth, Seventh, Eighth and Fourteenth Amendment rights were violated when the judge refused to instruct the jury at the end of the mitigation phase that it could consider the sentencing alternative of life without parole.

Twenty-First Ground for Relief:

Walter Raglin was denied his rights to an impartial and disinterested jury due to the bias of Juror Tara Veesart in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Twenty-Second Ground for Relief:

Walter Raglin was denied his Sixth Amendment rights because juror Tara Veesart was influenced by occurrences from outside of the courtroom, out of the presence of the jury and without the rights of confrontation, cross-examination, and of counsel. These occurrences were communicated to, and thereby prejudicially influenced, other members of Walter Raglin's jury in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Twenty-Third Ground for Relief:

Walter Raglin was denied his constitutional rights to a fair and impartial trial under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments as a result of prosecutorial misconduct during both phases of his capital proceedings.

Twenty-Fourth Ground for Relief:

Walter Raglin was denied his rights in violation of the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments and the "Fair Cross Section" requirement of the Sixth Amendment to the United States Constitution because procedures used by the Hamilton County Court of Common Pleas and the Hamilton County Prosecutor's Office to discriminate against African-Americans result in the imposition of the death sentence with much greater frequency upon those who kill white persons than those who kill African-Americans.

A. Members of The Grand Jury Venire were Improperly Chosen.

B. Grand Jury Forepersons were Improperly Chosen.

C. Members of The Petit Jury Venire were Improperly Chosen.

D. Prosecutor's Use of Peremptory Challenges to Exclude African-Americans

E. The Hamilton County Procedures Discriminate Against African-Americans

Twenty-Fifth Ground for Relief:

Walter Raglin was denied his rights under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments and the "Fair Cross Section" requirement of the Sixth Amendment to the United States Constitution because the process of selecting grand jurors, grand jury forepersons, and petit jurors in Hamilton County

was tainted in 1996 due to consideration of the factor of race in the drawing, selection and impanelment of grand jurors and petit jurors; and due to consideration of the factors of race and gender in the selection of grand jury forepersons.

Twenty-Sixth Ground for Relief:

Walter Raglin was denied his rights under the Equal Protection Clause because the prosecutors used their peremptory challenges to exclude members from the jury based on their race.

Twenty-Seventh Ground for Relief:

Walter Raglin's constitutional rights as guaranteed by the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments were violated when the trial court, in its decision to impose a sentence of death, improperly considered and weighed valid or improper aggravating circumstances; failed to specify the reasons why aggravation outweighs mitigation beyond a reasonable doubt; and failed to consider and weigh valid mitigating factors presented by the defense.

A. The trial court improperly considered an uncharged and unproven statutory aggravating factor in sentencing Mr. Raglin to death.

B. The trial court's failure to state reasons why aggravation outweighed mitigation.

C. The trial court failed to consider and weigh valid mitigating factors presented by the defense

Twenty-Eighth Ground for Relief:

The State failed to prove beyond a reasonable doubt the essential element of purpose to kill and Mr. Raglin's conviction is contrary to the manifest weight of the evidence. Therefore, Walter Raglin's death sentence must be vacated pursuant to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Twenty-Ninth Ground for Relief:

Walter Raglin was denied his constitutional rights to a fair trial and impartial jury under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments during the mitigation phase because the trial court permitted the prosecutor to introduce irrelevant and highly prejudicial evidence from the trial phase of the capital proceedings.

Thirtieth Ground for Relief:

Walter Raglin was denied his constitutional rights under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments during the mitigation phase because the trial court permitted the prosecutor to introduce inadmissable rebuttal evidence that was unfairly prejudicial to Mr. Raglin's rights to a fair trial and impartial jury.

Thirty-First Ground for Relief:

Walter Raglin was denied his constitutional rights to a fair trial and impartial jury under the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments when the trial court overruled trial counsel's challenge to the state's use of peremptory challenges under *Batson v. Kentucky*.

Thirty-Second Ground for Relief:

Walter Raglin's rights as guaranteed by the Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments were violated when the trial court committed multiple errors during the pretrial, trial and mitigation phases of his capital case.

Thirty-Third Ground for Relief:

The proportionality review that the appellate courts must conduct pursuant to Ohio Revised Code §2929.05 is fatally flawed. Therefore, Walter Raglin's death sentence must be vacated pursuant to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Thirty-Fourth Ground for Relief:

Walter Raglin's death sentence is constitutionally infirm because Ohio's capital punishment system operates in an arbitrary, capricious and discriminatory manner in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Additionally, Walter Raglin's death sentence is constitutionally infirm because within Hamilton County, Ohio, the death penalty is selectively imposed, rendering the penalty as applied in Hamilton County, arbitrary and capricious on the hone hand and the product of racial discrimination on the other.

Thirty-Fifth Ground for Relief:

Walter Raglin's death sentence is constitutionally infirm because the amendments to the Ohio Constitution occasioned by the passage of Issue One, and the amendments to the Ohio Revised Code enacted by the Ohio General Assembly to facilitate the changes in the Ohio Constitution governing capital cases, violates the rights of capital defendants in general and Mr. Raglin, in particular, under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Thirty-Sixth Ground for Relief:

Walter Raglin's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, and gross misconduct of state officials in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In his First Amended Petition (Doc. No. 76), Petitioner abandoned Claims A.1, A.2, A.3, A.4, B.1, B.2, B 3,[2] and D.2.b from the First Ground for Relief, Claims A, B, and C from the Second Ground for Relief and the Fifth, Seventh, Tenth, Eleventh, Twentieth, Twenty-Second, Twenty-Fourth, Twenty-

[2] In the First Amended Petition, a typographical error makes it appear that Claim B.2 has been abandoned twice; the context makes it clear that Claim B.3 has been abandoned along with B.2. *See* Doc. No. 76 at 22-23.

Sixth, Twenty-Eighth, Thirty-First, Thirty-Third, and Thirty-Fifth Grounds for Relief in their entirety (Doc. No. 76 at i-vii and 57.) Also in the First Amended Petition, Mr. Raglin added subpart D of the Second Ground for Relief and Grounds for Relief Thirty-Seven and Thirty-Eight. Those newly-added claims were dismissed as barred by the statute of limitations as interpreted in *Mayle v. Felix*, ___ U.S. ___, 125 S. Ct. 2562; 162 L. Ed. 2d 582 (2005)(Doc. Nos. 86, 87).

Analysis

The facts of the crime for which Petitioner was convicted are recounted as follows by the Ohio Supreme Court:

> During the early morning hours of December 29, 1995, appellant, Walter Raglin, and appellant's friend, Darnell "Bubba" Lowery, were looking for someone to rob. Appellant was wearing dark clothes and a black ski mask and was armed with a .380 semiautomatic pistol he had obtained from Lowery. The two men considered robbing a "dope boy," *i.e.*, a drug dealer, but decided against it for fear that such a person could be armed. They also discussed the possibility of robbing a taxicab driver, but appellant suggested that it might be safer for the two men to rob a more vulnerable victim.
>
> Meanwhile, at approximately 1:30 a.m., Michael Bany, a musician, concluded an engagement at a bar on Main Street in Cincinnati. At approximately 1:45 a.m., Bany left the bar carrying a bass guitar and a black bag or suitcase with music equipment and headed toward the parking lot where he had parked his car. Appellant and Lowery saw Bany and decided to rob him. While Bany was attempting to unlock the door to his vehicle, appellant approached him from behind, pulled out the .380 semiautomatic pistol, and demanded Bany's money. Bany handed appellant three $20 bills. Appellant then asked Bany whether Bany's car had an automatic or manual transmission since appellant planned to steal the car if it was an automatic. Bany did not reply to appellant's question. Appellant repeated the question, but Bany remained silent. At some point, Bany bent down to pick up his guitar case and/or his music equipment and turned to face appellant. While appellant and Bany were looking at each other, appellant shot Bany once in the side of the neck, killing him. The projectile entered through the left side of Bany's neck, just below the earlobe, and exited through the right side. The path of the projectile indicated that appellant and Bany were not standing face-to-face at the time of the shooting. Additionally, the record indicates that the shot was fired

> at the victim from a distance of more than three feet.
>
> Following the killing, appellant and Lowery ran to a house several blocks away from the scene of the murder. There, appellant cleaned the pistol of fingerprints and gave it to Lowery. Appellant told Lowery that he (appellant) had received only $20 from the victim. Later, appellant spent the $60 he had taken from Bany to purchase marijuana.
>
> On January 3, 1996, Cincinnati police received an anonymous telephone call identifying appellant as a suspect in the murder. Appellant was apprehended by police and was taken to an interview room for questioning. There, appellant voluntarily agreed to speak with police after being advised of his *Miranda* rights. See *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.
>
> During questioning, appellant lied to the police and denied any involvement in the murder. When police informed appellant that they had received telephone calls naming appellant as a suspect, appellant changed his story and admitted that he had been at the scene of the murder. Appellant told police that he had been paid $25 for being a lookout for Lowery, and that Lowery had robbed and killed Bany. The police officers then left the interview room. A short time later, appellant summoned an officer back to the room and admitted that he had shot Bany. Appellant then confessed to robbing and killing Bany and gave police a detailed account of the murder.
>
> After giving a full confession to police, appellant agreed to repeat his statement on tape. Appellant was once again advised of his *Miranda* rights. At that time, appellant indicated that he wanted to speak to an attorney. Therefore, police stopped the recorder, ceased their interrogation of appellant, and offered to bring appellant a telephone book and to assist him in obtaining counsel. Appellant stated that he did not want to inconvenience the officers, but police assured him that his request for counsel was not an inconvenience. Nevertheless, despite these assurances, appellant told police that he had changed his mind concerning his request for counsel and that he wished to continue with his statement. At that point, police resumed the interview and once again advised appellant of his rights. After ensuring that appellant fully understood his right to counsel and had freely and intelligently abandoned his known rights, police resumed the interrogation and tape recording of appellant's statement, and appellant reiterated the details of the robbery and killing.

State v. Raglin, 83 Ohio St. 3d 253, 253-55, 699 N.E. 2d 482 (1998).

First Ground for Relief

In his First Ground for Relief as amended, Petitioner asserts he was denied effective assistance of counsel in that counsel failed to adequately voir dire and remove Juror Tara Veesart (Claim B.4), conceded Petitioner's guilt and then made conflicting arguments to the jury (Claim C), failed to put on evidence which would have justified a jury instruction on manslaughter (Claim D.1), failed to procure the assistance of a firearms expert (Claim D.2.a), and failed to object to prosecutorial misconduct (Claim D.3).

Respondent contends that each of these claims is procedurally defaulted because it was not raised in the state courts until it was included in Mr. Raglin's petition for post-conviction relief, or, in the case of the prosecutorial misconduct claim, not raised at all (Amended Return of Writ, Doc. No. 80 at 24-37).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998) *citing Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

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

In deciding Mr. Raglin's appeal from denial of his petition for post-conviction relief, the Hamilton County Court of Appeals held

> An ineffective- assistance-of-counsel claim, however, may be dismissed as *res judicata* where the petitioner was represented by new counsel on direct appeal, that counsel failed to raise the issue of trial counsel's incompetence, and the issue could fairly have been determined without evidence *dehors* the record.

State v. Raglin, 1999 WL 420063 (Ohio App. 1 Dist.1999) *citing State v. Sowell*, 73 Ohio App. 3d 672, 598 N.E. 2d 136 (1st Dist. 1991). As to each claim of ineffective assistance of counsel made in Ground One, the Court of Appeals applied to the Ohio criminal *res judicata* rule to bar consideration of the claim on the merits in post-conviction proceedings because it could have been raised on direct appeal. In doing so, the Court of Appeals cited to numerous Ohio cases which stand for the proposition that a criminal defendant cannot raise in a post-conviction proceeding a claim which could be decided on the face of the record on direct appeal. *See, e.g., State v. Perry,* 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967).

Petitioner asserts that the Ohio *res judicata* rule is not applicable at all to Ground One for relief because he did raise these claims on direct appeal, to wit, by filing an application to re-open his direct appeal in the Ohio Supreme Court. The record reflects that Petitioner did file such an Application on December 29, 1998, and the Ohio Supreme Court declined to consider the Application. *State v. Raglin*, 85 Ohio St. 3d 1407, 706 N.E. 2d 789 (1999).

However, an application for reopening under Ohio Sup. Ct. Prac. R. XI is, by the very terms of the Rule, limited to an opportunity to assert ineffective assistance of appellate counsel. This Rule parallels Ohio R. App. P. 26(B) for death penalty cases after January 1, 1995, such as this case, where appeal is directly to the Ohio Supreme Court and the Ohio intermediate courts of appeals are bypassed. Like Rule 26(B), it is a collateral attack on the judgment and not a part of direct appeal. *Morgan v.*

Eads, 104 Ohio St. 3d 142, 818 N.E. 2d 1157 (2004); *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005)(*en banc*)(overruled *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), relied on by Petitioner and holding that 26(B) proceedings are collateral.)

Ohio's doctrine of *res judicata* in criminal cases, enunciated in *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967), is an adequate and independent state ground. *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003), *citing Coleman v. Mitchell, infra, Rust v. Zent, infra, and Riggins v. McMackin,* 935 F.2d 790 (6th Cir. 1991); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins,* 209 F.3d 486, 521-22 (6th Cir. 2000), *cert. denied* 531 U.S. 1082 (2001); *Rust v. Zent,* 17 F.3d 155, 160-61 (6th Cir. 1994); *Van Hook v. Anderson,* 127 F. Supp. 2d 899 (S.D. Ohio 2001).

Finally, Petitioner claimed that he could demonstrate cause and prejudice to excuse this procedural default, but stated he would need an evidentiary hearing in which to do so (Traverse, Doc. No. 16 at 51). However, no motion for evidentiary hearing was ever filed and the Court therefore treats the assertion of excusing cause and prejudice as abandoned.

Petitioner's Ground One for Relief is barred by procedural default and should be dismissed with prejudice.

Second Ground for Relief

The Second Ground for Relief has been abandoned in part and dismissed in part as barred by the statute of limitations.

Third Ground for Relief

In his Third Ground for Relief, Petitioner asserts he was denied effective assistance of trial counsel when his attorneys failed to object and properly preserve numerous errors for appeal. This Ground for Relief is barred by procedural default on the same basis as the First Ground for Relief. That is, it was not presented on direct appeal, but only in the petition for post-conviction relief, where it was held barred by Ohio's criminal *res judicata* rule. The analysis given with respect to the First Ground for Relief is fully applicable here.

The Third Ground for Relief should be dismissed with prejudice.

Fourth Ground for Relief

In his Fourth Ground for Relief, Mr. Raglin asserts he received ineffective assistance of counsel on direct appeal when his appellate counsel failed to raise the following assignments of error:

1. Walter Raglin was denied the effective assistance of counsel when his counsel failed to challenge a prospective juror for cause or utilize a peremptory challenge to remove a juror who had personal knowledge of the crime alleged and personal relationships with those affected by the crime alleged.

2. Walter Raglin was denied the effective assistance of counsel when, without his consent, counsel repeatedly conceded the issue of guilt at the trial phase of his capital trial, thereby voiding the state's burden of proof and eviscerating the defendant's right to confront witnesses.

3. Walter Raglin was denied the effective assistance of counsel when defense counsel repeatedly conceded the issue of guilt to the charged aggravated murder during voir dire and opening statement, but then inconsistently argued in closing that the state failed to prove the element of purpose beyond a reasonable doubt.

4. Walter Raglin was denied the effective assistance of counsel when his counsel failed to exercise his rights to procure reasonable and

> necessary experts to present forensic evidence essential to an effective defense, including, but not limited to, an expert to rebut the state's suspect evidence regarding the operability of the alleged murder weapon when that evidence bore directly on the element of intent central to the capital offenses alleged.
>
> 5. Walter Raglin was denied the effective assistance of counsel when his counsel failed to put on a defense case-in-chief targeting a lesser included offense in a situation where the need for such defense is clearly indicated by the facts and necessary to rebut the state's suspect evidence regarding the element of intent.
>
> 6. Walter Raglin was denied the effective assistance of counsel when his counsel failed to investigate and present substantial mitigating evidence of remorse during the sentencing phase hearing.
>
> 7. Walter Raglin was denied the effective assistance of appellate counsel when his counsel failed to raise as error, trial instructions which undermine the state's burden of proof beyond a reasonable doubt and which shift the burden of proof to the defendant.
>
> 8. Walter Raglin was denied the effective assistance of counsel when his counsel failed to object to a prosecutor's closing argument that is presented in a manner to inflame the jurors against the defendant.

(First Amended Petition, Doc. No. 76 at 36-37.)

In his original Petition, Petitioner pled fourteen omitted assignments of error (Doc. No. 14 at 56-59). When he filed his First Amended Petition, Raglin omitted seven of those assignments of error without stating that they were expressly abandoned. Since they have not been included in the First Amended Petition, however, the Court treats them as abandoned. Asserted assignment of error number 6 above was not in the original Petition at all, but was pled for the first time in the First Amended Petition. For the reasons stated in the Report and Recommendations on the statute of limitations (Doc. No. 77), this new claim does not "relate back" to the original filing and is thus barred by the statute of limitations because the First Amended Petition was filed after the statute expired. *See Mayle v. Felix*, *supra*. Alternatively, as Respondent points out, this claim is procedurally defaulted because it was not

among those presented to the Ohio Supreme Court on the Application to Reopen.

Respondent concedes that the remaining seven omitted assignments of error (1-5, 7-8) are not procedurally defaulted and that this Court should decide them on the merits.

The governing standard for effective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984):

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

466 U.S. at 687.

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

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

Id. at 689.

As to the second prong, the Supreme Court held:

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

Id. at 694. *See also Darden v. Wainright*, 477 U.S. 168 (1986); *Wong v. Money*, 142 F.3d 313, 319 (6th Cir. 1998); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987); *see generally* Annotation, 26 ALR Fed 218.

A criminal defendant is entitled to effective assistance of counsel on appeal as well as at trial, counsel who acts as an advocate rather than merely as a friend of the court. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Penson v. Ohio*, 488 U.S. 75 (1988). The *Strickland* test applies to appellate counsel. *Smith v. Robbins*, 528 U.S. 259 (2000); *Burger v. Kemp*, 483 U.S. 776 (1987). However, the appellate attorney need not advance every argument, regardless of merit, urged by the appellant. *Jones v. Barnes*, 463 U.S. 745 (1983)("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id*. at 751-52. Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *See Smith v. Murray*, 477 U.S. 527 (1986).

"In order to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show errors so serious that counsel was scarcely functioning as counsel at all and that those errors undermine the reliability of the defendant's convictions." *McMeans v. Brigano*, 228 F.3d 674(6th Cir. 2000) *citing Strickland* and *Rust v. Zent*, 17 F.3d 155, 161-62 (6th Cir. 1994). Counsels' failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004) *citing Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001) *cert.*

denied, 535 U.S. 940 (2002). "Counsel's performance is strongly presumed to be effective." *McFarland*, *quoting Scott v. Mitchell*, 209 F.3d 854, 880 (6th Cir. 2000) *citing Strickland*. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show that appellate counsel ignored issues [which] are clearly stronger than those presented. *Smith v. Robbins*, 528 U.S. 259, 288 (2000), *quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

While accepting these standards for claims of ineffective assistance of appellate counsel, Petitioner makes no argument as to why these omitted assignments of error are meritorious or how they are more meritorious than the assignments of error which actually were presented on direct appeal. In other words, Petitioner's Traverse merely asserts these were meritorious without making any argument (*See* Traverse, Doc. No. 16 at 106-109).

Petitioner has not demonstrated that he is entitled to relief on this Ground and it should be dismissed with prejudice.

Fifth Ground for Relief

This Ground for Relief has been abandoned (First Amended Petition, Doc. No. 76 at 38).

