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United States Court of Appeals, Sixth Circuit.

Kelontae CARTER, Petitioner-Appellant,

v.

Christopher LAROSE, Warden, Respondent-Appellee.

No. 21-3536

FILED February 3, 2023

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

Attorneys and Law Firms

Rhys Brendan Cartwright-Jones, Law Offices, Youngstown, OH, for Petitioner-Appellant.

Hilda Rosenberg, Office of the Attorney General of Ohio, Cincinnati, OH, for Respondent-Appellee.

Before: SILER, COLE, and DAVIS, Circuit Judges.

ORDER

*1 Kelontae Carter, an Ohio prisoner represented by counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The parties waived oral argument, and we unanimously agree that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2015, a jury found Carter guilty of aggravated murder, murder, aggravated robbery, and felonious assault. The convictions stemmed from the shooting of Kristopher Stuart after Carter and his uncle, DeJuan Thomas, attempted to rob him. The trial court merged the convictions and sentenced Carter to 20 years to life imprisonment, to run consecutively to 3 years of imprisonment for a firearm specification. His direct appeal was unsuccessful. *State v. Carter*, 96 N.E.3d 1046 (Ohio Ct. App. 2017), *perm. app. denied*, 90 N.E.3d 952 (Ohio 2018).

Carter then filed a § 2254 petition, asserting, among other things, that the trial court violated his Sixth Amendment right to confront witnesses against him. U.S. Const. amend. VI. The trial court allowed Thomas's cellmate and friend to testify that Thomas said that he and Carter went to Stuart's home to steal money and drugs, which resulted in the fatal shooting. *See Carter*, 96 N.E.3d at 1057. Thomas died before trial and was unable to testify. The district court dismissed the petition, *Carter v. Larose*, No. 4:19-CV-00208, 2021 WL 1903696 (N.D. Ohio May 12, 2021), but granted Carter a certificate of appealability ("COA") on his Confrontation Clause claim, *Carter v. Larose*, No. 4:19-CV-208, 2022 WL 368265 (N.D. Ohio Feb. 8, 2022), and Carter did not seek to expand the COA on appeal.

On appeal, Carter proposes that "virtually any claim concerning a non-testifying—here, deceased—informant should be cognizable under *Crawford v. Washington*, 541 U.S. 36 (2004)." He therefore argues that the hearsay testimony provided by the jailhouse informant should have been excluded because Thomas was unavailable and he did not have a prior opportunity to cross-examine him.

In an appeal from the denial of a habeas corpus petition, we review the district court's legal conclusions de novo and its factual findings for clear error. *Miles v. Jordan*, 988 F.3d 916, 924 (6th Cir.) *cert. denied*, 142 S. Ct. 583 (2021). Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court "shall not" grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless" the state court decision either (1) "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) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The Confrontation Clause of the Sixth Amendment prohibits the admission of out-of-court testimonial statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Davis v. Washington*, 547 U.S. 813, 821 (2006). The Confrontation Clause is not implicated by the admission of non-testimonial hearsay statements, however. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007). A statement is testimonial if its primary purpose is to prove past events that are potentially relevant to a later criminal trial. *See Ohio v. Clark*, 576 U.S. 237, 244-46 (2015). "[S]tatements made to police in the course of an official investigation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 81. Supreme Court (Refs & Annos)

28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Currentness

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 928; Pub.L. 100-352, § 2(a), (b), June 27, 1988, 102 Stat. 662.)

Notes of Decisions (519)

28 U.S.C.A. § 1254, 28 USCA § 1254
Current through P.L. 118-106. Some statute sections may be more current, see credits for details.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELONTAE CARTER, Petitioner, v. CHRISTOPHER LAROSE, Warden Respondent.	)	CASE NO. 4:19CV208 JUDGE JAMES S. GWIN MAGISTRATE JUDGE JONATHAN D. GREENBERG **REPORT & RECOMMENDATION**

This matter is before the magistrate judge pursuant to Local Rule 72.2. Before the Court is the Petition of Kelontae Carter ("Carter" or "Petitioner"), for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Carter is in the custody of the Ohio Department of Rehabilitation and Correction pursuant to journal entry of sentence in the case *State v. Carter*, No. 14CR-960. For the following reasons, the undersigned recommends that the Petition be DISMISSED.