Sixth Ground for Relief

In his Sixth Ground for Relief, Petitioner asserts his constitutional rights were violated when the trial court failed to suppress his confession to Cincinnati police because it was given while he was in custody and after he had made a request for counsel. Respondent concedes that this Ground

is properly preserved for merits review in this Court (Amended Return of Writ, Doc. No. 80 at 92).

The Ohio Supreme Court decided this claim on the merits as part of its decision on Raglin's Fourteenth Proposition of Law. It held:

> The second (and far more significant) issue raised by appellant is whether he effectuated a valid -- i.e., voluntary, knowing, and intelligent -- waiver of his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. Specifically, appellant contends that the audiotaped confession should have been suppressed and held inadmissible under the rule of *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378. We disagree.
>
> Edwards holds that once an accused undergoing custodial interrogation invokes his right to have counsel present during questioning, all further interrogation must cease, and the accused "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (Emphasis added.) 451 U.S. at 484-485, 101 S. Ct. at 1885, 68 L. Ed. 2d at 386. We find no violation of *Edwards* here.
>
> Appellant was advised of his *Miranda* rights before any questioning by police. He voluntarily agreed to speak with police and signed a written waiver of his Miranda rights. He then gave a full confession to police, but that confession was not recorded on tape. When asked to repeat his statement on tape, appellant agreed and was once again advised of his Miranda rights. However, at that point, appellant informed police that he wished to speak to an attorney before proceeding further. Therefore, police ceased questioning appellant and turned the recorder off. The record indicates that police offered to get appellant a telephone book and to assist him in obtaining counsel. Appellant told police that he did not want to "put [the police officers] to any trouble," but the officers assured him that his request for counsel was no trouble. Appellant then told police that he had changed his mind concerning counsel and that he wanted to "put it [his confession] on tape," and "get it off his chest." There is no evidence whatsoever that police said or did anything to change appellant's mind, and appellant changed his mind after only two or three minutes. Police then turned the recorder on and proceeded to ask appellant a series of questions regarding his waiver of the right to counsel. In response to these questions, appellant indicated that he

> fully understood his rights, that no threats or promises had been made to induce or coerce him into confessing, and that he wanted to put his confession on tape without talking to an attorney or having one present during questioning. The record in this case clearly reveals that it was appellant himself who, after invoking the right to counsel, initiated further conversations or communications with police concerning his wish to confess, and that appellant fully understood his right to counsel and voluntarily, knowingly, and intelligently abandoned that right before the custodial interrogation resumed.
>
> The trial court, in denying appellant's pretrial motion to suppress, implicitly determined that appellant's confessions to police were voluntarily given and that appellant had effectuated a voluntary, knowing, and intelligent waiver of his Miranda rights before his initial (unrecorded) confession to police, and again when he voluntarily confessed on tape after rescinding a request for counsel. The record before us supports the trial court's conclusions in this regard, and we find no error in that court's decision denying the motion to suppress. Accordingly, we reject appellant's fourteenth proposition of law.

State v. Raglin, 83 Ohio St. 3d 253, 262-264 (1998) (footnote omitted).

The Supreme Court has recently elaborated on the standard of review of state court decisions on claims later raised in federal habeas corpus:

> The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law. See *Williams v. Taylor*, 529 U.S. 362, 403-404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). To these ends, § 2254(d)(1) provides:
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."
>
> As we stated in *Williams*, § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529

> U.S., at 404-405, 120 S.Ct. 1495. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. *Id.*, at 405-406, 120 S. Ct. 1495. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.*, at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id.*, at 409- 410, 120 S.Ct. 1495. See also *id.*, at 411, 120 S.Ct. 1495 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Bell v. Cone, 535 U.S. 685 (2002).

> AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "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). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra,* at 405; *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) *(per curiam).* A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra,* at 405; *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) *(per curiam).*

Brown v. Payton, ___ U.S. ___, 125 S. Ct. 1432 (2005).

All parties agree that *Edwards v. Arizona*, 451 U.S. 477 (1981), is the relevant Supreme Court precedent and that is the clearly established Supreme Court law which the Ohio Supreme

Court applied to this asserted *Miranda* violation. Petitioner has not demonstrated in what way the Ohio Supreme Court's decision is an unreasonable application of *Edwards* or why the findings of fact on which that court based its conclusions are somehow an unreasonable determination of the facts in light of the evidence offered in the state court. Mr. Raglin, given his *Miranda* warnings, made a complete confession to the police before any audiotaping occurred. Once the police evinced a desire to put the confession on tape, he hesitated about getting an attorney. However, once the police brought him a telephone book to enable him to do that, he changed his mind and said he wanted to go ahead and put the confession on tape. The interchange between Mr. Raglin and the interrogating police officer which Petitioner's counsel characterize as "hounding" is just as reasonably read as conversation about what Mr. Raglin wanted to do. There is no evidence of any effort by the police to talk Mr. Raglin out of calling an attorney nor evidence to contradict the state court findings that it was Mr. Raglin who re-initiated the audiotaping.

Moreover, no evidence has been offered which suggests that there are any material differences in the content of the taped and untaped confessions. While the audiotape would probably be more persuasive to a jury and would forestall attempts to repudiate the confession, which otherwise would only have come to the jury through an officer's testimony, that does not eliminate the fact that the police had a *Mirandized* confession before any talk of an attorney occurred. Thus a full confession would have been admissible entirely apart from the audiotape.

The Ohio Supreme Court's disposition of this claim was not an unreasonable application of *Edwards* and this Ground for Relief should therefore be dismissed with prejudice.

Seventh Ground for Relief

This Ground for Relief has been abandoned (First Amended Petition, Doc. No. 76 at 41).

Eighth Ground for Relief

In his Eighth Ground for Relief, Petitioner asserts the trial court erred in not instructing the jury that it could find Petitioner guilty of the lesser included offense of involuntary manslaughter (First Amended Petition, Doc. No. 76 at 42).

In deciding Petitioner's lesser included offense proposition of law, the Ohio Supreme Court held:

> Appellant contends that the trial court erred by refusing to instruct the jury on involuntary manslaughter as a lesser included offense of aggravated murder. We disagree. We have considered similar issues in a number of prior cases and have discussed those issues to exhaustion. The applicable rule is that "[e]ven though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. We find no evidence in this case to reasonably suggest that appellant lacked the purpose to kill his victim.
>
> The facts of this case are clear. Appellant and his accomplice, Darnell Lowery, wandered the streets of Cincinnati looking for a victim to rob. Appellant was carrying a loaded .380 caliber semiautomatic pistol. The men considered two potential classes of victims to rob, but decided to search for easier prey. While appellant and Lowery were searching for a defenseless person to rob, appellant's unfortunate victim, Michael Bany, arrived on the scene. Appellant approached Bany and demanded money. Bany complied with appellant's demands. The record clearly indicates that Bany presented no threat to appellant and that appellant and Bany never argued. Bany never spoke a single word to appellant. While appellant was asking questions concerning Bany's car, Bany bent down and

> picked up what appellant referred to as a "suitcase," i.e., either the guitar case or the case containing Bany's music equipment. Bany turned to look at appellant, and appellant looked at Bany. Appellant then pointed the pistol at Bany and shot him in the neck in a manner that was certain to (and did) cause Bany's death.
>
> Appellant told police, "I, I fired the gun at [Bany]. I didn't know where I hit [him] at. I wasn'[t] tryin' to kill [him]." Appellant also claimed to have "panicked" at the time he shot and killed Bany. Appellant told police that he had been "scared" by Bany's movements because appellant "didn'[t] know what * * * was in the suitcase." However, appellant never claimed that the shot had been accidentally or unintentionally fired, and the evidence clearly establishes that the shooting was not accidental or unintentional. Appellant's claims of panic and fright are not reasonably supported by the evidence. Appellant had a loaded weapon, he was pointing that weapon at Bany, and he fired that weapon into the neck of his defenseless victim. Appellant told police that he had fired the weapon directly at Bany. He told police that Bany was not trying to "fiddle" with the suitcase or anything of that nature and that Bany had simply "picked it up." Appellant also admitted to police, "I didn'[t] have to shoot that man." The direct and circumstantial evidence in this case, and all reasonable inferences to be drawn therefrom, lead to one inescapable conclusion, to wit, appellant purposely killed Bany during the commission of an aggravated robbery when he pointed the gun at Bany and pulled the trigger.
>
> Under any reasonable view of the evidence, the killing of Bany was purposeful. Thus, we find that the evidence adduced at trial could not have reasonably supported both an acquittal on aggravated murder and a conviction on the charge of involuntary manslaughter. Accordingly, we hold that the trial court properly rejected appellant's request for an involuntary manslaughter instruction.

State v. Raglin, 83 Ohio St. 3d 253, 257-258 (1998).

Petitioner contends that this does not constitute a decision on his federal constitutional claim and thus should not be analyzed under 28 U.S.C. § 2254(d)(1)(Traverse, Doc. No. 16 at 130). However, a state court decision can constitute an "adjudication on the merits" entitled to deference under 28 U. S.C. § 2254(d)(1) even if the state court does not explicitly refer to the federal claim

or to relevant federal case law. *Sellan v. Kuhlman*, 261 F.3d 303 (2nd Cir. 2001). In order to avoid being contrary to Supreme Court precedent, a state court decision need not cite the controlling precedent or even be aware of it "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3 (2002)(*per curiam*).

Petitioner relies here, as he did in the Ohio Supreme Court, on *Beck v. Alabama*, 447 U.S. 625 (1980). In that case the Supreme Court granted *certiorari* to decide:

> May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense and when the evidence would have supported such a verdict?

Id. at 627. Under Alabama law felony murder was a lesser included offense of capital murder under the usual test for lesser included offenses: the lesser offense includes all but one of the elements of the greater offense. However, the judge was statutorily prohibited from allowing the jury to convict of the lesser included offense; instead, they had to convict of capital murder or acquit. *Id*. at 628-629. In *Beck* the State conceded that,

> [A]bsent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder as a matter of state law." *Id*. at 630. The Court noted that this statute was "unique in American criminal law. In the federal courts it has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. . . . Similarly, the state courts that have addressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it.

Id. at 635-636 *quoting Keeble v. United States*, 412 U.S. 205, 208 (1973) *citing* as to the Ohio practice *State v. Kilby*, 50 Ohio St. 2d 2, 361 N.E. 2d 1336 (1977). The Court held the Alabama

statute was unconstitutional, but also said "we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, . . ." *Id*. at 637.

The decision in this case is completely consistent with *Beck*. The hypothesis in *Beck* as it is in general in lesser included offense cases is that, on the evidence presented, a jury could rationally find the defendant guilty of the lesser included offense but not guilty on the element which elevates the crime to the greater offense. The whole burden of Justice Douglas' analysis on this point for the Ohio Supreme Court is that no jury could rationally have found that the victim's killing was not purposeful. Given the evidence before the Ohio courts, that finding was not an unreasonable determination of the facts in light of the evidence presented.

Petitioner's Eighth Ground for Relief should be dismissed with prejudice.

Ninth Ground for Relief

In his Ninth Ground for Relief, Petitioner contends that the trial phase instructions on the issues of causation, foreseeability, intent, and purpose were constitutionally infirm (First Amended Complaint, Doc. No. 76 at 43). The portions of the jury instructions to which Petitioner objects are as follows:

> [W]hen the death is the natural and foreseeable result of the act. . . . "Result occurs when the death is naturally and foreseeably caused by the act. . . . The causal responsibility of the defendant for an unlawful act is not limited to its most obvious result. The defendant is responsible for the natural, logical and foreseeable results that follow, in the ordinary course of events, from an unlawful act.

(First Amended Petition, Doc. No. 76 at 44 *quoting* trial transcript at 1476.[3]) Petitioner claims (1) this instruction undercut the other instruction the judge gave that the State had to prove Petitioner purposely caused the death of the victim, (2) the trial court erroneously gave "both prongs of the statutory definition,"[4] whereas only the first prong was applicable, and (3) that the instruction that "purpose is determined from the use of a weapon and the facts in evidence" created a conclusive presumption and in addition that it was mandatory to give an instruction that any inference of intent to kill from the use of a deadly weapon was permissive. *Id*.

Respondent collapses this claim: "Raglin argues that the instruction on purpose was invalid because it created a mandatory presumption." (Amended Return of Writ, Doc. No. 80 at 54.) She then asserts this claim is procedurally defaulted because Petitioner had conceded in the Ohio Supreme Court that the instruction stated only a permissive inference and not a mandatory one. *Id*. at 54-55.

Petitioner's Proposition of Law No. 17 as presented to the Ohio Supreme Court was

> Where, in a capital case, the guilt phase jury instructions, over defense objections, state (1) that the essential element of cause as being where the death is the foreseeable result of the act, and (2) that purpose may be inferred from the use of a deadly weapon, the right of the accused to due process of law under the Fourteenth Amendment of the U.S. Constitution has been violated, requiring reversal of his conviction.

(Appellant's Brief, Joint Appendix, Vol. VI at 813.) Although Petitioner pled this claim in state court as a federal constitutional claim, he argued it entirely in terms of state precedent – *State v. Burchfield*, 66 Ohio St. 3d 261, 611 N.E. 2d 819 (1993); *State v. Jacks*, 63 Ohio App. 3d 200, 578

[3] The other two page references made at this point in the First Amended Petition are to places where objections were lodged to the instructions.

[4] There is no citation in the First Amended Petition to whatever statute is intended to be referenced.

N.E. 2d 512 (Ohio App. 8th Dist. 1989); and *State v. Loza*, 71 Ohio St. 3d 61, 641 N.E. 2d 1082 (1994);(*See* Appellant's Brief, Joint Appendix, Vol. VI at 917-919.) The sole federal precedent cited was *County Court of Ulster Co. v. Allen*, 442 U.S. 140 (1979). (Appellant's Brief, Joint Appendix, Vol. VI at 919.) In his Traverse, however, to escape the force of 28 U.S.C. § 2254(d)(1), he asserts that the Ohio Supreme Court did not decide his federal constitutional claim and he is thus entitled to *de novo* review. (Traverse, Doc. No. 18 at 133-134.)

The Ohio Supreme Court dealt with Petitioner's Proposition of Law No. 17 as follows:

> Appellant contends that the trial court's instructions to the jury in the guilt phase that defined "causation" in terms of foreseeability permitted a conviction for aggravated murder without proof of purpose to kill. Appellant makes a similar argument with respect to the trial court's instruction to the jury that "[i]f a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to cause the death may be inferred from the use of the weapon." Appellant's arguments are not persuasive. The trial court's instructions to the jury, viewed as a whole, made it clear that a finding of purpose (and specific intent) to kill was necessary in order to convict appellant on the charge of aggravated murder. The jury in this case returned its verdicts in accordance with the overwhelming evidence on the issue. Accordingly, we find no reversible error here.

State v. Raglin, 83 Ohio St. 3d 253, 264 (1998).

The relevant portions of the jury instruction are as follows:

> Aggravated murder in Count 2 is purposely causing the death of another. . .
>
> Before you can find the defendant guilty, you must find . . . the defendant purposely caused the death of Michael Baney. . . . Purpose to cause the death of Michael Baney is an essential element of the crime of Aggravated Murder. A person acts purposely when it is his or her specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to cause the death of Michael Baney.
>
> **Purpose**

> Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result or engaging in specific conduct. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to him or herself, unless he or she expresses it to others or indicates it by his or her conduct.
>
> The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, the means or weapons used and all the other facts and circumstances in evidence.
> . . .
> If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to cause the death may be inferred from the use of the weapon.
>
> **Cause**
>
> Cause is an essential element of the offense charged. The State charges that the act by the defendant caused the death of Michael Baney.
>
> Cause is an act which in the natural and continuous sequence directly produces the death, and without which it would not have occurred. Cause occurs when the death is the natural and foreseeable result of the act.
>
> A death is the result of an act when it is produced directly by the act in the natural and continuous sequence and would not have occurred without the act. "Result" occurs when the death is naturally and foreseeably caused by the act. . . .
>
> The causal responsibility of the defendant for an unlawful act is not limited to its immediate or most obvious result. The defendant is responsible for the natural, logical and foreseeable results that follow, in the ordinary course of events, from the unlawful act.

(Trial Tr. at 1473-1476.) Petitioner's counsel made no explicit objection to this portion of the charge at its conclusion, but merely incorporated his prior objections. *See Id*. at 1412, 1487.

Petitioner's sole reliance in argument is on *Francis v. Franklin*, 471 U.S. 307 (1985)(*See*

Traverse, Doc. No. 18 at 135). In *Franklin* the Supreme Court was faced with a capital murder statute which required proof of intent, the fatal shot was fired through a door which was being slammed in the defendant's face, and the sole relevant instruction was

> A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Franklin, 471 U.S. at 311-312. The Court decided that this language created a mandatory presumption which violated *Sandstrom v. Montana*, 442 U.S. 510 (1979), even though the presumption was rebuttable. The Court recognized that

> If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of the offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption.

Id. at 315 *citing Cupp v. Naughton*, 414 U.S. 141 (1973). However, the charge in *Franklin*'s case only included general language about the burden of proof and presumption of innocence. *Id*. at 319.

The charge in this case is far different from the criticized charge in *Franklin*. Here the trial judge told the jury that purpose to cause death was an essential element and twice in the same

paragraph told them that proof of purpose required proof of specific intent to cause death. Then he went on to define purpose in terms of intention. Because, as he told the jury, we never have direct proof of someone's purpose, purpose being an internal mental state, purpose must be determined from circumstantial evidence. The Court agrees with Petitioner that the language the trial judge used – "is determined" – told the jury that it must decide Petitioner's *mens rea* from circumstantial evidence. But that is accurate. In criminal cases as in life in general, we never have direct evidence of another's person's state of mind, even when that person declares openly what his or her state of mind is.

Finally, of course, the judge's instruction that the jury "may infer" intent to cause death from the use of a deadly weapon is perfectly proper under *Sandstrom* and a manifestly reasonable, albeit not necessarily compelling, inference.

These completely proper instructions about purpose and specific intent were given virtually in the same breath with the causation instructions. Foreseeability of death as a result of conduct is permissible in a capital case when combined with specific intent instruction. *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000).

In 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. *Henderson v. Kibbe,* 431 U.S. 145, 154 (1977). The 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." *Estelle v. McGuire*, 502 U.S. 62 (1991) *quoting Cupp v. Naughten,* 414 U.S. 141(1973). The category of infractions that violate fundamental fairness is very

narrow. *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000) *citing Dowling v. United States*, 493 U.S. 342, 352 (1990).

As noted above with respect to the Eighth Ground for Relief, a state court decision can "count" as an adjudication of a federal constitutional claim and therefore be entitled to deference under the AEDPA even if federal case law is not cited. Justice Douglas' opinion here applies the appropriate federal standard – the fairness of the instructions on *mens rea* taken as a whole. That decision is not an unreasonable application of *Sandstrom* or *Franklin*. Therefore Petitioner's Ninth Ground for Relief is without merit.

Tenth Ground for Relief

Petitioner has abandoned his Tenth Ground for Relief (First Amended Petition, Doc. No. 76 at 45).

Eleventh Ground for Relief

Petitioner has abandoned his Eleventh Ground for Relief (First Amended Petition, Doc. No. 76 at 45).

Twelfth Ground for Relief

In his Twelfth Ground for Relief, Petitioner objects that at the end of the mitigation phase of the trial, the trial judge instructed the jury that "[r]easonable doubt is present when the jurors, after they have carefully considered and compared all the evidence, cannot say that they are firmly

convinced of the truth of the charge." (First Amended Petition, Doc. No. 76 at 45; emphasis *sic*.)

Obviously, the instruction should read that reasonable doubt exists at the mitigation stage if the jury is not firmly convinced that the aggravating circumstances outweigh the mitigating factors; that is the issue the jury must decide beyond a reasonable doubt at the penalty phase of a capital trial. This error of speaking, which the Court has encountered in other capital cases, probably arises from transposing the reasonable doubt definition in the statute and in Ohio Jury Instructions from the conviction stage to the penalty phase.

Nevertheless, the error does not rise to the level of making the penalty phase instructions, considered as a whole, misleading and unfair. The language was used in the context of telling the jury precisely what they had to decide, to wit, whether "the aggravating circumstances which the defendant was found guilty of committing is [sic] sufficient to outweigh the factors in mitigation." (Trial Transcript at 1909-1910.) The Ohio Supreme Court reviewed the penalty phase instructions as a whole in response to Petitioner's Proposition of Law No. 9 and found Petitioner's argument unpersuasive. Although the Ohio Supreme Court's analysis is cursory, it is not an unreasonable application of clearly established United States Supreme Court law. *See Cupp v. Naughton, supra.*

Petitioner's Twelfth Ground for Relief is without merit.

Thirteenth Ground for Relief

In his Thirteenth Ground for Relief, Petitioner objects that the trial judge instructed the jury at the end of the penalty phase that they should consider all the evidence admitted at the guilt phase in making their determination.

Respondent argues this claim is procedurally defaulted because it was never fairly presented to the Ohio courts for decision as a federal constitutional claim. The relevant Proposition of Law was No. 9.A which reads in its entirety:

> The trial court instructed the jury that they should consider all evidence admitted at the guilt-innocence phase of the proceedings, including the photos of the body of the deceased, to the introduction of which Appellant had objected (R.1909, 1911, 1916). This was error, *State v. DePew*, [38 Ohio St. 3d 275 (1989)] *supra; State v. Williams*, [73 Ohio St. 3d 153 (1995)] *supra.*

(Appellant's Brief, Joint Appendix, Vol. VI at 863.) The Ohio Supreme Court summarily rejected all of Petitioner's claims with respect to the penalty phase jury instructions made in Proposition of Law No. 9. *State v. Raglin*, 83 Ohio St. 3d 253, 260 (1998).

Petitioner did not cite any purportedly controlling federal case law in his Brief to the Ohio Supreme Court; he merely mentions the Eighth and Fourteenth Amendments in the text of Proposition of Law No 9. Indeed, his argument in the Traverse in this Court merely repeats the citations to *DePew* and *Williams* (Traverse, Doc. No. 18 at 150, 152.) There are, however, occasions when a state court defendant will have made claims in the state courts which, while not explicitly invoking the United States Constitution, in fact fairly place before the state courts the substance, both facts and legal theory, of a claim or claims later made in habeas corpus. In *Franklin v. Rose*, 811 F.2d 322 (6th Cir. 1987), the Sixth Circuit cited with approval a Second Circuit analysis in *Daye v. Attorney General*, 696 F.2d 186 (2nd Cir. 1982) *after remand*, 712 F.2d 1566 (1983):

> [T]he ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like factual situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d)

> allegation of a pattern of facts well within the mainstream of constitutional litigation.

811 F.2d at 326 *quoting* 696 F.2d at 193-94; *accord McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). The claim must be "fairly presented" to the state courts in a way which provides them with an opportunity to remedy the asserted constitutional violation. *Levine v. Torvik*, 986 F.2d 1506 (6th Cir. 1993); *Riggins v. McMackin*, 935 F.2d 790 (6th Cir. 1991). Merely using talismanic constitutional phrases like "fair trial" or "due process of law" does not constitute raising a federal constitutional issue. *Franklin v. Rose*, 811 F.2d 322 at 326 (6th Cir. 1987); *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000) *citing Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2nd Cir. 1984).

If a petitioner's claims in federal habeas rest on different theories than those presented to the state courts, they are procedurally defaulted. *Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002) *citing Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998); *Lott v. Coyle*, 261 F.3d 594, 607, 619 (6th Cir. 2001)("relatedness" of a claim will not save it).

A state prisoner ordinarily does not 'fairly present' a federal claim to a state court if that court must read beyond a petition, a brief, or similar papers to find material that will alert it to the presence of such a claim. *Baldwin v. Reese*, 541 U.S. 27 (2004).

A petitioner fairly presents a federal habeas claim to the state courts only if he "asserted both the factual and legal basis for his claim. *Hicks v. Straub*, 377 F.3d 538, (6th Cir. 2004) *citing McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000); and *Picard v. Connor*, 404 U.S. 270, 276, 277-78 (1971).

> In determining whether a petitioner "fairly presented" a federal constitutional claim to the state courts, we consider whether: 1) the petitioner phrased the federal claim in terms of the pertinent constitutional law or in terms sufficiently particular to allege a denial of the specific constitutional right in question; 2) the petitioner relied

> upon federal cases employing the constitutional analysis in question; 3) the petitioner relied upon state cases employing the federal constitutional analysis in question; or 4) the petitioner alleged "facts well within the mainstream of [the pertinent] constitutional law."

Hicks, 377 F.3d at 553 *citing McMeans*, 228 F.3d at 681.

In *DePew*, the Ohio Supreme Court decided as a matter of state law that introduction of victim photographs at the penalty phase of a capital trial was appropriate if relevant to the nature and circumstances of the aggravating circumstances of the crime. *State v. Depew*, 38 Ohio St. 3d 275, 282, 528 N.E. 2d 542, 551-552 (1989). This holding was in the context of finding that Ohio law permitted the introduction at the penalty phase of virtually all the evidence already admitted at the guilt phase. *Id*. In *Williams*, the Ohio Supreme Court relied on *DePew* for the same proposition of state law. *State v. Williams*, 73 Ohio St. 3d 153, 159, 652 N.E. 2d 721, 727-728 (1995). Neither case discusses on this point any relevant principle of federal constitutional law or cites any federal case law. Thus neither *DePew* nor *Williams* is a state case relying on federal constitutional analysis.

The Court concludes that Petitioner did not fairly present to the Ohio courts the federal constitutional claim he now makes in his Thirteenth Ground for Relief and thus is procedurally barred from obtaining review of that Ground for Relief; it should be dismissed with prejudice.

Fourteenth Ground for Relief

In his Fourteenth Ground for Relief, Petitioner claims that the jury should have been given a definition of mitigating factors in the penalty phase instructions (First Amended Petition, Doc. No. 76 at 47). He raised this claim before the Ohio Supreme Court as Proposition of Law No. 9.C:

> The trial court failed to define mitigating circumstances, merely

> advising the jury which mitigating factors were to be considered. Not advising the jury of the definition of a mitigating factor renders it impossible to comply with the constitutional requirement that jurors be advised to consider all relevant mitigating factors, Penry v. Linaugh (1989), 492 U.S. 302, 109 S. Ct. 2934. Years ago, this Court has [sic] fashioned a proper definition of mitigating circumstances in State v. Steffen, supra, and Appellant was entitled to have his jury given that instruction, especially since he specifically asked for it (R. 1768).

(Appellant's Brief, Joint Appendix, Vol. VI at 863-64.) As noted above, the Ohio Supreme Court summarily rejected Proposition of Law No. 9. Respondent concedes that this claim is preserved for merit review in this Court (Amended Return of Writ, Doc. No. 80 at 63-64).

Petitioner's sole reliance for this claim is on *Penry*, *supra*. *Penry* does not, however, stand for the proposition that it is constitutional error to fail to provide a jury with a definition of the term "mitigating factors." Instead, the *Penry* Court held that, in the context of the Texas death penalty statute which required the jury to answer three special questions, failure to define the word "deliberately" in one of them prevented the jury from taking into account all the mitigating evidence which was offered. *Penry v. Linaugh*, 492 U.S. 302, 323 (1989). *Penry* is thus an application of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Petitioner has cited no clearly established federal constitutional law which requires a trial judge to define "mitigating factors." Thus his Fourteenth Ground for Relief is without merit.

Fifteenth Ground for Relief

In his Fifteenth Ground for Relief, Petitioner asserts that the instruction that the jury could consider "any other factors that are relevant to the issue of whether the offender should be sentenced

to death" meant that the "sentencing discretion of the jury was wholly undirected and without limitation. . . ." (First Amended Petition, Doc. No. 76 at 48). He also asserts that the mitigation phase instructions violated Ohio's statutory death penalty scheme. *Id*.

This claim, also raised as part of Proposition of Law No. 9 on direct appeal, was summarily rejected by the Ohio Supreme Court along with the balance of that proposition.

As noted by Respondent, the United States Supreme Court has never held that consideration of mitigating evidence must be structured in any particular way. (Amended Return of Writ, Doc. No. 80 at 63-64 *citing Buchanon v. Angelone*, 522 U.S. 269 (1998)). Of course, under *Lockett* and *Eddings, supra*, the trial court must allow a defendant to present any evidence which could rationally be considered to be mitigating. This particular instruction, taken verbatim from Ohio Revised Code § 2929.04(B)(7), is designed to comply with *Lockett*. Given the tight line which a trial judge must walk between admitting any mitigating evidence and giving an instruction which might "structure" the jury's consideration of that evidence in a way which might appear to minimize it, this Court cannot say that quoting the statute under the circumstances of this case was likely to mislead the jury. Thus the Ohio Supreme Court's rejection of this claim is not an unreasonable application of any clearly established federal constitutional law and the Fifteenth Ground for Relief is without merit.

Sixteenth Ground for Relief

In his Sixteenth Ground for Relief, Petitioner contends he was denied a fair trial because the

judge instructed the jury that the killing itself was a factor relevant to whether a death sentence should be recommended and that the killing itself was an aggravating circumstance (First Amended Petition, Doc. No. 76 at 49).

Petitioner presented this claim to the Ohio Supreme Court as Proposition of Law No. 9.E:

> The penalty phase instructions were also erroneous in that, in defining aggravating circumstances, the trial court included the killing itself, having denied a defense motion to instruct the jury that the killing itself was not an aggravating factor (R. 1520; 1764). This is contrary to Ohio law, *State v. DePew, supra, State v. Henderson* (1988), 39 Ohio St. 3d 25, 26, 528 N.E. 2d 1237, *cert. denied,* 489 U.S. 1072. The defense objection was repeated at the proper juncture.

(Appellant's Brief, Joint Appendix, Vol. VI at 865.) As noted above, Proposition of Law No. 9 was summarily rejected by the Ohio Supreme Court.

Because Petitioner's federal claim made in this Ground for Relief was not fairly presented to the Ohio courts, it is procedurally defaulted, in accordance with the authority cited with respect to the Thirteenth Ground for Relief. The Sixteenth Ground for Relief should be dismissed with prejudice.

Seventeenth Ground for Relief

In his Seventeenth Ground for Relief, Petitioner asserts that the mitigation phase instructions would have led the jury to conclude that it had to consider and reject a recommendation as to imposition of the death penalty before it could consider either of the life sentence options (First Amended Petition, Doc. No. 76 at 50).

This claim was presented to the Ohio Supreme Court as Proposition of Law 9.F as follows:

> The trial court in effect instructed the jury that it had to consider, and reject, the death sentence before considering either life option (R.1917). While not stating expressly that the jury was required to consider death before considering life, that is the clear import of the instruction. This is error sufficient to warrant reversal of the death sentence, *State v. Brooks* (1996), 75 Ohio St.3d 148, 159-160, 661 N.E.2d 1030, 1042. Furthermore, the trial court failed to instruct that one juror could prevent the imposition of the death penalty, as required by *Brooks* henceforth from that decision (which preceded Appellant's trial by several months), although the trial court did instruct the jury that any verdict it returned had to be unanimous, and the jury verdict forms also reflected the requirement of unanimity (R.1917-1919).

(Appellant's Brief, Joint Appendix, Vol. VI at 865-66.) Because this claim is phrased entirely as a matter of state law, it was not fairly presented to the Ohio Supreme Court and is thus procedurally defaulted. It should be dismissed with prejudice.

Eighteenth Ground for Relief

In his Eighteenth Ground for Relief, Petitioner contends he was denied a fair trial because the jury was told in the penalty phase instructions that it could consider the nature and circumstances of the offense as a mitigating factor. This contention was presented in the Ohio Supreme Court as Proposition of Law No. 9.H:

> The trial court instructed the jurors to consider as a mitigating factor the nature and circumstances of the offense although that factor was not advanced by Appellant in mitigation. Present counsel perceive nothing mitigating about the nature and circumstance. The instruction thus violates State v. Depew, supra.

(Appellant's Brief, Joint Appendix, Vol. VI at 866-867.) Because this claim is phrased entirely as a matter of state law, it was not fairly presented to the Ohio Supreme Court and is thus

procedurally defaulted. It should be dismissed with prejudice.

Nineteenth Ground for Relief

Petitioner asserts the trial court denied him a fair trial when it refused to instruct that remorse, residual doubt, and cooperation with law enforcement could be considered as mitigating factors (First Amended Petition, Doc. No. 76 at 51.) This contention was presented to the Ohio Supreme Court as Proposition of Law No. 9.I as follows:

> The trial court refused defense requests to instruct the jury as requested by the defense (R. 1765) to the mitigating factors of remorse, residual doubt and cooperation with police, although those are well-recognized mitigating factors, State v. Smith (1991), 61 Ohio St. 3d 284, 574 N.E. 2d 510, *cert. denied,* 502 U.S. 1110, Bell v. Ohio, supra (cooperation with police); State v. Buell, supra (residual doubt), and remorse for what he had done, State v. Hicks, supra. Given the vagueness with which the trial court defined the (B)(7) mitigator, it is not at all clear that the jury understood that these mitigating factors, all recognized by this Court as mitigating, could be considered.

(Appellant's Brief, Joint Appendix, Vol.VI at 867.) Because this claim is phrased entirely as a matter of state law, it was not fairly presented to the Ohio Supreme Court and is thus procedurally defaulted. It should be dismissed with prejudice.

Twentieth Ground for Relief

Petitioner has abandoned this Ground for Relief (First Amended Petition, Doc. No. 76 at 52).

Twenty-First Ground for Relief

In his Twenty-First Ground for Relief, Petitioner asserts that the presence of Juror Tara Veesart on his jury deprive him of a fair trial (First Amended Petition, Doc. No. 76 at 52-53). He cites various facts about Ms. Veesart which he says made her biased and which should have led the trial judge to strike her *sua sponte*; it is conceded that Petitioner's counsel did not object to her being seated.

This claim has never been presented to the Ohio courts except when it was pled as an assignment of error in which, Petitioner claimed, it was ineffective assistance of appellate counsel to fail to raise on direct appeal. For reasons already given, the only claim which can be made in an application for reopening direct appeal in Ohio is a claim of ineffective assistance of appellate counsel; alleging matter as an underlying deficiency does not "resurrect" a claim already defaulted unless, of course, the appellate court reopens the appeal. "Neither *Murnahan* nor App. R. 26(B) was intended as an open invitation for persons sentenced to long periods of incarceration to concoct new theories of ineffective assistance of appellate counsel in order to have a new round of appeals." *State v. Reddick* 72 Ohio St. 3d 88, 90-91, 647 N.E. 2d 784 (1995). "In light of the requirements of Rule 26(B), the [appellate] court's holding must be read as pertaining to the merits' of [petitioner's] ineffective assistance of appellate counsel claim, not his state procedural rule claim." *Roberts v. Carter*, 337 F.3d 609 (6th Cir. 2003).

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

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate

> and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 749 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainright v. Sykes*, 433 U.S. 72, 87 (1977). *Wainright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963).

Failure to raise a constitutional issue at all on direct appeal is subject to the cause and prejudice standard of *Wainwright v. Sykes*, 433 U. S. 72 (1977). *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999); *Rust v. Zent*, 17 F.3d 155 (6th Cir. 1994); *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1985).

Because this claim was never raised in the state courts, it has not been preserved for review here and should be dismissed with prejudice.

Twenty-Second Ground for Relief

Petitioner has abandoned his Twenty-Second Ground for Relief (First Amended Petition, Doc. No. 76 at 53).

Twenty-Third Ground for Relief

In his Twenty-Third Ground for Relief, Petitioner contends he was denied his right to a fair trial by numerous instances of prosecutorial misconduct (First Amended Petition, Doc. No. 76 at 53).

In the Ohio Supreme Court, Petitioner presented the following Proposition of Law No. 5:

> Egregious misconduct by the prosecutor **in the penalty phase** of capital proceedings requires reversal, and where the prosecutor's final argument for death argues nonstatutory aggravating factors, argues "facts" outside the evidence, attacks the relevance of evidence admitted by the court, contains inflammatory remarks and invective against the accused and his counsel, a death sentence based on a jury verdict following such arguments violates due process and the Eighth Amendment to the United States Constitution, and their counterparts in the Ohio Constitution, requiring reversal of the death sentence.

(Appellant's Brief, Joint Appendix, Vol. VI at 844, emphasis added). As Respondent notes, this claim as made to the Ohio Supreme Court is limited to alleged misconduct occurring during the penalty phase of the trial. Thus the following asserted instances of prosecutorial misconduct were not presented at all to the state courts and cannot be considered here:

> • "the prosecutors made expressions as to what the opinions of Mr. Raglin's counsel might be and denigrated defense counsel with regard to their argument (Tr. 1447)."
>
> • "The prosecutors frequently stated their opinion as to Mr. Raglin's state of mind during the shooting, without any evidentiary foundation. (Tr. 1450, 1457)."
>
> • "The prosecutors also sarcastically mis-characterized[sic] Mr. Raglin's statement that the gun went off accidentally. (Tr. 1451)."
>
> • "Prosecutors also stated that trial counsel was asking them to not follow the law. (Tr. 1896)."

> • "The prosecutors made impermissible statements of personal opinion to the jury. (Tr. 1900, 1901, 1904)."
>
> • "The prosecutors consistently substituted emotion for reasoned advocacy in their closing arguments. (Tr. 1419-1420, 1427, 1428, 1457-1460)."
>
> • "The prosecutors also repeatedly referred to Mr. Raglin's silence as well as to facts that were not in evidence. (Tr. 1420, 1450-1454, 1838, 1839, 1896, 1901)."
>
> • "The prosecutors blamed the need for a trial on Mr. Raglin's unwillingness to plead guilty. (Tr. 1424, 1431)."
>
> • "The prosecutors attempted to reduce the state's burden of proof by arguing that jurors should not 'make this case more difficult than it is.' (Tr. 1444)."
>
> • "The prosecutors assured the jury that the case was that simple and that they could 'sit on a hundred more cases' and they would never find one as easy to decide as this one. (Tr. 1444-1445)."
>
> • The prosecutors' handling of the murder weapon during the guilt phase closing argument
>
> • "the prosecutor invited the jury to look at Walter Raglin and, with respect to the hours following Mr. Bany's murder 'see him bragging and laughing and about it and bragging about it.' (Tr. 1900).
>
> • "the prosecutor invited the jury to speculate on where Mr. Raglin would have gone or what he would have done if he had escaped from the Hamilton County Justice Center (Tr. 1904). The prosecutor compounded this misconduct by telling the jury that Walter Raglin would have committed more murders if his escape from the Hamilton County Justice Center had been successful…"

(Amended Return of Writ, Doc. No. 80 at 80-81.)

On habeas corpus review, the standard to be applied to claims of prosecutorial misconduct is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process, *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainright*,

477 U.S. 168 (1986); *Kincade v. Sparkman*, 175 F.3d 444 (6th Cir. 1999) or whether it was "so egregious as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir. 1979); accord *Summitt v. Bordenkircher*, 608 F.2d 247 (6th Cir. 1979), *aff'd sub nom, Watkins v. Sowders*, 449 U.S. 341 (1981); *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983).

The Sixth Circuit has recently articulated the relevant standard for habeas claims of prosecutorial misconduct as follows:

> On habeas review, claims of prosecutorial misconduct are reviewed deferentially. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To be cognizable, the misconduct must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id*. (citation omitted). Even if the prosecutor's conduct was improper or even "universally condemned," *id*., we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial. *See Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). Under [the] AEDPA, this bar is heightened by the deference we give to the . . . [Ohio] Supreme Court's determination of . . . [Petitioner's] prosecutorial-misconduct claims. *See Macias v. Makowski*, 291 F.3d 447, 453-54 (6th Cir. 2002)("If this court were hearing the case on direct appeal, we might have concluded that the prosecutor's comments violated Macias's due process rights. But this case is before us on a petition for a writ of habeas corpus. So the relevant question is not whether the state court's decision was wrong, but whether it was an unreasonable application of clearly established federal law.").