I. Summary of Facts

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, factual determinations made by state courts are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012); *Montgomery v. Bobby*, 654 F.3d 668, 701 (6th Cir. 2011). The state

appellate court summarized the facts underlying Carter's conviction as follows:

> {¶2} On April 29, 2013, Kristopher Stuart was shot to death in his house on Elm Street in Youngstown. Upon arriving at the scene, police learned Appellant and his uncle, DeJuan Thomas, arrived at separate hospitals with gunshot wounds.
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> * * *
>
> {¶4} Appellant's case was tried to a jury. The victim's brother testified the victim sold drugs, including marijuana and heroin. (Tr. 409, 411, 417). He was 26 years old when he died. The victim previously lived with Lorraine McKinnon, who was like a "mother figure" to the victim, but the brother blamed her for the victim's involvement in drug trafficking. (Tr. 413- 414, 418). The victim's neighbor confirmed the victim was a drug dealer. (Tr. 421-422).
>
> {¶5} On the evening of April 29, 2013, this neighbor heard arguing at the victim's house and then heard a barrage of gunshots. (Tr. 424-426). She soon heard running on the walkway between their houses, but she remained on the floor for a time. When she eventually looked out her window, she saw Appellant's roommate "Q" approach his car, go back to the house, return to his car, and drive away. (Tr. 422, 427). She called 911 to report gunfire. A police car drove past but did not stop. (Tr. 428). The neighbor noticed the victim's door was open. (Tr. 428). At this point, Q returned to look for his phone which he found near the driveway. (Tr. 429, 439). The neighbor spoke to other neighbors about the situation, and they called 911 to report the gunfire and the open door. She then approached the open door with them and saw the victim's body in the house, at which point they called 911 again. (Tr. 430-431).
>
> {¶6} An officer testified he responded to a call of gunfire on Elm Street around 9:30 p.m. He drove around the area but did not notice anything unusual. (Tr. 459). He was soon dispatched to the hospital as DeJuan Thomas had arrived in critical condition after being shot. (Tr. 460). Bullet fragments were recovered during surgery and a bag of pills was found on his person. (Tr. 484, 540). While the officer was at the hospital, Appellant was transferred there from another hospital. (Tr. 461, 492). Appellant had a gunshot wound to the left bicep area. From his experience, the officer ascertained this was a "contact shot" or a close range gunshot wound describing it as: "massive. It was opened up almost like an explosion. It was much larger than a bullet hole. It was, you know, you can put your hand in it. And there were burn marks, you know, around the edges." (Tr. 461-462, 476-477). Appellant told the officer he was walking on Norwood Street near his home when shots were fired at him from

a passing vehicle. (Tr. 462-462). He soon repeated this story to a detective as well. (Tr. 492). The area near Appellant's residence was investigated; no blood or casing was found, and residents did not hear gunfire. (Tr. 494).

{¶7} When police responded to the more specific 911 call around 10:30 p.m., they found the deceased victim on the floor in his Elm Street residence with a silver Smith & Wesson .357 Magnum revolver at his fingertips. (Tr. 445, 447, 536-537, 660). The victim suffered eleven bullet wounds, with the following entry points: three in the chest, two in the back, one in the abdomen, one in the hip, two in the left thigh, one in the right hand, and one grazing the left hand. (Tr. 673-678). The coroner found the victim's wallet containing $445 on his person. (Tr. 710). The victim had opiates in his system. (Tr. 712). The police found a scale, pills, and baggies containing suspected heroin and cocaine at the scene. (Tr. 513, 743).

{¶8} The cylinder of the six-shot revolver contained one live round and five spent cartridges, all of them .357 Magnum caliber. (Tr. 536, 538, 652, 660-661). The victim's DNA was found on the trigger, and a mixture of the victim's DNA and DNA consistent with Appellant was found on the handle of the revolver. (Tr. 638). This was believed to be Appellant's touch DNA, but due to the amount of blood at the scene, it was possible the DNA on the revolver's handle was from blood. (Tr. 645-646). In the 12-foot by 12-foot room where the victim was lying, there was blood on a mattress; in this vicinity, there was blood spatter on the window blinds and blood and body matter on the ceiling. (Tr. 532). This blood matched Appellant (as did blood on the driveway and front step). Blood on the sidewalk matched DeJuan Thomas. (Tr. 639).