Bowling v. Parker, 344 F.3d 487, 512-13 (6th Cir. 2003).

In deciding Petitioner's Proposition of Law No. 5, the Ohio Supreme Court wrote:

> Appellant raises claims of prosecutorial misconduct, but many of appellant's arguments have been waived. Additionally, many of appellant's claims of prosecutorial misconduct are simply not

> supported by a fair and impartial review of the record, such as appellant's various attempts to persuade us that the arguments by the prosecution essentially converted the nature and circumstances of the offense into "a grossly prejudicial nonstatutory aggravating factor." We have carefully reviewed the record in its entirety 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 trial.

State v. Raglin, 83 Ohio St. 3d 253, 259 (1998). Having reviewed those instances of alleged prosecutorial misconduct during the penalty phase of which Petitioner complains, the Court is not persuaded that the Ohio Supreme Court's resolution of this claim is an unreasonable application of *Donnelly v. DeChristoforo, supra*. The Twenty-Third Ground for Relief should be dismissed with prejudice, in part because of procedural default and in part because it is without merit.

Twenty-Fourth Ground for Relief

Petitioner has abandoned his Twenty-Fourth Ground for Relief (First Amended Petition, Doc. No. 76 at 57).

Twenty-Fifth Ground for Relief

In his Twenty-Fifth Ground for Relief, Petitioner contends he was denied his constitutional rights because in 1996 race was a factor considered in the selection of grand jurors, grand jury forepersons, and petit jurors and because gender was also a factor considered in selecting grand jury forepersons (First Amended Petition, Doc. No. 76 at 57).

Respondent asserts that this claim is procedurally defaulted because it has never been presented to the state courts (Amended Return of Writ, Doc. No. 80 at 76). Although Petitioner asserts in his Traverse (Doc. No. 18 at 220) that the claim was presented at Proposition of Law 12.B, that proposition has nothing to do with racially or sexually discriminatory selection of jurors, but rather asserts that the death penalty is inflicted disproportionately on those who kill whites (*See* Appellant's Brief, Joint Appendix, Vol. VI at 883).

The Court concludes that Petitioner's Twenty-Fifth Ground for Relief is procedurally defaulted because it was never presented to the state courts and should therefore be dismissed with prejudice.

Twenty-Sixth Ground for Relief

Petitioner has abandoned the Twenty-Sixth Ground for Relief (First Amended Petition, Doc. No. 76 at 62).

Twenty-Seventh Ground for Relief

In his Twenty-Seventh Ground for Relief, Petitioner asserts the trial judge improperly considered and weighed invalid or improper aggravating circumstances, failed to specify the reasons why the aggravating circumstances outweighed the mitigating factors, and failed to consider and weigh valid mitigating factors (First Amended Petition, Doc. No. 76 at 62).

This claim was, as Respondent concedes, properly presented to the Ohio Supreme Court as

Petitioner's Proposition of Law No. 1 (*See* Appellant's Brief, Joint Appendix, Vol.VI at 828). In denying relief on this Proposition, the Ohio Supreme Court wrote:

> The trial court, in its sentencing opinion, considered and weighed an R.C. 2929.04(A)(3) aggravating circumstance even though appellant was neither charged with nor convicted of an R.C. 2929.04(A)(3) death penalty specification. However, this error in the trial court's sentencing opinion, and all other allegations of error raised by appellant in Proposition of Law No. 1, can be readily cured by our independent review of appellant's death sentence. See, generally, State v. Lott (1990), 51 Ohio St.3d 160, 170- 173, 555 N.E.2d 293, 304-307. See, also, State v. Reynolds (1998), 80 Ohio St.3d 670, 684-685, 687 N.E.2d 1358, 1373; State v. Gumm (1995), 73 Ohio St.3d 413, 424, 653 N.E.2d 253, 265; and State v. Fox (1994), 69 Ohio St.3d 183, 191-192, 631 N.E.2d 124, 131.

State v. Raglin, 83 Ohio St. 3d at 257. The Ohio Supreme Court thus recognized the weighing error which the trial judge made, but reweighed the proper aggravating circumstances against the mitigating factors and reached the same conclusion that the trial court had. That reweighing is constitutionally sufficient to eliminate the impact of the invalid aggravating circumstance. *Fox v. Coyle*, 271 F.3d 658, 667 (6th Cir. 2001)(citing *Wainright v. Goode*, 464 U.S. 78 (1983), and *Barclay v. Florida*, 463 U.S. 939 (1983)). Petitioner's Twenty-Seventh Ground for Relief is therefore without merit.

Twenty-Eighth Ground for Relief

Petitioner has abandoned his Twenty-Eighth Ground for Relief (First Amended Petition, Doc. No. 76 at 67).

Twenty-Ninth Ground for Relief

Petitioner contends in the Twenty-Ninth Ground for Relief that he was denied his constitutional rights when all of the evidence from the guilt phase of trial was reintroduced at the penalty phase, particularly the photos of the deceased (First Amended Petition, Doc. No. 76 at 67).

Petitioner presented this claim to the Ohio Supreme Court as Proposition of Law No. 6 (Appellant's Brief, Joint Appendix, Vol. VI at 855-856). Therein, he cited only Ohio state law, to wit, *Depew and Williams, supra,* and *State v. Woodward*, 68 Ohio St. 3d 70, 623 N.E. 2d 75 (1993). The Ohio Supreme Court rejected the claim summarily on the authority of its decision in *DePew. State v. Raglin*, 83 Ohio St. 3d 253, 259 (1998).

This again is a claim not fairly presented to the Ohio courts as a federal constitutional claim. Indeed, in this Court the Petitioner relies on the same three Ohio opinions (*See* Traverse, Doc. No. 18 at 242). The claim is therefore procedurally defaulted and should be dismissed with prejudice.

Thirtieth Ground for Relief

In his Thirtieth Ground for Relief, Petitioner claims the trial court committed constitutional error in permitting the prosecutor to introduce inadmissible rebuttal evidence, to wit, a death threat to a corrections officer and an escape attempt while awaiting trial (First Amended Petition, Doc. No. 76 at 68).

In rejecting this Proposition, the Ohio Supreme Court wrote:

> Appellant contends that he was unfairly prejudiced by the state's presentation of the rebuttal witnesses and that testimony of the corrections officers "injected evidence of a nonstatutory aggravating circumstance, future dangerousness," into the penalty phase. We disagree. The prosecution was entitled to introduce relevant evidence rebutting the existence of any statutorily defined or other mitigating

> factor first asserted by the defense. Gumm, 73 Ohio St. 3d 413, 653 N.E.2d 253, syllabus. Here, that is precisely what occurred. The testimony of the state's rebuttal witnesses was indeed relevant to rebut mitigating evidence that had been offered by the defense that appellant was remorseful for the killing, that he would help or benefit others while serving a term of life imprisonment, and that his life should therefore be spared. The testimony of the state's rebuttal witnesses was not unfairly prejudicial to appellant, was not offered for an improper purpose, and did not inject a "nonstatutory aggravating factor" into the mix.

State v. Raglin, 83 Ohio St.3d 253, 261 (1998).

In essence, the Ohio Supreme Court decided that this evidence was relevant to rebut Mr. Raglin's unsworn statement that he was remorseful or that he would help or benefit others while in prison. The death threat to a corrections officer who had asked him to move to another area was indeed relevant to rebut a claim of remorse. The escape attempt was relevant to his claim he would help or benefit others while imprisoned. Petitioner attempted to characterize these as the introduction of an invalid aggravating circumstance – future dangerousness. If that were a an aggravating circumstance under Ohio law, which it is not, this evidence might have been relevant to prove it. But the fact that evidence might be relevant to prove one proposition does not make it irrelevant to prove another. One might expect that a person who was sincerely remorseful for killing another human being would be slow to threaten death to others; the fact that Petitioner readily threatened death to a corrections officer for what was at most a minor inconvenience casts doubt on the sincerity of his claim of remorse and thus was properly admitted as rebuttal to that claim.

In addition, Petitioner relies on cited federal case law for very broad propositions, failing to cite any Supreme Court precedent suggesting evidence such as this is irrelevant or that its introduction thereby renders a trial fundamentally unfair.

Petitioner's Thirtieth Ground for Relief is without merit.

Thirty-First Ground for Relief

Petitioner has abandoned his Thirty-First Ground for Relief (First Amended Petition, Doc. No. 76 at 80).

Thirty-Second Ground for Relief

In his Thirty-Second Ground for Relief, Petitioner contends that the cumulative effect of trial court error denied him his constitutional right to a fair trial (First Amended Petition, Doc. No. 76 at 70).

Petitioner presented this "cumulative error" argument to the Ohio Supreme Court as Proposition of Law No. 21(Appellant's Brief, Joint Appendix, Vol. VI at 929-930). That court summarily rejected the claim. *State v. Raglin*, 83 Ohio St. 3d 253, 266 (1998).

The Sixth Circuit has held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief. *Moore v. Parker*, 425 F.3d 250, (6th Cir. 2005) *citing Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002); *Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002). Petitioner has not demonstrated that any of the asserted errors he lists in this claim are constitutional errors. Their cumulation also cannot be a basis for relief. The Thirty-Second Ground for Relief should be dismissed on the merits.

Thirty-Third Ground for Relief

Petitioner has abandoned his Thirty-Third Ground for Relief (First Amended Petition, Doc. No. 76 at 71).

Thirty-Fourth Ground for Relief

In his Thirty-Fourth Ground for Relief, Petitioner claims that both the Ohio death penalty system in general and the manner in which that system is carried out in Hamilton County are unconstitutional (First Amended Petition, Doc. No. 76 at 71).

Petitioner alleges that "virtually uncontrolled discretion of prosecutors in indictment" leads to arbitrary and capricious imposition of the death penalty. This argument has been rejected by this Court on the authority of *Gregg v. Georgia*, 428 U.S. 153 (1976). *Zuern v. Tate*, 101 F. Supp. 2d 948 (S.D. Ohio 2000), *rev'd on other grounds*, 336 F.3d 478 (6th Cir. 2003). The argument that the system as a whole has racially discriminatory impact was also rejected in *Zuern* on basis of *McCleskey v. Kemp*, 481 U.S. 279 (1987).

Petitioner's contention that Ohio unconstitutionally requires proof of aggravating circumstance at guilt rather than penalty phase was rejected in *Zuern* on authority of *Tuilaepa v. California*, 512 U.S. 967 (1994).

Petitioner's claim that the Ohio death penalty scheme is unconstitutional because Ohio R. Crim P. 11(C)(3) permits life sentence on guilty plea was rejected in *Zuern* on authority of *Corbitt v. New Jersey*, 439 U.S. 212 (1978), because the three-judge court can still impose a death sentence. *Accord, Scott v. Anderson*, 58 F. Supp. 2d 767, 796 (N.D. Ohio 1999).

Petitioner contends that Ohio's scheme lacks adequate proportionality review. This

proposition was rejected in *Zuern* on authority of *Pulley v. Harris*, 465 U.S. 37 (1984)(proportionality review on appeal not required). *Accord*, *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000).

Petitioner's contention that the Ohio death penalty scheme is unconstitutional because a pre-sentence investigation report and mental evaluation require submission of these documents to the judge and jury if prepared was not presented at all to the Ohio Supreme Court on direct appeal.

The Thirty-Fourth Ground for Relief must be dismissed on the basis of the cited authority.

Thirty-Fifth Ground for Relief

Petitioner has abandoned his Thirty-Fifth Ground for Relief (First Amended Petition, Doc. No. 76 at 76.)

Thirty-Sixth Ground for Relief

In his Thirty-Sixth Ground for Relief, Petitioner asserts that the cumulative effect of the other errors already argued make his conviction unconstitutional. This Ground for Relief should be dismissed on the basis of the authority cited with respect to the Thirty-Second Ground for Relief.

Thirty-Seventh and Thirty-Eighth Grounds for Relief

These claims have previously been dismissed as barred by the statute of limitations.

Conclusion

On the basis of the foregoing analysis, it is respectfully recommended that the First Amended Petition be dismissed with prejudice.

February 2, 2006.

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

NOTICE REGARDING OBJECTIONS

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

State v. Raglin

Supreme Court of Ohio

July 15, 1998, Submitted ; September 30, 1998, Decided

Nos. 96-2872 and 97-141

Reporter
83 Ohio St. 3d 253 *; 699 N.E.2d 482 **; 1998 Ohio LEXIS 2511 ***; 1998-Ohio-110

THE STATE OF OHIO, APPELLEE, v. RAGLIN, APPELLANT.

Prior History: [*1]** APPEAL from the Common Pleas Court of Hamilton County, No. B-96000135.

APPEAL from the Court of Appeals for Hamilton County, No. C-970009.

Disposition: Judgments affirmed.

Case Summary

Procedural Posture
Appellant was charged with aggravated robbery, aggravated murder, and related offenses. A jury found appellant guilty of the charges and recommended a death sentence for the aggravated murder. The trial court imposed the death sentence for the murder and sentenced appellant in accordance with law for the aggravated robbery and other counts. The Court of Appeals for Hamilton County (Ohio) struck appellant's notice of appeal. Appellant appealed.

Overview
Appellant sought review of his convictions and sentences on multiple grounds. The court held (1) the trial court did not erred by refusing to instruct the jury on involuntary manslaughter as a lesser included offense of aggravated murder because there was no evidence to reasonably suggest that appellant lacked the purpose to kill his victim; (2) the testimony of the state's rebuttal witnesses was admissible because it was relevant to rebut mitigating evidence offered by the defense that appellant was remorseful for the killing; (3) appellant's confessions were admissible because he effectuated a voluntary, knowing, and intelligent waiver of his Miranda rights and the confessions were not involuntary simply because he was not informed by police of the gravity of the possible punishment for the aggravated murder; (4) the trial court did not erred in permitting the use of peremptory challenges in a racially discriminatory manner because the prosecution had race-neutral explanations for the use of the peremptory challenges; and (5) appellant's death sentence was neither excessive nor disproportionate because the aggravating circumstance outweighed the mitigating factors.

Outcome
The court affirmed appellant's convictions and sentences, including the sentence of death, and affirmed the court of appeals' judgment striking appellant's notice of appeal.

[*253] During the early morning hours of December 29, 1995, appellant, Walter Raglin, and appellant's friend, Darnell "Bubba" Lowery, were looking for someone to rob. Appellant was wearing dark clothes and a black ski mask and was armed with a .380 semiautomatic pistol he had obtained from Lowery. The two men considered robbing a "dope boy," i.e., a drug dealer, but decided against it **[*254]** for fear that such a

person could be armed. They also discussed the possibility of robbing a taxicab driver, but appellant suggested that it might be safer for the two men to rob a more vulnerable victim.

Meanwhile, at approximately 1:30 a.m., Michael Bany, [1] a musician, concluded an engagement at a bar on Main Street in Cincinnati. At approximately 1:45 a.m., Bany left the bar carrying a bass guitar and **[***2]** a black bag or suitcase with music equipment and headed toward the parking lot where he had parked his car. Appellant and Lowery saw Bany and decided to rob him. While Bany was attempting to unlock the door to his vehicle, appellant approached him from behind, pulled out the .380 semiautomatic pistol, and demanded Bany's money. Bany handed appellant three $ 20 bills. Appellant then asked Bany whether Bany's car had an automatic or manual transmission since appellant planned to steal the car if it was an automatic. Bany did not reply to appellant's question. Appellant repeated the question, but Bany remained silent. At some point, Bany bent down to pick up his guitar case and/or his music equipment and turned to face appellant. While appellant and Bany were looking at each other, appellant shot Bany once in the side of the neck, killing him. The projectile entered through the left side of Bany's neck, just below the earlobe, and exited through the right side. The path of the projectile indicated that appellant and Bany were not standing face-to-face at the time of the shooting. Additionally, the record indicates that the shot was fired at the victim from a distance of more than three **[***3]** feet.

Following the killing, appellant and Lowery ran to a house several blocks away from the scene of the murder. There, appellant cleaned the pistol of fingerprints and gave it to Lowery. Appellant told Lowery that he (appellant) had received only $ 20 from the victim. Later, appellant spent the $ 60 he had taken from Bany to purchase marijuana.

[1] There is some confusion in the record concerning the spelling of the victim's last name. The printed transcript uses the spelling "Baney," whereas other portions of the record (including the indictment) reflect that the spelling is "Bany." We have been forced to elect between the alternate spellings for purposes of our opinion in this case. If the spelling we have chosen is incorrect, we extend our deepest apologies to anyone who may take issue with that matter. We certainly intend no disrespect for the memory of the decedent.

On January 3, 1996, Cincinnati police received an anonymous telephone call identifying appellant as a suspect in the murder. Appellant was apprehended by police and was taken to an interview room for questioning. There, appellant voluntarily agreed to speak with police after being advised of his Miranda rights. See *Miranda v. Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694*.

During questioning, appellant lied to the police and denied any involvement in the murder. When police informed appellant that they had received telephone **[*255]** calls naming appellant as a suspect, appellant changed his story and admitted that he had been at the scene of the murder. Appellant told police that he had been paid $ 25 for being a lookout for Lowery, and that Lowery had robbed and killed Bany. The police officers then left the interview room. A short time later, appellant summoned an officer back to the room and admitted **[***4]** that he had shot Bany. Appellant then confessed to robbing and killing Bany and gave police a detailed account of the murder.

After giving a full confession to police, appellant agreed to repeat his statement on tape. Appellant was once again advised of his Miranda rights. At that time, appellant indicated that he wanted to speak to an attorney. Therefore, police stopped the recorder, ceased their interrogation of appellant, and offered to bring appellant a telephone book and to assist him in obtaining counsel. Appellant stated that he did not want to inconvenience the officers, but police assured him that his request for counsel was not an inconvenience. Nevertheless, despite these assurances, appellant told police that he had changed his mind concerning his request for counsel and that he wished to continue with his statement. At that point, police resumed the interview and once again advised appellant of his rights. After ensuring that appellant fully understood his right to counsel and had freely and intelligently abandoned his known rights, police resumed the interrogation and tape recording of appellant's statement, and appellant reiterated the details of the robbery and killing. **[***5]**

In January 1996, appellant was indicted by the Hamilton County Grand Jury for the aggravated murder of Bany. Count Four of the indictment charged appellant with purposely causing the death of Bany during the commission of an aggravated robbery. Count Four of

the indictment also carried an R.C. 2929.04(A)(7) death penalty specification. Count Three of the indictment charged appellant with the aggravated robbery of Bany. Counts One and Two of the indictment charged appellant with certain offenses that were unrelated to the robbery and killing of Bany. Counts Two, Three, and Four carried a firearm specification. Appellant eventually entered a plea of no contest to the charge set forth in Count One of the indictment and the specification in connection with that count. Additionally, the state of Ohio eventually dismissed Count Two.

The charges and specifications relating to the aggravated robbery and aggravated murder of Bany (i.e., Counts Three and Four and related specifications) proceeded to trial by jury. The jury found appellant guilty of these charges and specifications. With regard to the R.C. 2929.04(A)(7) death penalty specification, the jury found that appellant was the principal offender in the commission of the **[***6]** aggravated murder. Following a mitigation hearing, the jury recommended that appellant be sentenced to death for the aggravated murder of Bany. The trial court accepted the jury's recommendation and imposed the sentence of death. **[*256]** For the aggravated robbery of Bany (Count Three), for the matter to which appellant had pled no contest (Count One), and for the firearm specification in connection with Count Three, the trial court sentenced appellant in accordance with law.

In case No. 96-2872, appellant directly appeals his convictions and sentences for aggravated murder and aggravated robbery (and for the associated firearm specifications) from the trial court to this court pursuant to *Section 2(B)(2)(c), Article IV of the Ohio Constitution*, as amended in 1994. See, also, R.C. 2953.02. Appellant also filed a notice of appeal in the court of appeals. However, the court of appeals issued an entry striking the notice of appeal because the appellate court lacked jurisdiction to consider appellant's appeal from the imposition of the death penalty. See *Sections 2(B)(2)(c)* and *3(B)(2), Article IV of the Ohio Constitution*, and R.C. 2953.02. In case No. 97-141, appellant appeals from the court of appeals' decision striking the notice of appeal. Upon motion, we consolidated the two cases.

Counsel: Joseph T. Deters, Hamilton County Prosecuting **[***7]** Attorney, Steven W. Rakow and Ronald W. Springman, Assistant Prosecuting Attorneys, for appellee.

H. Fred Hoefle and David J. Boyd, for appellant.

Judges: DOUGLAS, J. MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

Opinion by: DOUGLAS

Opinion

[487]** **DOUGLAS, J.** Appellant presents twenty-one propositions of law for our consideration. (See Appendix, *infra*.) We have considered each of appellant's propositions of law and have reviewed the death penalty for appropriateness and proportionality. Upon review, and for the reasons that follow, we uphold appellant's convictions and sentences, including the sentence of death.

I

We have held, time and again, that this court is not required to address and discuss, in opinion form, each and every proposition of law raised by the parties in a death penalty appeal. We continue to adhere to that position today. We recognize that the case at bar is among the first of the death penalty appeals that have come to this court on direct appeal from the trial courts of this state. However, in this case, as in all other death penalty cases, we have carefully considered all of the propositions of law and allegations of error and have thoroughly reviewed the **[***8]** record in its entirety. Most of the issues raised by appellant have been addressed and rejected by this court under analogous circumstances in a number of our prior cases. Therefore, these issues require little, if any, discussion. Additionally, a number of appellant's arguments have been waived. Upon a careful review of the record and

the governing law, we fail **[*257]** to detect any errors requiring reversal of appellant's convictions and sentences. We have found nothing in the record or in the arguments advanced by appellant that would, in any way, undermine our confidence in the integrity and reliability of the trial court's findings. Accordingly, we see no reason to deviate from our prior procedures in death penalty appeals. We address and discuss, in detail, only those issues that merit analysis.

II

Proposition of Law No. 1

The trial court, in its sentencing opinion, considered and weighed an *R.C. 2929.04(A)(3)* aggravating circumstance even though appellant was neither charged with nor convicted of an *R.C. 2929.04(A)(3)* death penalty specification. However, this error in the trial court's sentencing opinion, and all other allegations of error raised by appellant in Proposition of Law No. 1, can be readily cured by our independent **[***9]** review of appellant's death sentence. See, generally, *State v. Lott (1990), 51 Ohio St. 3d 160, 170-173, 555 N.E.2d 293, 304-307*. See, also, *State v. Reynolds (1998), 80 Ohio St. 3d 670, 684-685, 687 N.E.2d 1358, 1373*; *State v. Gumm (1995), 73 Ohio St. 3d 413, 424, 653 N.E.2d 253, 265*; and *State v. Fox (1994), 69 Ohio St. 3d 183, 191-192, 631 N.E.2d 124, 131*.

III

Proposition of Law No. 2

Appellant contends that the trial court erred by refusing to instruct the jury on involuntary manslaughter as a lesser included offense of aggravated murder. We disagree. We have considered similar issues in a number of prior cases and have discussed those issues to exhaustion. The applicable rule is that "even though an offense **[**488]** may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas (1988), 40 Ohio St. 3d 213, 533 N.E.2d 286*, paragraph two of the syllabus. We find no evidence in this case to reasonably suggest that appellant lacked the purpose to kill his victim.

The facts of this case are clear. Appellant and his accomplice, Darnell Lowery, wandered the streets of Cincinnati looking for a victim to rob. Appellant was carrying a loaded .380 caliber semiautomatic pistol. The men considered two potential classes of victims to rob, but decided to search for easier prey. While appellant and Lowery were searching **[***10]** for a defenseless person to rob, appellant's unfortunate victim, Michael Bany, arrived on the scene. Appellant approached **[*258]** Bany and demanded money. Bany complied with appellant's demands. The record clearly indicates that Bany presented no threat to appellant and that appellant and Bany never argued. Bany never spoke a single word to appellant. While appellant was asking questions concerning Bany's car, Bany bent down and picked up what appellant referred to as a "suitcase," *i.e.*, either the guitar case or the case containing Bany's music equipment. Bany turned to look at appellant, and appellant looked at Bany. Appellant then pointed the pistol at Bany and shot him in the neck in a manner that was certain to (and did) cause Bany's death.

Appellant told police, "I, I fired the gun at [Bany]. I didn't know where I hit [him] at. I wasn'[t] tryin' to kill [him]." Appellant also claimed to have "panicked" at the time he shot and killed Bany. Appellant told police that he had been "scared" by Bany's movements because appellant "didn'[t] know what * * * was in the suitcase." However, appellant never claimed that the shot had been accidentally or unintentionally fired, and the evidence clearly **[***11]** establishes that the shooting was not accidental or unintentional. Appellant's claims of panic and fright are not reasonably supported by the evidence. Appellant had a loaded weapon, he was pointing that weapon at Bany, and he fired that weapon into the neck of his defenseless victim. Appellant told police that he had fired the weapon directly at Bany. He told police that Bany was not trying to "fiddle" with the suitcase or anything of that nature and that Bany had simply "picked it up." Appellant also admitted to police, "I didn'[t] have to shoot that man." The direct and

circumstantial evidence in this case, and all reasonable inferences to be drawn therefrom, lead to one inescapable conclusion, to wit, appellant purposely killed Bany during the commission of an aggravated robbery when he pointed the gun at Bany and pulled the trigger.

Under any reasonable view of the evidence, the killing of Bany was purposeful. Thus, we find that the evidence adduced at trial could not have reasonably supported both an acquittal on aggravated murder and a conviction on the charge of involuntary manslaughter. Accordingly, we hold that the trial court properly rejected appellant's request for an involuntary **[***12]** manslaughter instruction.

IV

Proposition of Law No. 3

Appellant argues that the evidence at trial was legally insufficient to sustain his conviction for aggravated murder. Specifically, appellant claims that the evidence was insufficient to show that he *purposely* caused the death of the victim. We disagree. The evidence in this case sufficiently, undoubtedly, and overwhelmingly supported the finding that appellant purposely killed his victim.

[*259] V

Proposition of Law No. 4

Similarly, appellant also argues that his conviction for aggravated murder is against the manifest weight of the evidence, since, according to appellant, he did not *purposely* kill his victim. Again, we have reviewed the evidence in its entirety. Appellant's conviction for aggravated murder is not against the manifest weight of the evidence.

[489]** VI

Proposition of Law No. 5

Appellant raises claims of prosecutorial misconduct, but many of appellant's arguments have been waived. Additionally, many of appellant's claims of prosecutorial misconduct are simply not supported by a fair and impartial review of the record, such as appellant's various attempts to persuade us that the arguments by the prosecution essentially converted the nature **[***13]** and circumstances of the offense into "a grossly prejudicial nonstatutory aggravating factor." We have carefully reviewed the record in its entirety 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 trial.

VII

Proposition of Law No. 6

The matter raised in appellant's Proposition of Law No. 6 is rejected on authority of *State v. DePew (1988), 38 Ohio St. 3d 275, 282-283, 528 N.E.2d 542, 552*.

VIII

Proposition of Law No. 7

R.C. 2929.03 was amended as part of Am.Sub.S.B. No. 2 (146 Ohio Laws, Part IV, 7136, 7454-7456) and Am.Sub.S.B. No. 269 (146 Ohio Laws, Part VI, 10752, 10926-10927) to allow a jury in a capital case to consider the sentencing alternative of life imprisonment without parole. The effective date of the amendment was July 1, 1996. Appellant committed the aggravated murder offense prior to the effective date of the amendment, but he was not sentenced until after July 1, 1996. Nevertheless, appellant contends that the trial court was required to instruct the jury, in the penalty phase, to consider the new sentencing **[***14]** **[*260]** alternative of life imprisonment without parole. However, the sentencing provisions of Am.Sub.S.B. No. 2 apply only to those crimes committed on or after July 1, 1996. See *State v. Rush (1998), 83 Ohio St. 3d 53, 697 N.E.2d 634*. Therefore, contrary to appellant's arguments, the trial court did not err by refusing to instruct the jury to consider the sentencing alternative of life imprisonment without parole.

IX

Proposition of Law No. 8

The matter raised in appellant's Proposition of Law No. 8 has been addressed and rejected under analogous circumstances in a number of our prior cases. See, *e.g., State v. Phillips (1995), 74 Ohio St. 3d 72, 101, 656 N.E.2d 643, 669,* and *State v. Woodard (1993), 68 Ohio St. 3d 70, 77, 623 N.E.2d 75, 80-81*. We have not altered our position on the issue.

X

Proposition of Law No. 9

In Proposition of Law No. 9, appellant questions the trial court's penalty phase jury instructions. We have reviewed the jury instructions as a whole and find appellant's objections not persuasive.

XI

Proposition of Law No. 10

The matter raised in appellant's Proposition of Law No. 10 is rejected on authority of *State v. Greer (1988), 39 Ohio St. 3d 236, 244-246, 530 N.E.2d 382, 394-396*; *State v. Carter (1995), 72 Ohio St. 3d 545, 555-556, 651 N.E.2d 965, 975*; and *State v. Garner (1995), 74 Ohio St. 3d 49, 63-64, 656 N.E.2d 623, 637.*

XII

Proposition of Law No. 11

During the penalty phase, after the defense had rested, the trial court, over defense objections, permitted the state to present the testimony of two corrections officers as rebuttal witnesses. Officer Timothy Higgs testified **[***15]** that appellant, while in jail, had become belligerent on one occasion and had threatened to kill Higgs. Officer Byron Brown testified that appellant, while incarcerated, **[**490]** had attempted to escape from the fifth floor of the Hamilton County Justice Center by jumping out of a window that had been temporarily removed by workers. The prosecution asserted that this evidence was intended to rebut defense evidence **[*261]** that appellant (1) felt remorse for his crimes, and (2) would adjust to incarceration and could benefit others in prison.

Appellant contends that he was unfairly prejudiced by the state's presentation of the rebuttal witnesses and that testimony of the corrections officers "injected evidence of a nonstatutory aggravating circumstance, future dangerousness," into the penalty phase. We disagree. The prosecution was entitled to introduce relevant evidence rebutting the existence of any statutorily defined or other mitigating factor first asserted by the defense. *Gumm, 73 Ohio St. 3d 413, 653 N.E.2d 253*, syllabus. Here, that is precisely what occurred. The testimony of the state's rebuttal witnesses was indeed relevant to rebut mitigating evidence that had been offered by the defense that appellant was remorseful for the **[***16]** killing, that he would help or benefit others while serving a term of life imprisonment, and that his life should therefore be spared. The testimony of the state's rebuttal witnesses was not unfairly prejudicial to appellant, was not offered for an improper purpose, and did not inject a "nonstatutory aggravating factor" into the mix.

XIII

Proposition of Law No. 12

We have held, time and again, that Ohio's death penalty statutes are constitutional. To appellant's credit, he acknowledges that the arguments advanced under subsections (A) through (G) of Proposition of Law No. 12 have been raised here for the sole purpose of preserving those issues for federal appeal. The argument advanced in subsection (H) of Proposition of Law No. 12 is that this court's decision in *Gumm, 73 Ohio St. 3d 413, 653 N.E.2d 253*, coupled with our decision in *State v. Wogenstahl (1996), 75 Ohio St. 3d 344, 662 N.E.2d 311*, renders Ohio's death penalty scheme unconstitutional. According to appellant, those decisions, taken together, encourage the arbitrary and capricious imposition of the death penalty. However, our decisions in those two cases do no such thing. The arguments advanced under subsection (I) of Proposition

of Law No. 12 are resolved by *State v. Smith (1997), 80 Ohio St. 3d 89, 684 N.E.2d 668*.

XIV

Proposition of Law No. 13

Appellant contends that he should have **[***17]** been allowed to challenge his convictions for aggravated murder and aggravated robbery in the court of appeals. However, as we held in *Smith, 80 Ohio St. 3d 89, 684 N.E.2d 668*, paragraphs one and two of the syllabus:

[*262] "1. The amendments to Section 2(B)(2)(c) and *Section 3(B)(2), Article IV, Ohio Constitution*, and the implementing statute, *R.C. 2953.02*, are constitutional.

"2. The courts of appeals shall not accept jurisdiction of any case in which the sentence of death has been imposed for an offense committed on or after January 1, 1995. Appeals in such cases shall be made directly from the trial court to the Supreme Court of Ohio."

Thus, the court of appeals was correct to have issued the entry striking the notice of appeal that appellant had filed with that court. Accordingly, we affirm the judgment of the court of appeals in case No. 97-141.

XV

Proposition of Law No. 14

In Proposition of Law No. 14, appellant contends that his confession was involuntary and that his right to counsel and right against self-incrimination were violated because, according to appellant, police should have informed him before questioning that "the statement he was about to give could be (and would be) used against him in an effort to exterminate him in the electric chair." This court has addressed and **[***18]** rejected similar contentions in a number of our prior cases. See, generally, *State v. Bell (1976), 48 Ohio St. 2d 270, 278, **[**491]** 2 Ohio Op. 3d 427, 431, 358 N.E.2d 556, 562*, reversed on other grounds (1978), *438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010*; and *Garner, 74 Ohio St. 3d 49, 60-61, 656 N.E.2d 623, 635*. Today, we likewise reject appellant's contentions that his confession was involuntary simply because he was not informed by police of the gravity of the possible punishment for the aggravated (felony) murder of Bany.

The second (and far more significant) issue raised by appellant is whether he effectuated a valid -- *i.e.*, voluntary, knowing, and intelligent -- waiver of his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. Specifically, appellant contends that the audiotaped confession should have been suppressed and held inadmissible under the rule of *Edwards v. Arizona (1981), 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378*. We disagree.

Edwards holds that once an accused undergoing custodial interrogation invokes his right to have counsel present during questioning, all further interrogation must cease, and the accused "is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*." (Emphasis added.) *451 U.S. at 484-485, 101 S. Ct. at 1885, 68 L. Ed. 2d at 386*. We find no violation of *Edwards* here.

[*263] Appellant was advised **[***19]** of his *Miranda* rights before any questioning by police. He voluntarily agreed to speak with police and signed a written waiver of his *Miranda* rights. He then gave a full confession to police, but that confession was not recorded on tape. When asked to repeat his statement on tape, appellant agreed and was once again advised of his *Miranda* rights. However, at that point, appellant informed police that he wished to speak to an attorney before proceeding further. Therefore, police ceased questioning appellant and turned the recorder off. The record indicates that police offered to get appellant a telephone book and to assist him in obtaining counsel. Appellant told police that he did not want to "put [the police officers] to any trouble," but the officers assured him that his request for counsel was no trouble. Appellant then told police that he had changed his mind concerning counsel and that he wanted to "put it [his confession] on tape," and "get it off his chest." There is no evidence whatsoever that police said or did anything to change appellant's mind, and appellant changed his mind after only two or three minutes. Police then turned the recorder on and proceeded to ask appellant **[***20]** a series of questions regarding his waiver of the right to counsel. In response

to these questions, appellant indicated that he fully understood his rights, that no threats or promises had been made to induce or coerce him into confessing, and that he wanted to put his confession on tape without talking to an attorney or having one present during questioning. The record in this case clearly reveals that it was appellant himself who, after invoking the right to counsel, initiated further conversations or communications with police concerning his wish to confess, and that appellant fully understood his right to counsel and voluntarily, knowingly, and intelligently abandoned that right before the custodial interrogation resumed.

The trial court, in denying appellant's pretrial motion to suppress, implicitly determined that appellant's confessions to police were voluntarily given and that appellant had effectuated a voluntary, knowing, and intelligent waiver of his *Miranda* rights before his initial (unrecorded) confession to police, and again when he voluntarily confessed on tape after rescinding a request for counsel. The record before us supports the trial court's conclusions in this **[***21]** regard, and we find no error in that court's decision denying the motion to suppress. Accordingly, we reject appellant's fourteenth proposition of law. [2]

[*264] [492]** XVI

Proposition of Law No. 15

The matter concerning the appropriateness of appellant's death sentence is addressed in our discussion in Part XXIII, *infra*.

XVII

Proposition of Law No. 16

Appellant argues in Proposition of Law No. 16 that the prosecutor improperly referred to facts not in evidence during closing argument in the guilt phase. However, as appellant acknowledges, defense objections to these alleged incidents of prosecutorial misconduct were sustained. The prosecution was admonished by the court, and the jury was instructed to disregard the prosecutor's remarks. The jury is presumed to have followed the court's instructions. *State v. Goff (1998), 82 Ohio St. 3d 123, 135, 694 N.E.2d 916, 926*. Appellant's argument is rejected.

XVIII

Proposition of Law No. 17

Appellant contends that the trial court's instructions to the jury in the guilt phase that defined "causation" in **[***22]** terms of foreseeability permitted a conviction for aggravated murder without proof of purpose to kill. Appellant makes a similar argument with respect to the trial court's instruction to the jury that "if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to cause the death may be inferred from the use of the weapon." Appellant's arguments are not persuasive. The trial court's instructions to the jury, viewed as a whole, made it clear that a finding of purpose (and specific intent) to kill was necessary in order to convict appellant on the charge of aggravated murder. The jury in this case returned its verdicts in accordance with the overwhelming evidence on the issue. Accordingly, we find no reversible error here.

XIX

Proposition of Law No. 18

We have no reason to question the trial court's decision to excuse prospective juror Solomon for cause. Her removal was warranted, since she clearly and unequivocally stated to the court that she would be unable to perform her duties as a juror. See, generally, *State v. Moore (1998), 81 Ohio St. 3d 22, 27, 689 N.E.2d 1, 8*; *State v. Rogers (1985), 17 Ohio St. 3d 174, 17 Ohio B. Rep. 414, 478 N.E.2d **[*265]** 984*, paragraph three of the syllabus, vacated and remanded on different grounds (1985), *474 U.S. 1002, 106 S. Ct.*

[2] We also note, in passing, that appellant apparently claims that he had a Sixth Amendment right to counsel during the January 3, 1996 custodial interrogation. However, we find that the Sixth Amendment was not applicable in this instance. The right to counsel that appellant invoked (but later chose to rescind) derives from the *Fifth* and *Fourteenth Amendments to the United States Constitution* as those amendments were interpreted in *Miranda*. See *Miranda v. Arizona (1966), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694*. See, also, *Edwards v. Arizona (1981), 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378*.

518, 88 L. Ed. 2d 452.

XX

Proposition of Law No. 19

Appellant contends **[***23]** that the prosecutor exercised two peremptory challenges in a racially discriminatory manner. Appellant relies on *Batson v. Kentucky (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69*, wherein the United States Supreme Court recognized that the *Equal Protection Clause of the United States Constitution* precludes purposeful discrimination by the state in the exercise of its peremptory challenges so as to exclude members of minority groups from service on petit juries. *Id. at 89, 106 S. Ct. at 1719, 90 L. Ed. 2d at 82-83*. See, also, *State v. Hernandez (1992), 63 Ohio St. 3d 577, 581, 589 N.E.2d 1310, 1313*. To make a prima facie case of purposeful discrimination, the defendant must demonstrate (1) that members of a cognizable racial group were peremptorily challenged, and (2) that the facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory challenges to exclude jurors on account of their race. *State v. Hill (1995), 73 Ohio St. 3d 433, 444-445, 653 N.E.2d 271, 282*. If the defendant makes a prima facie case of discrimination, the state must then come forward with a race-neutral explanation. *Id. at 445, 653 N.E.2d at 282*. A trial court's finding of no discriminatory intent will not be reversed on appeal absent a determination **[**493]** that it was clearly erroneous. *Id*. See, also, *Hernandez at 583, 589 N.E.2d at 1314*.