{¶9} A bullet jacket recovered from Thomas during surgery had characteristics consistent with the victim's .357 revolver. (Tr. 661-662). Ten fired .40 caliber cartridge cases were collected, mostly from one corner of the room. (Tr. 531). These were not fired from the revolver and were all fired from the same firearm. (Tr. 661). A bullet extracted from the victim's right wrist and three fired bullets recovered from the scene were inconsistent with the revolver and were all .40 S&W caliber or 10 mm auto caliber with the same class of characteristics (but there remained insufficient features to say they were fired from the same firearm). (Tr. 661, 665). A distinct fired bullet core was found lying on the floor near the victim. (Tr. 774). This bullet core had a different direction of twist (six lands and grooves with a left twist) than the revolver (five lands and grooves with a right twist) and the four other fired bullets (a rare six-sided polygonal rifling-style with a right twist). (Tr. 662-663, 665-666). From this, the forensic scientist, testifying as a ballistics expert for the Bureau of Criminal Investigation ("BCI"), concluded at least three different

firearms were used. (Tr. 664).

{¶10} The lead detective visited Appellant in the emergency room. Appellant said the story he told to the other detective and the first responding officer was false and he wanted to tell the truth. He said his uncle called him, asked him to pick him up, and said they were going to Elm Street for a "bop." (Tr. 727). In the detective's experience, this was slang for a robbery. (Tr. 727, 733). The detective thus stopped the interview and went to his car to retrieve a Miranda rights waiver form, which he read to Appellant and his mother. (Tr. 727).

{¶11} Appellant told the detective they knocked on the victim's door and were invited in; he said he sat on the bed while Thomas and the victim argued in the hallway. (Tr. 729). Appellant told the detective "bop" meant drug deal. (Tr. 733). The detective believed Appellant changed the meaning after realizing he made a mistake by admitting they had intent to commit a robbery. (Tr. 761). Appellant told the detective the victim robbed Thomas by demanding Thomas give him what he had. At this point, Appellant said: he was shot; he ran outside; he heard more shots; he got in the car; his uncle stumbled out; and he dragged his uncle to the car. Appellant dropped his uncle off at a hospital guard shack. Appellant went home, and his sister drove him to a different hospital. (Tr. 730). He told the detective the victim had a "cowboy" gun (not an "automatic" weapon like the detective carried). (Tr. 732). Appellant's hands were swabbed for gunshot residue just before 1:30 a.m. Weeks later, the test result came back negative. (Tr. 815).

{¶12} When the detective arrived at work the next day, he had messages from Appellant saying he needed to speak with the detective immediately. The detective returned to the hospital and re-Mirandized Appellant. (Tr. 734). Appellant reported it was not the victim who robbed his uncle but was his uncle who robbed the victim. Appellant said he merely gave his uncle a ride and had no prior knowledge of the robbery. (Tr. 735). The detective asked Appellant to provide a video-statement at the police department after the hospital released him. (Tr. 735-736).

{¶13} Appellant came to the station with his parents and provided a corresponding video-statement which was played to the jury. (Tr. 747). In the video, Appellant said he was accompanying his uncle "to hit a bop" which he said was a "drug transaction." He saw a man with a child in a room on the opposite side of the hall from the room he entered. Appellant sat on the bed while his uncle and the victim talked in the hallway. He heard his uncle order the victim to "give the shit up," and the victim responded, "I ain't got nothin'." He said his uncle and the victim started wrestling and ended up in the room where Appellant was sitting on the bed. Appellant said the shot that hit him

knocked him off the bed into the corner. He claimed he had no gun and they were still wrestling when he fled the room during which time he heard more shots.

{¶14} At the time Appellant provided these statements, it was believed DeJuan Thomas was dying. (Tr. 749). After Thomas recovered, Appellant changed his story and said there was no robbery. (Tr. 750-751). (DeJuan Thomas subsequently died before trial in a separate shooting incident). As for the person Appellant saw in a room with a child, the detective testified Laquawn Hopkins pled guilty to tampering with evidence. (Tr. 740, 782). It was elicited that Hopkins hid with his child in the backyard during the shooting, but he thereafter entered his room to remove photographs so he could not be connected with the situation. (Tr. 741).

{¶15} The detective believed the evidence suggested the collection of shell casings found in the corner were consistent with a gun being fired from Appellant's position in the room. He noted the evidence as to: the testimony about a third firearm producing a bullet core; the direction of cartridge ejection from a semi-automatic firearm; the blood evidence belonging to Appellant on the mattress, ceiling, and blinds; and Appellant's admitted position in the room (which we note included Appellant's statement he was knocked into a corner upon being shot). (Tr. 738, 774, 794-795). The detective said he filed the juvenile complaint against Appellant after speaking to an inmate.