Here, the prosecution exercised one of its peremptory challenges against prospective juror Denson, an African-American woman. The defense raised a *Batson* claim to the prosecution's use of the peremptory challenge. While **[***24]** it is not clear that the defense had met its burden of demonstrating a prima facie case of discrimination, the trial court nevertheless asked the prosecutor to explain or justify the peremptory challenge against Denson. The prosecutor responded: "Judge, her brother-in-law was prosecuted by our office for murder and was convicted. We feel a little uncomfortable with that." The trial court accepted this explanation. The prosecutor later stated on the record that he was not challenging prospective juror Stutson, another African-American woman, in order to purposely leave her on the jury panel. Stutson was, in fact, seated as a juror in this case.

After the jury was seated, the prosecution exercised a peremptory challenge against prospective alternate juror Slade, another African-American woman. The defense raised another *Batson* objection, and the trial judge asked the state to justify its challenge. The prosecutor stated that during the preliminary questioning of the entire venire, Slade had raised her hand to indicate that she **[*266]** would have a problem dealing with gruesome testimony and photographs, and that she might have a problem with the death penalty. The prosecutor explained: "Later **[***25]** on in the questioning [during individual voir dire] she changed that and was able to pass for cause. But for those reasons we feel that she's indicated at least at one point some problem sitting on this case." The trial court accepted this explanation. Additionally, as it eventually turned out, the alternates were never required to serve on the jury panel.

As to both *Batson* objections, the trial court required the state to respond and accepted the prosecution's race-neutral explanations for the use of the peremptory challenges. With respect to each *Batson* objection, we question whether appellant ever demonstrated a prima facie case of purposeful discrimination that would have necessitated a response by the prosecution. In any event, the explanations provided by the prosecution were specific and race-neutral, and the trial court's acceptance of the justifications was not erroneous. Considering the relevant circumstances surrounding the *Batson* issues, the trial court's apparent finding of no discriminatory intent was not clearly erroneous. Indeed, it appears to us that the trial court's actions in permitting the use of the peremptory challenges was reasonable and proper. Thus, appellant's **[***26]** claims that the trial court erred in permitting the use of the peremptory challenges are not well taken.

XXI

Proposition of Law No. 20

We reject appellant's Proposition of Law No. 20 on

authority *of* State v. Steffen (1987), 31 Ohio St. 3d 111, 31 Ohio B. Rep. 273, 509 N.E.2d 383, paragraph one of the syllabus.

XXII

Proposition of Law No. 21

Appellant argues that the cumulative effect of errors at the trial court level deprived him of a fair trial and a fair and reliable sentencing determination. We reject appellant's argument in this regard. We find that appellant received a fair trial and a fair and reliable sentencing determination.

XXIII

Having considered appellant's propositions of law, we must now independently review the death sentence for appropriateness (also raised in appellant's Proposition of Law No. 15) and proportionality. We find that the aggravating circumstance **[*267]** appellant was found guilty of committing (R.C. 2929.04[A][7]) was proven beyond a reasonable doubt.

In mitigation, appellant's two sisters, Tabatha and LaSonya Raglin, and his father, Walter Raglin, Sr., testified concerning the difficult circumstances of appellant's youth.

[494]** Testimony established that appellant was born into a stable home environment. However, when appellant was approximately two or three years old, **[***27]** his parents began living apart. Following the separation, appellant and his two older sisters, Tabatha and LaSonya Raglin, lived with their mother during a series of peripatetic moves and travels. Apparently, things remained relatively stable for a brief period of time following the separation, but the mother then began carousing with male acquaintances and using crack cocaine. The mother eventually became heavily involved in a life of drug and alcohol abuse, and appellant's father became involved in a life of crime. On one occasion, the children witnessed an incident where their mother shot and wounded their father during a domestic dispute. During appellant's childhood, his father was incarcerated on several occasions for drug-related offenses. The father was also incarcerated at the time of appellant's trial and testified in the penalty phase (on videotape) from a Kentucky prison where he was serving a twenty-year sentence for possession of cocaine.

Testimony established that during appellant's childhood appellant and his siblings moved with their mother from place to place. The mother had numerous boyfriends and gave birth to two additional children (appellant's younger half-brothers) **[***28]** from liaisons with different men. The housing in which the mother and children lived was deplorable. The homes were characterized by extreme filth and inadequate facilities. Some of the places were infested with mice and insects. When the mother began dating workers at racetracks in Kentucky, she lived with appellant and some of appellant's siblings in tack rooms near the horse stables. The tack rooms were very small and there was no kitchen, electricity, plumbing, or privacy. LaSonya recalled finding the mother in the bathroom at one residence "shooting up" drugs intravenously, causing blood to spatter all over the room, including the ceiling. LaSonya also recalled having attempted to clean the bathroom so that her younger brothers would not be exposed to what their mother had done. Additionally, the mother would often abandon the children for days or a week at a time and spent some nights in jail for prostitution. While the mother was out "running the streets and getting high," Tabatha and LaSonya were attempting to raise the younger children, none of whom regularly attended school. When appellant was approximately nine years old, the mother allowed him to drink alcohol and smoke **[***29]** cigarettes, and appellant began stealing money at his mother's command. The mother would use the money to support her drug habit. On one occasion, someone fired shots at the family home after appellant, **[*268]** at his mother's direction, stole $ 700 or $ 800 from a drug dealer that LaSonya had been dating. The mother also engaged in prostitution and used her monthly ADC checks to purchase drugs. Apparently, during his preteen years, appellant would accompany the mother to drug deals as a form of protection for his mother.

Tabatha, at the age of twenty or twenty-one, obtained custody of appellant, who, at the time, was either twelve or thirteen years old. Tabatha also obtained custody of the two younger boys. However, Tabatha testified, "I was just a sister. He [appellant] was already taller than I was. He never disrespected me, but he just did what he wanted to do." Tabatha also testified, "Whatever I told Walter to do she [the mother] would tell the opposite."

Tabatha testified further: "He [appellant] never had nobody to show him the right way. Nobody. My mother always showed him the wrong way." LaSonya and Tabatha also recounted several instances where appellant, as a child, had engaged **[***30]** in self-destructive behavior, including jumping out of windows, putting firecrackers in his shoes, and shooting himself in the leg. On one occasion, when appellant was eleven or twelve years old, he was drunk and put his hand through a glass window. Appellant also spent time in several juvenile facilities in Kentucky and, on one occasion, underwent psychiatric evaluation.

After Tabatha had obtained custody of the children, appellant got in trouble for not attending school and was once again placed in a juvenile facility in Lexington, Kentucky. There, appellant's mother visited appellant and, without permission and unbeknownst to either Tabatha or the authorities, took appellant **[**495]** out of the facility and out of the state. When Tabatha and the authorities discovered that appellant was missing, they assumed that appellant had simply walked away from the facility. The mother then brought appellant to Cincinnati, Ohio, and Tabatha and the authorities did not know of appellant's whereabouts. While in Cincinnati, appellant, who was approximately thirteen or fourteen years old at the time, lived with the mother and her boyfriend. The boyfriend, who was also the mother's former pimp, sometimes **[***31]** would not permit appellant to live in the house. Thus, appellant would occasionally be forced to live and sleep in a junkyard owned by the boyfriend. It was not until a year later that Tabatha found out where appellant was living.

Appellant also presented the testimony of John Hale, a Kentucky law enforcement officer and a former social worker. Hale first met appellant when appellant was approximately twelve or thirteen years old. At that time, Hale was a social worker in Kentucky and had received a referral concerning appellant from appellant's school or from a state social worker. Hale testified that when he conducted the first home visit at Tabatha's residence, several people were seated around a table smoking marijuana. According to Hale, Tabatha's having custody of appellant was like "a child raising a child." Hale also testified that he was able **[*269]** to form a bond with appellant during appellant's childhood. However, according to Hale, the "lure of the streets" and appellant's "street savvy" caused him to opt for the streets rather than to accept the services that Hale could provide. Nevertheless, Hale testified that "Walter probably has more potential and value than anybody I ever **[***32]** seen." Hale testified further: "He just never was challenged and never believed that he was worth something because one of the greatest needs that we have in life is [the] need to be loved. And I don't think he got the proper love or somebody really to love him for who he is. Not for how tall he was or how smart he was or how street savvy he was. He got fed the wrong information and his behavior just escalated and channeled in the wrong direction." Hale had also promised appellant, during his childhood, that he (Hale) would always be available to appellant whenever he needed help. However, appellant apparently never took full advantage of that offer until after he robbed and killed Bany.

During the mitigation phase, appellant gave an unsworn statement in which he expressed sorrow for the pain and grief he had caused to Bany's family, to society, and to his own family. Additionally, he stated, "Knowing that I took a person's life * * * haunts me every second and every minute of my life. It's going to be with me forever." Appellant also stated, "I don't think I deserve the death penalty. I think I deserve a life sentence." Appellant then repeated that he was sorry for what he had done **[***33]** and for putting everyone "in this situation like this, especially the [Bany] family."

Dr. Kathleen J. Burch, appellant's court-appointed psychologist, testified in mitigation. Burch, a clinical psychologist, first met with appellant in March 1996. Between that time and the time of the mitigation hearing, Burch met with appellant on a number of occasions, performed psychological testing, interviewed Tabatha and LaSonya Raglin, and reviewed records and other information concerning appellant. Burch noted that appellant had grown up in an "extremely impoverished, extremely frightening, unsupportive and chaotic environment." She also noted that "some of the conditions under which he lived as a young child are sort of like the things you read about going on in Rio [de Janeiro] or Calcutta, so it's pretty extreme circumstances." Burch described appellant as having a very problematic and very insecure relationship with his mother. Burch stated that the major bonding between appellant and the mother during his childhood years centered around alcohol and drug use. Burch also stated

that, according to appellant and his sisters, the mother had begun furnishing him with alcohol when he was just **[***34]** nine years old. Burch testified that "according to [appellant] he and his mother would be together [and] she would do her drugs and he would do his." Burch also testified that the relationship between appellant and the mother was obviously very conflicted and unhealthy and that he lacked **[**496]** appropriate parental support, guidance, and nurturing during his formative years.

[*270] Dr. Burch performed psychological and neuropsychological testing of appellant. Burch testified that she was able to obtain valid test data despite the fact that, among other things, appellant had initially lied to her to make himself appear less responsible. Burch testified that the results of the psychological testing were consistent with the profile of a person who lacks a well-developed sense of self, who is prone to "problems with impulse control and his thinking that are greatly in excess of those that other people experience," and who has "real difficulties with his mood." Burch also testified that appellant has an overall IQ of eighty-one which, according to Burch, "is at the low end of the low average range and compared to others his age this means that 90 percent of people his age would earn better scores than **[***35]** he would on this test." Burch testified further that the neuropsychological testing yielded results that were consistent with a finding of "some mild deficits in the integrity and functioning" of appellant's brain. Burch stated that this mild brain damage may have been caused by a series of closed-head injuries, such as the "repeated insults to [appellant's] brain over a number of years from automobile accidents which he described to me, from fits, from falls and also very heavy alcohol use."

Burch diagnosed appellant as suffering from adjustment disorder with depressed mood, cognitive disorder, alcohol-related disorder, cannabis-related disorder, borderline personality disorder, and antisocial personality disorder. Burch was asked the following questions, and gave the following responses, concerning the existence of the *R.C. 2929.04(B)(3)* mitigating factor:

"Q. Does Walter have a mental disease or defect?

"A. Yes, he does.

" * * *

"Q. Which do we have?

"A. Well, he actually is at least moderately impaired at this time both by the adjustment disorder diagnosis and the cognitive disorder as well as the personality disorder diagnoses. He is a person who has very significant, ongoing difficulty with managing **[***36]** himself and dealing with the environment.

"Q. At the time of the offense for which Walter has been convicted, did the symptoms of his mental defect substantially impair his capacity to appreciate the criminality of his conduct?

"A. I don't believe so.

"Q. Is that opinion offered within a reasonable degree of psychological certainty?

"A. Yes.

" * * *

[*271] "Q. Okay. Mitigating factors [*i.e.*, the *R.C. 2929.04(B)(3)* mitigating factor] talking about lacking substantial capacity to appreciate the criminality or to conform [*sic*]?

"A. Or to conform. I think that's the critical issue with Walter. Because I do believe that with his marked impairments of impulse control that are substantiated in his history and in the psychological testing results and neuro-psychological test results he has much more difficulty than your average person in withstanding impulses, in controlling impulses and controlling his behaviors.

"Q. So * * * would [it] be your opinion that his mental disease or defect impairs his capacity to conform his conduct to the requirement of the law?

"A. Yes.

" * * *

"Q. With all the clarification then, Doctor, maybe we can better appreciate the composite picture, the overall of your diagnostic impression. If you **[***37]** could just briefly highlight the most important features of your diagnosis.

"A. Okay. I believe that Walter has some acute psychopathology meaning the adjustment disorder. He has this underlying depression and this vulnerability to depression * * * . He also has from the neuropsychological evaluation evidence of some real impairment of his brain from repeated injuries and the repeated assaults of the substance abuse which impair his ability to thoughtfully **[**497]** and reasonably and adaptively plan and organize and conduct his behavior.

"He also has the substance abuse diagnoses. They're not operative right now except for the residual effects, and then he also qualifies for two personality diagnoses, personality disorder diagnoses borderline and anti-social. Is that what you wanted?

"Q. Yeah. And then again as a result of that diagnosis you feel that he lacked substantial capacity to conform his conduct?

"A. Yes, I do."

Burch also testified about a variety of other matters concerning appellant's history, background, and psychological composition. Additionally, Burch testified that appellant had stated to her that he never intended to kill the victim. Burch testified further that appellant had **[***38]** expressed regret over the killing.

On cross-examination, the prosecutor questioned the validity and legitimacy of the psychological and neuropsychological test results and questioned Burch's various conclusions regarding appellant's psychological conditions. Additionally, the prosecutor pointed out to Burch that appellant had spoken to friends immediately after the killing and had laughed and bragged about the murder. Burch explained that appellant's behavior in bragging about the murder was not surprising and was consistent with appellant's background and psychological **[*272]** makeup. In response to further questioning, Burch indicated that appellant had admitted to her that the shooting was intentional. With respect to the *R.C. 2929.04(B)(3)* mitigating factor, the prosecutor questioned Burch as follows:

"Q. You're saying he did know what he did was wrong?

"A. Correct.

"Q. Are you saying that he could not prevent himself from doing that though?

"A. No. What I said was that I believe that compared to the average person his ability to conform his behavior to the requirements of the law in that case was substantially impaired.

"Q. And that's because of this Anti-Social Personality Disorder that says he has a disregard **[***39]** for the rights of other people?

"A. No. I believe that that's due to the other personality disorder aspects of impaired impulse control in combination with the evidence of neuro-psychological deficit impacting the frontal lobe functions. And also you would have to say if indeed he was strongly intoxicated at the time, the impact of that, of the substances.

"Q. You were assuming that he was strongly intoxicated?

"A. That's what I was told. That's [what] I was told. It would not be inconsistent with his history.

"Q. The plan that he carried out that night, and again from his statement I believe you can see that he wore a mask, he had a weapon, that he wiped his prints off immediately afterwards --

"A. Yes.

"Q. -- he waited, he apparently bypassed a couple of targets: a cabdriver and a drug boy?

"A. Um-hum.

"Q. Is that consistent with someone that's acting on impulse?

"A. Well, not that aspect of it."

Following the presentation of the defense witnesses, the state presented the testimony of two witnesses in rebuttal. See our discussion in Part XII, *supra*.

Upon a review of the evidence in mitigation, it is clear to us that appellant had an extremely difficult and troubled childhood. He lacked appropriate **[***40]** parental support and guidance, his family life was chaotic, the conduct of his mother was reprehensible, and the resulting situations appellant was subjected to during his formative years are nothing short of atrocious. We find that appellant's troubled childhood,

history, and family background are entitled to some meaningful weight in mitigation.

[*273] The nature and circumstances of the offense reveal nothing of any mitigating value. The *R.C. 2929.04(B)(1)*, *(2)*, *(5)*, and *(6)* **[**498]** mitigating factors are not applicable on the record before us.

Appellant was eighteen years old at the time of the offense. We find that this *R.C. 2929.04(B)(4)* mitigating factor (youth of the offender) is entitled to some weight in mitigation.

The mitigating factor set forth in *R.C. 2929.04(B)(3)* is "whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Here, there is no question that appellant did appreciate the criminality of his conduct. However, Dr. Burch clearly testified in mitigation that, in her opinion, appellant suffers from a mental disease or defect. She also clearly testified that, because **[***41]** of appellant's psychological and neuropsychological conditions and lack of impulse control, appellant lacked substantial capacity to conform his conduct to the requirements of the law. Nevertheless, we have serious reservations whether appellant established the *R.C. 2929.04(B)(3)* mitigating factor by a preponderance of the evidence. First, we note that there is no medical evidence of appellant's impaired brain function, although we acknowledge that medical testing might be incapable of confirming the type of mild brain deficit that Burch's testing revealed. Second, Burch apparently relied on appellant's statements that he had suffered from repeated head injuries. However, on cross-examination, the prosecutor pointed out that during a medical evaluation on December 29, 1994, *i.e.*, one year before the killing, appellant denied that he had ever suffered a head injury. Third, it appears from Burch's testimony on cross-examination that she had assumed for purposes of her opinion that appellant was "strongly" intoxicated at the time of the shooting. While there is some evidence of the fact that appellant may have consumed alcohol and smoked marijuana prior to the murder, we find no credible evidence that **[***42]** appellant was intoxicated. Fourth, and perhaps most important, we find no credible evidence that reasonably suggests that appellant acted impulsively and, thus, was substantially unable to control his behavior at the time of the murder. In our judgment, the nature and circumstances of the offense clearly indicate a lack of impulsive behavior in the planning and execution of the robbery, in the killing that occurred during the robbery, or in appellant's actions immediately following the robbery and killing. In any event, assuming that the *R.C. 2929.04(B)(3)* mitigating factor was established in this case, we assign this factor, and the testimony concerning appellant's various psychological conditions, limited weight in mitigation.

We have also considered appellant's cooperation with police and his expressions of remorse and sorrow. We assign these matters some, but very little, weight in mitigation. (*R.C. 2929.04[B][7]*.)

[*274] During the course of the robbery, Bany fully complied with the demands appellant made of him, offered no resistance, and presented no threat. However, appellant did not simply walk away from the robbery after having taken Bany's money. He also took Bany's life. In his confession to police, appellant said, **[***43]** "I didn'[t] have to shoot that man." There is no question about it -- appellant did *not* need to shoot and kill Bany. Nevertheless, appellant did purposely kill Bany during the course of the aggravated robbery, and the killing was senseless, tragic, and wholly avoidable. The combined mitigating factors in this case (including appellant's pathetic family background) are stronger than the mitigation we typically see in some appeals involving the death penalty. However, the mitigating factors in this case are heavily counterbalanced by the *R.C. 2929.04(A)(7)* specification of the aggravating circumstance appellant was found guilty of committing.

Weighing the evidence presented in mitigation against the single *R.C. 2929.04(A)(7)* aggravating circumstance, we find that the aggravating circumstance outweighs the mitigating factors. We find this beyond a reasonable doubt.

As a final matter, we have undertaken a comparison of the sentence imposed in **[**499]** this case to those in which we have previously imposed the death penalty. Appellant's death sentence is neither excessive nor disproportionate in comparison to the penalty imposed in similar cases. See, *e.g.*, *State v. Spivey (1998), 81 Ohio St. 3d 405, 692 N.E.2d 151*.