{¶16} Jonathan Queener testified he was in the county jail with longtime friend DeJuan Thomas when Thomas said: he and Appellant went to rob the victim; he told Appellant they were going to get money and try to get drugs; the victim pulled out a .357; they exchanged fire; and Appellant dropped him off at the hospital. (Tr. 564-565, 570). Queener acknowledged he benefitted from a plea deal in return for his agreement to testify truthfully; his aggravated burglary charge was reduced to burglary, and the state recommended community control. (Tr. 561-562).

{¶17} Loraine McKinnon testified the victim lived with her when he was in his teens and was like a son to her. (Tr. 593, 596, 604). She also knew Appellant because he would visit his female cousin who stayed at her house; she said she loved Appellant (as she loved the victim). (Tr. 591, 599). This witness testified: Appellant apologized to her after the shooting; he told her he did not know they were going to "Kris's" house; and he explained his uncle called him to accompany him on an "easy lick," which she defined as a street term meaning to "rob someone." (Tr. 597-598). She explained she did not call the police upon learning this because Appellant was a child and his uncle was to blame; she voiced her story to a prosecutor who called her while preparing for

trial. (Tr. 615). She noted the victim's guns had been stolen a couple weeks prior to his death. (Tr. 602).

State v. Carter, 96 N.E.3d 1046, 1054-1057 (Ohio Ct. App. Aug. 30, 2017).

II. Procedural History

A. Trial Court Proceedings

On November 14, 2013, the state charged Carter with the murder of Stewart in a complaint filed in juvenile court. *Carter*, 96 N.E.3d at 1054. Carter was subject to mandatory transfer to the general division of the common pleas court because he was seventeen at the time of the crime, and the juvenile court found probable cause to believe he committed murder. *Id.*

On October 16, 2014, the Mahoning County grand jury indicted Carter on the following charges:

- aggravated murder in violation of Ohio Rev. Code § 2903.01(B)(F), accompanied by a firearm specification;
- aggravated robbery in violation of Ohio Rev. Code § 2911.01(A)(1)(C), accompanied by a firearm specification; and, alternatively,
- murder in violation of Ohio Rev. Code § 2903.03(B)(D), accompanied by a firearm specification; and
- felonious assault in violation of Ohio Rev. Code § 2903.11 (A)(2)(D), accompanied by a firearm specification.

(Doc. No. 6-1, Ex. 1.) Carter entered pleas of not guilty to all charges. (*Id.* at Ex. 2.)

The case proceeded to jury trial. On December 8, 2015, the jury returned its verdict, finding Carter guilty of all charges. (*Id.* at Exs. 3 & 4.)

On December 22, 2015, the state trial court held a sentencing hearing. The trial court sentenced Carter to 20 years to life for aggravated murder plus three years for the firearm

specification, and merged the remaining charges. (*Id.* at Ex. 5.)

B. Direct Appeal

Carter, through counsel, filed a timely notice of appeal to the Seventh District Court of Appeals, Mahoning County, Ohio. In his appellate brief, he raised the following assignments of error:

I. The Trial Court erred in permitting a jailhouse snitch to testify to an alleged out-of-court statement made by a co-defendant in the trial of Defendant-Appellant as it both constituted inadmissible hearsay and violated his confrontation rights. (Tr. Vol. I, pp.24-35; Tr. Vol. III, pp. 558-588).

Issue Presented for Review: Did the trial court commit prejudicial error in allowing the testimony of a jailhouse snitch claiming that a subsequently deceased co-defendant had told him that Defendant-Appellant and he went to the crime scene for the purpose of committing a robbery to be used against Defendant-Appellant when such testimony was inadmissible hearsay and violated his right to confrontation?

II. Appellant was denied equal protection of the laws, fundamental fairness and his rights under the Fourteenth Amendment as a result of the systematic removal of African-American jurors and the racially-based appeal of the prosecution. (Tr. Vols. I, II, pp. 39-369)

Issue Presented for Review: Was Defendant-Appellant denied equal protection and due process when three African-American jurors were removed from the venire and the prosecutor made an explicit race-based appeal to the jury in his rebuttal argument?