Accordingly, for the foregoing reasons, we affirm appellant's convictions **[***44]** and sentences, including the sentence of death, in case No. 96-2872. We affirm the judgment of the court of appeals in case No. 97-141.

Judgments affirmed.

MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

APPENDIX

"*Proposition of Law No. 1:* Where, in a capital case, the sentencing court considers and weighs invalid or improper aggravating circumstances; fails to consider and weigh valid mitigating factors presented by the defense; and fails to specify the reasons why aggravation outweighs mitigation beyond a reasonable doubt, the death sentence offends the *Eighth Amendment to the Constitution of the United States*, and the right to due process under the Fourteenth Amendment, and their counterparts in the Ohio Constitution, and must be reversed.

"*Proposition of Law No. 2:* Involuntary manslaughter is always a lesser included offense of aggravated murder, and where the accused has denied a purposeful killing, he is entitled by due process to an instruction on the lesser offense, and denial of a proper request for an instruction on the lesser offense **[*275]** violates the Due Process Clause of the U.S. and Ohio Constitutions, rendering the conviction of capital murder unconstitutional, and the death sentence void.

"*Proposition of Law No. 3:* Where the state **[***45]** fails to prove beyond a reasonable doubt the essential element of purpose to kill, convictions for aggravated murder must be reversed as contrary to the right of the accused to due process of law under the Ohio and federal Constitutions.

"*Proposition of Law No. 4:* Convictions for aggravated murder which are contrary to the manifest weight of the evidence must be reversed, as contrary to the right of the accused to due process of law under the Ohio and federal Constitutions.

"*Proposition of Law No. 5:* Egregious misconduct by the prosecutor in the penalty phase of capital proceedings requires reversal, and where the prosecutor's final argument for death argues nonstatutory aggravating factors, argues 'facts' outside the evidence, attacks the relevance of evidence admitted by the court, contains inflammatory remarks and invective against the accused and his counsel, a death sentence based on a jury verdict following such arguments violates due process and the *Eighth Amendment of the United States Constitution*, and their counterparts in the Ohio Constitution, requiring reversal of the death sentence.

"*Proposition of Law No. 6:* A death sentence is imposed in violation of the *Eighth* and *Fourteenth Amendments to the U.S. Constitution*, and *Art. I. Sections 9* and *16 of the Ohio Constitution*, following a penalty trial in which the trial court **[***46]** denies a defense motion to limit the state to presentation of evidence of the aggravating circumstances, and permits the state to reintroduce all evidence it presented at the trial phase, including inflammatory irrelevant evidence about the nature and circumstances of the killing itself.

"*Proposition of Law No. 7:* One who commits aggravated murder prior to January 1, 1996, but is sentenced thereafter, is entitled to the benefit of an instruction permitting the jury to consider the sentencing alternative of life without parole, and the denial of a defense motion that the jury be permitted to consider that alternative violates the rights of the defendant under *R.C. 1.58(B)*, [Ohio] Const. Art. II, Section 15(D), the Fourteenth Amendment right to due process of law, the Eighth Amendment prohibition against cruel and unusual punishment, and their counterparts in the *Ohio Constitution, Art. I. Sections 9* and *16*.

"*Proposition of Law No. 8:* It is impermissible under the *Eighth* and *Fourteenth* ***[**500]*** *Amendments to the U.S. Constitution* and *Art. I. Sections 9* and *16 of the Ohio Constitution* for the trial court to instruct the jury that their verdict is merely a recommendation, as such an instruction impermissibly attenuates the **[*276]** jury's sense of responsibility for its decision, and a death sentence imposed following such an instruction is constitutionally infirm.

"*Proposition of Law* ***[***47]*** *No. 9:* Where jury instructions at the penalty phase of capital proceedings misstate the law to the jury, fail to define mitigating factors, exclude relevant mitigation, and is [*sic*]

otherwise erroneous and misleads [*sic*] the jury, the resulting death sentence violates the Eighth and Fourteenth Amendments [to the United States Constitution], and *Art. I. Sections 9* and *16 of the Ohio Constitution*, and must be reversed.

"*Proposition of Law No. 10:* The increased need for reliability required in capital cases by the Ohio and federal Constitutions mandates the granting to the defense more than six peremptory challenges.

"*Proposition of Law No. 11:* It is error prejudicial to the right of the accused to a fair[,] reliable, and impartial capital sentencing process, secured to him by the *Eighth* and *Fourteenth Amendments to the U.S. Constitution* and [Ohio] Const. [Article I] Sections 9 and 16, for the trial court to permit the state to present evidence of other bad acts and statements of the accused not related to the offense in question, ostensibly to rebut statements of the accused that he feels remorse for taking the life of the victim in the case in which he is being sentenced.

"*Proposition of Law No. 12:* The Ohio death penalty statutes are unconstitutional, violating the Eighth Amendment proscription of cruel and unusual punishments, **[***48]** the Fourteenth Amendment guarantees to due process of law and to the equal protection of the laws, and also violating the concomitant provisions of the Ohio Constitution.

"[*Sub-Proposition of Law 12(A):*] The death penalty is so totally without penological justification that it results in the gratuitous infliction of suffering, and that consequently, there is no rational state interest served by the ultimate sanction.

"[*Sub-Proposition of Law 12(B):*] Both locally, statewide and nationally, the death penalty is inflicted disproportionately upon those who kill whites as opposed to those who kill blacks, and even within Hamilton County, the death penalty is selectively imposed, rendering the penalty as applied in Hamilton County arbitrary and capricious on the one hand, and the product of racial discrimination on the other.

"[*Sub-Proposition of Law 12(C):*] The use of the same operative fact to first elevate what would be 'ordinary' murder to aggravated murder, and then to capital, death-eligible aggravated murder permits the state (1) to obtain a death sentence upon less proof in a felony murder case than in a case involving prior calculation and design, although both crimes are ostensibly equally culpable **[*277]** **[***49]** under the Revised Code, and (2) fails to narrow the capital class to those murderers for whom the death penalty is constitutionally appropriate [*sic*].

"[*Sub-Proposition of Law 12(D):*] The requirement that a jury must recommend death upon proof beyond a reasonable doubt that the aggravating circumstances outweigh only to the slightest degree the mitigating circumstances renders the Ohio capital statutes quasi-mandatory and permits the execution of an offender even though the mitigating evidence falls just short of equipoise with the aggravating factors, with the result that the risk of putting someone to death when it is practically as likely as not that he deserves to live renders the Ohio capital process arbitrary and capricious, and, in the absence of a requirement that, before death may be imposed, aggravating factors must *substantially* outweigh mitigating factors, unconstitutional.

"[*Sub-Proposition of Law 12(E):*] The Ohio capital statutes are constitutionally infirm in that they do not permit the extension of mercy by the jury even though aggravating factors may only slightly outweigh mitigating factors.

"[*Sub-Proposition of Law 12(F):*] The provisions of *Crim.R. 11(C)(3)* permitting a **[**501]** trial court **[***50]** to dismiss specifications upon a guilty plea only under the nebulous and undefined concept 'in the interests of justice' (1) needlessly encourages guilty pleas and the concomitant waiver of the right to jury, to compulsory process and to confrontation and (2) reintroduces the possibility that the death sentence will be imposed arbitrarily and capriciously.

"[*Sub-Proposition of Law 12(G):*] The Ohio capital sentencing scheme is unconstitutional because it provides no standards for sentencing or review at several significant stages of the process and consequently death sentences are imposed, and reviewed, without significant statutory guidance to juries, trial courts and reviewing courts to prevent the unconstitutional arbitrary and capricious infliction of the death penalty.

"[*Sub-Proposition of Law 12(H):*] The decisions of the

Supreme Court of Ohio in [*State v. Gumm (1995), 73 Ohio St. 3d 413, 653 N.E.2d 253*, and *State v. Wogenstahl (1996), 75 Ohio St. 3d 344, 662 N.E.2d 311]* [have] rendered the Ohio capital statutes unconstitutional in that they encourage, rather than prevent, the arbitrary and capricious imposition of the penalty of death.

"[*Sub-Proposition of Law 12(I):*] The amendments to the Ohio Constitution occasioned by the passage of Issue One, and the amendments to the Ohio Revised Code enacted **[***51]** by the General Assembly to facilitate the changes in the Ohio Constitution governing capital cases, violate the right of capital defendants to be free from cruel and unusual punishments, secured to them by the *Eighth Amendment to the U.S. Constitution*, and to due process of law and the equal protection of the laws secured to them by the *Fourteenth Amendment to the U.S. **[*278]** Constitution*. The Amendment to *R.C. 2953.02*, purporting to enable the [Ohio] Supreme Court to weigh evidence in a capital case violates the Ohio Constitution.

"*Proposition of Law No. 13:* The rejection by the court of appeals of a capital defendant's notice of appeal to that court pursuant to Issue One deprives the defendant of due process of law and the equal protection of the laws under the *Fourteenth Amendment to the Constitution of the United States*, and also of his rights under the Eighth Amendment where he has been sentenced to death in the trial court.

"*Proposition of Law No. 14:* The admission of involuntary, incriminating statements, or those given without a valid waiver of the suspect's privilege against self-incrimination, violates that privilege, guaranteed by the *Fifth*, *Sixth*, and *Fourteenth Amendments to the Constitution of the United States*, and *Art. I., Section 10 of the Ohio Constitution.*

"*Proposition of Law No. 15:* Where the state fails to prove beyond a reasonable doubt at the penalty phase of a capital prosecution that the aggravating circumstances of which the offender was convicted outweigh **[***52]** the mitigating factors established by the evidence, a death sentence imposed violates the rights of the accused under the Eighth and the *Fourteenth Amendments to the Constitution of the United States*, and *Art. I. [Sections] 9* and *16 of the Ohio Constitution*, as well as rights secured to the offender by the Revised Code.

"*Proposition of Law No. 16:* A prosecutor's argument which goes beyond the facts in evidence is improper and, even where defense objections are sustained, violates the right of the accused to due process under the U.S. and Ohio Constitutions.

"*Proposition of Law No. 17:* Where, in a capital case, the guilt phase jury instructions, over defense objections, state (1) that the essential element of cause as being where the death is [*sic*] the foreseeable result of the act, and (2) that purpose may be inferred from the use of a deadly weapon, the right of the accused to due process of law under the *Fourteenth Amendment to the U.S. Constitution* has been violated, requiring reversal of his conviction.

"*Proposition of Law No. 18:* A death sentence recommended by a jury from service on which one or more veniremen were excused because of their views concerning capital punishment cannot stand unless it affirmatively appears on the record that each such veniremen [*sic*] excused for cause unequivocally indicates that his scruples against **[***53]** **[**502]** capital punishment will automatically prevent him from recommending the death penalty and/or that such views will render him unable to return a verdict of guilty no matter what the evidence, and that he is prevented by his scruples from following the instructions of the court and considering fairly the imposition of the death sentence.

[*279] "*Proposition of Law No. 19:* It is constitutionally impermissible under the Equal Protection and *Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution* for the state, in a capital prosecution, to exclude from the jury prospective jurors solely on the basis of their race.

"*Proposition of Law No. 20:* To comport with due process under the United States and Ohio Constitutions, and the Ohio capital statutes, for purposes of proportionality review, death sentences must be compared with all other cases within the jurisdiction in which the death sentence was imposed, as well as those capital cases in which it was not imposed.

"*Proposition of Law No. 21:* Where, during a criminal trial, there are multiple instances of error, and the

cumulative effect of such errors deprives the accused of a fair trial and undermines the reliability of the conviction and the sentence of death imposed upon a jury verdict, the rights **[***54]** of the accused to due process and to be free from cruel and unusual punishment, under the Fourteenth and Eighth Amendments, respectively, of the United States Constitution, and their corollaries in the Ohio Constitution, have been violated, requiring reversal." (Emphasis *sic*.)

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

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COST
T. √

STATE OF OHIO,	:	APPEAL NO. C-980425 TRIAL NO. B-9600135
Plaintiff-Appellee,	:	*DECISION.*
vs.	:	
WALTER RAGLIN,	:	
Defendant-Appellant.	:	

PRESENTED TO THE CLERK OF COURTS FOR FILING
JUN 25 1999
COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 25, 1999

Michael K. Allen, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

David H. Bodiker, Ohio Public Defender, *Laney J. Hawkins*, and *Jonathan A. Woodman*, Assistant Ohio Public Defenders, for Defendant-Appellant.

FILED
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JAMES CISSELL
CLERK OF COURTS
HAMILTON COUNTY, OH

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COURT OF APPEALS

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Per Curiam.

Petitioner-appellant Walter Raglin appeals from the trial court's denial of his R.C. 2953.21 petition to vacate or set aside the judgment convicting him of aggravated murder, aggravated robbery, and two gun specifications, and sentencing him to death.

I. FACTS AND PROCEEDINGS

A jury found Raglin guilty of aggravated murder for the purposeful shooting of Michael Bany while he was also committing aggravated robbery. Following a mitigation hearing, the jury recommended a sentence of death, which the trial court imposed. The Ohio Supreme Court upheld Raglin's conviction on direct appeal.[1] The United States Supreme Court denied his petition for a writ of certiorari.[2]

On February 2, 1998, Raglin filed a petition to vacate or set aside his convictions in the court of common pleas, asserting twenty-two grounds for relief. Seventeen of the twenty-two grounds for relief involved assertions by Raglin that his trial counsel was ineffective. The remaining grounds for relief challenged (1) specific jury instructions; (2) the prosecutor's conduct; (3) the weight of the evidence in support of his convictions; (4) the denial of his Crim.R. 29(A) motion for acquittal; and (5) the page limitation imposed on postconviction petitions by Crim.R. 35. Raglin sought an evidentiary hearing on these claims. Also on February 2, 1998, Raglin filed a motion requesting funds for expert assistance.

By entry of April 17, 1998, the trial court denied Raglin's request for an evidentiary hearing and dismissed his petition, concluding that the majority of his claims

[1] *State v. Raglin* (1998), 83 Ohio St.3d 253, 699 N.E.2d 482.
[2] *Raglin v. Ohio* (1999), ___U.S.___, 119 S. Ct. 1118.

were barred by *res judicata* or otherwise lacked merit. The trial court also denied his motion requesting funds for expert assistance. This appeal followed.

II. FIRST ASSIGNMENT

In his appeal, Raglin brings two assignments of error. In the first assignment, he asserts that the trial court erred in granting the state's motion to dismiss his post-conviction petition. We disagree.

To prevail on a postconviction claim, the petitioner must demonstrate that a violation of constitutional dimension occurred at the time he was tried and convicted.[3] A petitioner is not automatically entitled to a hearing on a postconviction claim. He must first demonstrate, through the petition, supporting affidavits, and the record, that substantive grounds for relief exist.[4] Substantive grounds for relief exist when the petition presents a claim that, on its face, raises a constitutional issue and that depends, for its resolution, upon factual allegations that cannot be determined by an examination of the record alone.[5]

The filing of supporting affidavits and documents does not always mandate a hearing on a postconviction claim. If a petitioner's claim relies on evidence *dehors* the record, to warrant a hearing, such evidence must meet a threshold of cogency. We have described cogent evidence as evidence that is more than "marginally significant" and that advances a claim "beyond mere hypothesis and a desire for further discovery."[6]

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[3] *State v. Hill* (June 19, 1998), Hamilton App. No. C-970650, unreported.
[4] *Id.*
[5] *Id.*
[6] *Id.*

A postconviction petition may also be dismissed without a hearing where the claims raised are barred by *res judicata*.[7] The doctrine of *res judicata* precludes a hearing where the claims raised in the petition were raised or could have been raised at trial or on direct appeal.[8] *Res judicata* bars a hearing on the petition even where a claim relies on evidence *dehors* the record, unless that evidence shows that the petitioner could not have appealed the constitutional claim based upon information in the original trial record. The evidence *dehors* the record must be more than that evidence which was in existence at the time of trial and which should and could have been submitted at trial if the defendant wished to make use of it.[9]

A. Ineffective Assistance of Counsel

We begin by reviewing the trial court's dismissal of Raglin's seventeen claims for relief alleging ineffective assistance of counsel.

To secure a hearing in a postconviction proceeding on a claim of ineffective assistance of counsel, the petitioner must proffer evidence to establish that there was a substantial violation of an essential duty to him, and that the defense was prejudiced by the deficient performance.[10] To establish prejudice, the petitioner must show that he was denied some substantive or procedural right that made the trial unreliable or the proceeding fundamentally unfair.[11] Broad assertions without a further demonstration of prejudice do not warrant a hearing for a postconviction petition. General conclusory

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[7] *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.
[8] *Id.* at paragraph nine of the syllabus.
[9] *State v. Mills* (Mar. 15, 1995), Hamilton App. No. C-930817, unreported; *State v. Hill*, *supra*.
[10] See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St. 3d 136, 143, 538 N.E.2d 373, 380, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.
[11] *State v. Combs* (1994), 100 Ohio App.3d 90, 101, 652 N.E.2d 205, 211-212, quoting *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 844.

allegations to the effect that a defendant has been denied effective assistance of counsel are inadequate as a matter of law to require an evidentiary hearing.[12]

Generally, the introduction of evidence *dehors* the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of *res judicata*.[13] An ineffective-assistance-of-counsel claim, however, may be dismissed as *res judicata* where the petitioner was represented by new counsel on direct appeal, that counsel failed to raise the issue of trial counsel's incompetence, and the issue could fairly have been determined without evidence *dehors* the record.[14]

Raglin alleged, in his second claim for relief, that his counsel was ineffective during the guilt phase of his trial because he failed to zealously pursue a motion for a new trial. In support of this claim, Raglin offered the affidavit of Randall Porter, an attorney experienced in death-penalty prosecutions. This claim was *res judicata*, as it was not raised by Raglin's appellate counsel in his direct appeal and could have fairly been determined without evidence *dehors* the record. Accordingly, the trial court correctly dismissed it.

In his third claim for relief, Raglin maintained that his trial counsel was ineffective because he failed to move for a change of venue after voir dire questioning revealed a number of jurors who had knowledge of the case due to media coverage. In support of this claim, Raglin again offered the affidavit of Porter, as well as the juror questionnaires.

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[12] *State v. Jackson* (1980), 64 Ohio St.2d 107, 111, 413 N.E.2d 819, 822.
[13] *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169.
[14] *State v. Sowell* (1991), 73 Ohio App.3d 672, 598 N.E.2d 136.

The record reflects that, prior to voir dire, trial counsel did move for a change of venue. Further, the trial court did not rule on this motion until the close of voir dire. In any event, this claim was *res judicata*, as Raglin's appellate counsel did not raise it in his direct appeal, and it could have fairly been determined without evidence *dehors* the record. Therefore, the trial court correctly dismissed it.

In his fourth claim for relief, Raglin contended that his trial counsel was ineffective because, during voir dire, he failed to adequately inquire into the jury's openness to mitigation topics such as Raglin's young age and his extreme living conditions. In support of this claim, Raglin again offered the affidavit of Porter. This claim was *res judicata*; it could fairly have been determined without evidence *dehors* the record, but was not raised by his appellate counsel on direct appeal. Accordingly, the trial court correctly dismissed it.

Raglin's fifth and sixth claims for relief, which alleged that his trial counsel was ineffective during the mitigation phase of the trial because he failed to present (1) specific psychological information about Raglin; and (2) expert testimony regarding homelessness or "street" culture, were also *res judicata*. The claimed errors were evident from the record and should have been brought on direct appeal. Accordingly, Raglin's proffered evidence *dehors* the record was of no consequence. The trial court, therefore, correctly dismissed these claims.

In his seventh claim for relief, Raglin contended that his trial counsel was ineffective because he failed to adequately prepare him for the presentation of his unsworn statement. Although Raglin attached his own affidavit in support of this claim, that affidavit did not contain sufficient evidence *dehors* the record to overcome the

presumption of counsel's effective representation of Raglin.[15] Therefore, the trial court correctly dismissed the claim.

Raglin maintained, in his eighth claim for relief, that his trial counsel was ineffective because, without his consent, he made statements during voir dire and opening argument that, in effect, conceded his guilt. Raglin points this court to the case of *Wiley v. Sowders*,[16] wherein the Sixth Circuit Court of Appeals determined that when a defense counsel plans to utilize a strategy that completely concedes his client's guilt, he must first obtain the client's consent prior to employing the strategy. The *Wiley* court also held that the client's consent must appear in the trial record. Based on this precedent, Raglin contends that his trial counsel was ineffective. He also contends that his evidence *dehors* the record, which included his own affidavit in which he averred that his trial counsel never obtained his consent, precluded the application of *res judicata*. We disagree.

We first note that *Wiley* is only applicable where defense counsel's statements amount to total and complete concessions of the defendant's guilt, and not just concessions as to one or some of the elements of the offense charged.[17] Although they are perhaps inartful, we do not read the comments cited by Raglin as the complete concessions of guilt contemplated by *Wiley*. However, even if we assume that these comments did amount to complete concessions of guilt so that *Wiley* might apply, Raglin's claim still lacks merit. As we noted, *Wiley* specifically requires that a defense

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[15] See *State v. Kapper* (1983), 5 Ohio St.3d 36, 448 N.E.2d 823; *State v. Pankey* (1981), 68 Ohio St.2d 58, 428 N.E.2d 413.
[16] (1981), 647 F.2d 642.
[17] See *State v. Reimsnyder* (Dec. 30, 1994), Erie App. No. E-93-71, unreported.

counsel employing the strategy of completely conceding his client's guilt must make a part of the trial record his client's consent to this strategy. No such consent by Raglin is apparent in the trial record. Accordingly, the alleged violation of the rule from *Wiley* was evident in the record and should have been raised on direct appeal. Accordingly, the trial court's dismissal of the claim on the basis of *res judicata* was not in error.

In his ninth claim for relief, Raglin contended that his trial counsel was ineffective because certain comments made by him during the guilt and mitigation phases of the trial were in conflict. Because this claim was based entirely on matters in the record, Raglin's proffered evidence *dehors* the record was of no consequence and the claim was *res judicata*. Therefore, the trial court correctly dismissed it.

Raglin contended, in this tenth claim for relief, that his trial counsel was ineffective because he failed to challenge a specific juror for cause or to use a peremptory challenge. Because this claim challenged conduct that was evident in the record, it should have been brought on direct appeal. Raglin's attempt to support the claim with evidence *dehors* the record, such as Porter's affidavit and newspaper articles, did not change this fact. Accordingly, the trial court correctly dismissed the claim under the doctrine of *res judicata*.

Raglin's eleventh claim for relief contained an allegation that his trial counsel was ineffective because he failed to file a motion to suppress his statements on the basis that his arrest was unconstitutional. In support of the claim, he offered Porter's affidavit. This claim, however, challenged counsel's trial conduct and should have been brought on direct appeal. Therefore, the trial court correctly dismissed it on the basis of *res judicata*.

Raglin's twelfth claim for relief, which alleged that his trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of involuntary manslaughter until after the defense rested, was *res judicata*. The claimed error was evident from the record and, thus, should have been raised on direct appeal. Raglin's inclusion of Porter's affidavit as evidence *dehors* the record was of no assistance under these circumstances. Therefore, the trial court correctly dismissed the claim.

In his thirteenth and twenty-second claims for relief, Raglin asserted that his trial counsel was ineffective because he failed to retain a toxicologist to testify with respect to the effect that substance abuse had on his behavior. In support of the claim, Raglin offered his own affidavits, the affidavit of Hugh A. Turner, a psychologist, and the affidavit of Porter. This claimed error, however, could have been determined from the record and should have been raised on direct appeal. Under these circumstances, it was *res judicata* and was properly dismissed.

Raglin's fourteenth claim for relief, which asserted that his trial counsel was ineffective for failing to have him testify at a suppression hearing, was *res judicata*. The claimed error was evident from the record and, thus, should have been raised on direct appeal. Raglin's inclusion of his affidavit and that of Porter were of no consequence given this. The trial court, therefore, correctly dismissed the claim.

In his fifteenth claim for relief, Raglin maintained that his trial counsel was ineffective because he failed to introduce evidence to demonstrate that the victim was intoxicated at the time of the offense. In support, he offered Porter's affidavit. This

issue, however, was evident from the record. Accordingly, the trial court correctly dismissed it as *res judicata*.

Raglin contended, in his sixteenth claim for relief, that his trial counsel was ineffective because he failed to obtain a firearms expert to testify with respect to whether his gun had a hair trigger and whether it was possible to shoot someone without purpose even with a gun that did not have a hair trigger. This claim, which challenged his counsel's trial strategy, should have been brought on direct appeal. It was *res judicata*. Raglin's inclusion of Porter's affidavit did not obviate this fact. Therefore, the trial court correctly dismissed it.

In his nineteenth claim for relief, Raglin contended that the cumulative effect of his counsel's ineffective representation rendered his trial unconstitutional. Insofar as we have rejected each of Raglin's claims of ineffective assistance of counsel, we also reject this claim.

B. REMAINING CLAIMS

Having disposed of Raglin's claims relating to ineffective assistance of counsel, we now turn to his remaining claims.

In his first claim for relief, Raglin asserted that the page limitation imposed upon postconviction petitions by Crim.R. 35 was unconstitutional. The trial court correctly dismissed this claim, noting that the Ohio Supreme Court has previously held that page limitations in capital cases are proper.[18]

In his seventeenth claim for relief, Raglin maintained that specific jury

[18] See *State v. Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082; *State v. Davis* (1991), 62 Ohio St.3d 326, 581 N.E.2d 1362.

instructions given by the trial court were erroneous and prejudicial. This claim was based entirely on matters in the record and should have been raised on direct appeal. Under these circumstances, Raglin's proffered evidence *dehors* the record was of no consequence, and the trial court's dismissal of the claim on the basis of *res judicata* was proper.

Raglin's eighteenth claim for relief alleged prosecutorial misconduct. We note that the Ohio Supreme Court's decision in Raglin's direct appeal reflects that Raglin raised issues of prosecutorial misconduct before it. Raglin cannot now relitigate those issues that were rejected by the supreme court. And, to the extent that Raglin's instant claim for relief focused on different conduct by the prosecutor, this claim too should have been brought on direct appeal. Accordingly, the claim was *res judicata* and the trial court properly dismissed it.

Raglin asserted in his twentieth claim for relief that his conviction was against the weight of the evidence. This assertion was already considered and rejected by the Ohio Supreme Court in his direct appeal. Accordingly, it was *res judicata*. The trial court's dismissal of it was proper.

Finally, in his twenty-first claim for relief, Raglin maintained that the trial court erred in overruling his Crim.R. 29(A) motion for acquittal. Because this claim was based entirely on matters in the record, it should have been raised on direct appeal. Given this, the trial court properly dismissed the claim on the basis of *res judicata*.

Because we conclude that the trial court properly rejected each of Raglin's twenty-two claims for relief, we overrule the first assignment of error.

III. SECOND ASSIGNMENT

In his second assignment of error, Raglin contends that the trial court erred in denying his motion requesting funds for expert assistance in the areas of "street culture," firearms, and toxicology. Because a petitioner in a postconviction proceeding is not entitled to funds for the appointment of experts, we overrule this assignment of error.[19]

IV. CONCLUSION

For the reasons stated in this decision, we affirm the judgment of the trial court.

Judgment affirmed.

DOAN, P.J. GORMAN and **SUNDERMANN, JJ.**

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

[19] *State v. Hill* (June 19, 1998), Hamilton App. No. C-970650, unreported; *State v. Garner* (Dec. 19, 1997), Hamilton App. No. C-960995, unreported.

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

STATE OF OHIO	:	NO. B-9600135
Plaintiff-Respondent	:	(Judge O'Connor)
vs.	:	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY DISMISSING PETITION TO VACATE**
WALTER RAGLIN	:	
Defendant-Petitioner	:	

This matter is before the Court on the defendant's petition to vacate, the state's motion to dismiss and defendant's response thereto, and the entire record. All issues can be resolved from the existing record, therefore, the defendant's requests for discovery and an evidentiary hearing are denied. The Court makes the following **Findings of Fact** which are applicable to each of defendant's grounds for relief.

(1) Defendant was represented at trial by attorneys Robert J. Ranz and John T. Keller.

(2) Defendant is represented on direct appeal by attorneys H. Fred Hoefle and David J. Boyd.

(3) Defendant is represented in this petition to vacate by the Ohio Public Defender's Office.

The Court makes the following specific findings as to each of defendant's grounds for relief.

(A) Defendant's first claim for relief is that the page limitation on petitions to vacate, found in Crim.R. 35, is unconstitutional. The Court makes the following Conclusion of Law:

(1) The page limitations found in Crim. R. 35 are constitutional. State v. Bonnell, 61 Ohio St.3d 179 (1991); State v. Davis, 62 Ohio St.3d 326, 581 N.E.2d 1362 (1991).

(B) Defendant's second claim for relief is an allegation that trial counsel were ineffective for failing to more aggressively and zealously pursue a motion for a new trial due to the publicity of the trial. As to this claim, the Court makes the following Findings of Fact:

(1) This claim is based entirely on material in the record.

(2) Defense counsel filed a motion for a new trial that was denied by this court.

(3) That the defendant has failed to set forth evidence dehors the record to adequately support this claim.

The Court makes the following Conclusion of Law.

(1) This claim is barred by res judicata. State v. Perry 10 Ohio St.2d 175 (1967).

(C) Defendant's third claim of relief is a claim of ineffective assistance of counsel. Defendant argues that trial counsel failed to make a change of venue request at the

close of voir dire. With regard to this claim the Court makes the following Findings of Fact:

(1) The record reflects that trial counsel did file a motion for a change of venue.

(2) The record reflects that the court ruled on this motion after voir dire.

The Court makes the following Conclusions of Law:

(1) Trial counsel were not ineffective. State v. Bradley 42 Ohio St.3d 136 (1989). Counsel properly and timely filed a change of venue motion with this court.

(2) This issue is sufficiently preserved in the record and is therefore barred under the doctrine of res judicata. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(D) Defendant's fourth ground for relief is an allegation of ineffective assistance of counsel during voir dire by failing to inquire into various mitigation topics. As to this claim, the Court makes the following Finding of Fact:

(1) This issue is clearly evident from matters found in the record.

The Court makes the following Conclusions of Law:

(1) This issue is sufficiently preserved in the record and is therefore barred under the doctrine of res judicata.

State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(E) Defendant's fifth ground for relief is a claim of ineffective assistance of counsel at mitigation. The Court also makes the following Finding of Fact:

(1) That defense counsel presented a full mitigation defense for their client.

The Court makes the following Conclusions of Law:

(1) The Ohio Supreme Court has held that alternate theories of mitigation that are not presented do not constitute ineffective assistance. State v. Post, 32 Ohio St.3d 380, 513 N.E.2d 754 (1987).

(2) Claimed errors that are evident from the record must be raised on direct appeal and are therefore barred in post conviction proceedings under the doctrine of res judicata. State v. Perry 10 Ohio St.2d 175 (1967).

(F) Defendant's sixth ground for relief is an allegation of ineffective assistance at mitigation. Defendant alleges trial counsel failed to obtain an independent expert in the area of street culture. As to this claim, the Court adopts the Findings of Fact and Conclusions of Law set forth in the preceding claim of error pertaining to the defendant's fifth claim for relief.

(G) Defendant's seventh ground for relief is a claim of ineffective assistance of counsel at mitigation. Defendant alleges counsel failed to properly prepare him for the presentation of his unsworn statement. The Court makes the following Finding of Fact:

(1) That the only evidence presented to support this claim is a self-serving affidavit from the defendant.

The Court makes the following Conclusion of Law:

(1) That this claim is not sufficiently supported by evidence dehors the record, in that self-serving affidavits do not overcome the presumption of counsel's effective representation of the defendant. State v. Reynolds 80 Ohio St.3d 670, 687 N.E.2d 1358 (1998); State v. Kapper, 5 Ohio St.3d 36, 448 N.E.2d 823 (1983); State v. Pankey, 68 Ohio St.2d 58, 428 N.E.2d 413 (1981).

(H) Defendant's eighth ground for relief is an allegation of ineffective assistance of counsel during the guilt phase of the trial for pursuing a defense that acknowledged that an aggravated robbery and murder took place, but that the defendant lacked the requisite mens rea for a conviction for aggravated murder. As to this claim, the Court makes the following Findings of Fact:

(1) The trial strategy presented by defense counsel was proper in light of the evidence presented at trial, including the confession of the defendant.

2) The claim raised by the defendant is a matter that may be found wholly within the record.

The Court makes the following Conclusion of Law:

(1) This claim is barred by the doctrine of res judicata. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(I) Defendant's ninth ground for relief is an allegation of ineffective assistance of trial counsel because of comments made by counsel during voir dire and the guilt phase of the trial. As to this claim, the Court makes the following Finding of Fact:

(1) This claim is based entirely on material in the record.

The Court makes the following Conclusion of Law:

(1) This claim is barred by res judicata. State v. Perry 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(J) Defendant's tenth ground for relief is that trial counsel failed to challenge a juror for cause or with a peremptory. As to this claim, the Court makes the following Findings of Fact:

(1) This claim could have been raised at trial or on appeal.

(2) This claim is based entirely on matters in the record.

The Court makes the following Conclusion of Law:

(1) This claim is barred by res judicata. State v. Perry 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(K) Defendant's eleventh ground for relief is a claim of ineffective assistance based upon the defendant's claim that a motion to suppress the confession should have been filed. The Court makes the following Finding of Fact:

(1) This claim is a matter that must be raised on direct appeal, not a post conviction proceeding.

The Court makes the following Conclusion of Law:

(1) This claim is barred by res judicata. State v. Perry 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(L) Defendant's twelfth ground for relief is a claim of ineffective assistance of counsel regarding a jury instruction. The Court makes the following Finding of Fact:

(1) This claim is a matter that must be raised on direct appeal, not a post conviction proceeding.

The Court makes the following Conclusion of Law:

(1) This claim is barred by res judicata. State v. Perry 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(M) The defendant's thirteenth ground for relief makes a claim that counsel was ineffective in failing to investigate a toxicologist as an expert with respect to its effects of substance abuse on the defendant. The Court makes the following Finding of Fact:

(1) The failure to investigate a toxicology expert is merely an attempt to present an alternate theory of mitigation and does not render counsel's performance ineffective.

The Court makes the following Conclusion of Law:

(1) The Ohio Supreme Court has held that alternate theories of mitigation not raised by the defense does not constitute ineffective assistance of counsel. State v. Post, 32 Ohio St.3d 380, 513 N.E.2d 754 (1987).

(N) The defendant's fourteenth ground for relief asserts another ineffective assistance claim in failing to have the defendant testify at this motion to suppress. The Court makes the following Finding of Fact:

(1) This issue presents a matter of trial strategy that is evident from the record.

The Court makes the following Conclusion of Law:

(1) This claim is barred by res judicata. State v. Perry 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(O) The defendant's fifteenth ground for relief is another ineffective assistance claim. This claim is based upon the defendant's claim that counsel failed to introduce the victim's state of intoxication at the time of the offense. The Court makes the following Findings of Fact:

(1) The intoxication of the victim has no bearing on the acts committed by the defendant.

(2) The coroner testified that the victim was under the influence of alcohol at the time of the offense.

(3) The intoxication level of the victim is irrelevant to the defendant's conviction.

The Court makes the following Conclusions of Law:

(1) Counsel was not ineffective in failing to explore this irrelevant issue. State v. Campbell, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994).

(2) This issue is plainly evident from the record and must be raise on direct appeal. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(P) The defendant raises another ineffectiveness claim in his sixteenth claim of error. The defendant claims that counsel should have brought forth a defense firearms expert to rebut the state's firearm expert concerning the amount of trigger pressure required to fire the weapon used in the shooting. The Court makes the following Findings of Fact:

(1) The state's expert testified on the issue of a hair trigger and the amount of pressure required to fire the weapon.

(2) The state's expert was cross examined on the issue of how much pressure the actual weapon required in order to fire.

(3) The defendant's assertion that his own expert would have testified as to matters outside the record (pertaining to the effect of nervousness by the defendant and its effect on trigger pressure) was not sufficiently presented to this Court to merit a hearing or require further discovery on the matter.

The Court makes the following Conclusions of Law:

(1) Claims of ineffective assistance in regards to trial strategy must be raised on direct appeal. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(2) The defendant failed to set forth specifically how a failure to hire a defense firearm expert to testify to matters sufficiently inquired into during cross examination of the state's expert constitutes prejudice to the defendant that would have resulted in a different trial outcome. State v. Campbell, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994).

(Q) The defendant's seventeenth claim of error involves issues surrounding jury instructions. The Court makes the following Finding of Fact:

(1) The claim of error is based entirely upon matters in the record.

The Court makes the following Conclusion of Law:

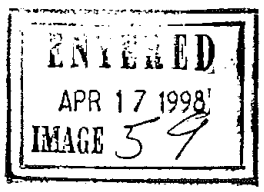
(1) This claim is barred under the doctrine of res judicata. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(R) The defendant's eighteenth claim of error involves issues of prosecutorial misconduct. The Court makes the following Finding of Fact:

(1) The claim of error is based entirely upon matters in the record.

The Court makes the following Conclusion of Law:

(1) This claim is barred under the doctrine of res judicata. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).



(S) The defendant's nineteenth claim of error is an ineffective counsel claim stating that all prior claims of ineffective assistance render the defendant's conviction void. The Court adopts the findings of fact and conclusions of law set forth in the foregoing claims of error dealing with ineffective assistance of counsel in order to deny this claim of cumulative error.

(T) The defendant's twentieth claim of error is a manifest weight of the evidence claim. The Court makes the following Finding of Fact:

(1) The claim of error is based entirely upon matters in the record.

The Court makes the following Conclusion of Law:

(1) This claim is barred under the doctrine of res judicata. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(U) The defendant's twenty-first claim of error states that this Court erroneously denied the motion for acquittal. The Court makes the following Finding of Fact:

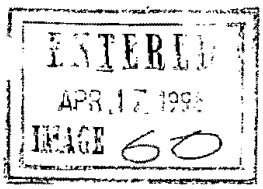
(1) The claim of error is based entirely upon matters in the record.

The Court makes the following Conclusion of Law:

(1) This claim is barred under the doctrine of res judicata. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(V) The defendant's twenty-second ground for relief was previously raised and addressed by this Court in the defendant's thirteenth ground for relief. The Court adopts its earlier findings of fact and conclusions of law denying that claim.

For all of the foregoing findings of fact and conclusions of law, the Court hereby denies the defendant's post conviction petition for relief and all motions for discovery



contained therein. The defendant's request for an evidentiary hearing is therefore denied. The Court hereby grants the State's motion to dismiss.

POC 4/17/98

John P. O'Connor
Judge, Court of Common Pleas

COURT OF COMMON PLEAS
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CASE 61

002422

APPENDIX I

No. 19-3361

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 30, 2022
DEBORAH S. HUNT, Clerk

WALTER RAGLIN,

Petitioner-Appellant,

v.

TIM SHOOP, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: BOGGS, KETHLEDGE, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Murphy recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: June 30, 2022

Mr. Allen L. Bohnert
Federal Public Defender's Office
Capital Habeas Unit
1401 W. Capitol Street
Suite 490
Columbus, OH 43215

Re: Case No. 19-3361, *Walter Raglin v. Tim Shoop*
Originating Case No.: 1:00-cv-00767

Dear Mr. Bohnert,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Jacob A. Cairns
Ms. Margaret Moore
Mr. Charles L. Wille

Enclosure