III. Appellant was denied the effective assistance of counsel.

Issue Presented for Review: Was Defendant-Appellant's conviction against the Manifest Weight of the Evidence and based on insufficient evidence when no evidence supported elements of some verdicts and all verdicts were supported by a combination of unreliable hearsay statements?

IV. Appellant's conviction violates the Fourteenth Amendment to the

United States Constitution and Article I § 16 of the Ohio Constitution as the conviction was against the Manifest Weight of the Evidence and not supported by sufficient evidence.

Issue Presented for Review: Was Defendant-Appellant's conviction against the Manifest Weight of the Evidence and based on insufficient evidence when no evidence supported elements of some verdicts and all verdicts were supported by a combination of unreliable hearsay statements?

V. The mandatory transfer of Appellant, an alleged juvenile offender, violated his rights of due process and equal protection. (Transcript from Mahoning County Juvenile Court, September 19, 2014)

Issue Presented for Review: Did the mandatory transfer of Appellant, an alleged juvenile offender, violate his rights to due process and equal protection pursuant to *State v. Aalim*, Ohio Supreme Court Case Number 2015-0677.

(*Id.* at Exs. 6 & 7.) The State filed a brief in response. (*Id.* at Ex. 8.) Carter filed a Reply. (*Id.* at Ex. 9.)

On August 30, 2017, the state appellate court affirmed Carter's convictions.[1] (*Id.* at Ex. 12.)

On September 4, 2017, Carter moved for reconsideration pursuant to App. R. 26(A) and asked the court to certify a conflict. (*Id.* at Ex. 13.) In his motion, Carter asked the court to revisit his Confrontation Clause and Hearsay claim, asserted in his first assignment of error, and his ineffective assistance of counsel claims, asserted in his third assignment of error. (*Id.*) He also asked the court to consider that trial counsel was ineffective for failing to argue that he could not be transferred to the court of common pleas without an amenability hearing. (*Id.*) The appellate court

[1] The resolution of Carter's appeal was delayed because the Court of Appeals held this case in abeyance pending the Ohio Supreme Court's reconsideration of *State v. Aalim*, 83 N.E.3d 862 (Ohio 2016), which held that the mandatory transfer of a juvenile to the general division violates a juvenile's right to due process under the Ohio Constitution. (Doc. No. 6-1, Ex.10.) On May 31, 2017, the Ohio Supreme Court vacated the *Aalim* decision, and the Ohio Court of Appeals lifted the stay. (*Id.* at Ex. 11.)

had rejected the underlying issue in the fifth assignment of error. On September 28, 2017, the appellate court denied Carter's motion for reconsideration and the motion to certify a conflict. (*Id.* at Ex. 14.)

On October 27, 2017, Carter, proceeding *pro se*, filed a Notice of Appeal with the Supreme Court of Ohio. (*Id.* at Ex. 15.) In his Memorandum in Support of Jurisdiction, Carter raised the following Propositions of Law:

> I. The lower courts erred in finding that permitting a jailhouse snitch to testify to an alleged out of court statement made by a co-defendant did not constitute hearsay and a violation of confrontation rights.
>
> II. The Appellant was denied equal protection of the laws and his rights under the Fourteenth Amendment as a result of the systematic removal of African-American jurors.
>
> III. The Appellant was denied the effective assistance of counsel.
>
> IV. The Appellant's conviction violated the Fourteenth Amendment to the United States Constitution and Article I, §16 of the Ohio Constitution as the conviction was against the manifest weight of the evidence and not supported by sufficient evidence.

(*Id.* at Ex. 16.) The State did not file a response.

On January 31, 2018, the Supreme Court of Ohio declined to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4).[2]

C. Federal Habeas Petition

On January 29, 2019, Carter, through counsel, filed a Petition for Writ of Habeas Corpus in this Court and asserted the following grounds for relief:

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[2] Carter also moved to file an amended memorandum in support of jurisdiction to include pages 4 and 15 which were missing from the original memorandum. Doc. No. 6-1 at Exs. 16, 17& 18.) The Ohio Supreme Court denied his motion to amend as moot on January 31, 2018, when it declined jurisdiction. (*Id.* at Ex. 19.)

GROUND ONE: The Trial Court violated Carter's Sixth and Fourteenth Amendment rights in permitting a jailhouse snitch to testify to an alleged out-of-court statement that his deceased co-defendant made.

GROUND TWO: The trial court denied Carter equal protection of the laws and his rights under the Fourteenth Amendment as a result of its allowance of systematic removal of African-American jurors and the racially-based appeal of the prosecution.

GROUND THREE: Appellant was denied the effective assistance of counsel.

GROUND FOUR: Carter's convictions violate the Fourteenth Amendment to the United States Constitution was not supported by sufficient evidence.

GROUND FIVE: The mandatory transfer of Kalontae, an alleged juvenile offender, to the adult court system violated his rights to due process and equal protection.

(Doc. 1.)

On March 27, 2019, Warden Christopher Larose ("Respondent") filed his Return of Writ. (Doc. No. 6.) Carter filed a Traverse on May 10, 2019. (Doc. No. 8.)

III. Exhaustion and Procedural Default

A. Legal Standard

Petitioners must exhaust their state remedies prior to raising claims in federal habeas corpus proceedings. *See* 28 U.S.C. § 2254(b), (c). This requirement is satisfied "when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990).

Federal courts will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or where failure to review the claim would result in a fundamental miscarriage of justice. *See Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)). A claim may become procedurally defaulted in two ways. *Id.* First, a

petitioner may procedurally default a claim by failing to comply with state procedural rules in presenting his claim to the appropriate state court. *Id.; see also Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). If, due to petitioner's failure to comply with the procedural rule, the state court declines to reach the merits of the issue, and the state procedural rule is an independent and adequate grounds for precluding relief, the claim is procedurally defaulted.[3] *Id.*

Second, a petitioner may also procedurally default a claim by failing to raise and pursue that claim through the state's "ordinary appellate review procedures." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, it is procedurally defaulted. *Engle v. Isaac*, 456 U.S. 107, 125 n. 28, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *see also Coleman v. Thompson*, 501 U.S. 722, 731 32, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Lovins*, 712 F.3d 283, 295 (6th Cir. 2013) ("a claim is procedurally defaulted where the petitioner failed to exhaust state court remedies, and the remedies are no longer available at the time the federal petition is filed because of a state procedural rule.") This second type of procedural default is often confused with exhaustion. Exhaustion and procedural default, however, are distinct concepts. AEDPA's exhaustion

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[3] In *Maupin*, the Sixth Circuit established a four-step analysis to determine whether a claim is procedurally defaulted. 785 F.2d at 135. Under this test, the Court decides (1) whether the petitioner failed to comply with an applicable state procedural rule, (2) whether the state courts actually enforced the state procedural sanction, (3) whether the state procedural bar is an "independent and adequate" state ground on which the state can foreclose federal review, and (4) whether the petitioner has demonstrated "cause" and "prejudice." *Id.* at 138 39; *Barkley v. Konteh*, 240 F. Supp. 2d 708 (N.D. Ohio 2002). "In determining whether a state court actually enforced a procedural rule, we apply the 'plain statement' rule of *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)." *Lovins v. Parker*, 712 F.3d 283, 296 (6th Cir. 2013) ("a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on the procedural bar.") (citations omitted).

requirement only "refers to remedies still available at the time of the federal petition." *Engle*, 456 U.S. at 125 n.28. Where state court remedies are no longer available to a petitioner because he failed to use them within the required time period, procedural default and not exhaustion bars federal court review. *Id.* In Ohio, a petitioner is not entitled to raise claims in post-conviction proceedings where those claims could have been raised on direct appeal. *Id.* Thus, if an Ohio petitioner failed to raise a claim on direct appeal, which could have been raised, the claim is procedurally defaulted. *Id.*

A claim is adequately raised on direct appeal if it was "fairly presented" to the state court. To fairly present a claim to a state court a petitioner must assert both the legal and factual basis for his claim. *See McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). Accordingly, a "petitioner must present his claim to the state courts as a federal constitutional issue-not merely as an issue arising under state law." *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984). A petitioner can take four actions in his brief which are significant to the determination as to whether a claim has been fairly presented as a federal constitutional claim: (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. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

A petitioner's procedural default, however, may be excused upon a showing of "cause" for the procedural default and "actual prejudice" from the alleged error. *See Maupin*, 785 F.2d at 138 39. "Demonstrating cause requires showing that an 'objective factor external to the defense impeded counsel's efforts to comply' with the state procedural rule." *Franklin v. Anderson*, 434 F.3d 412, 417 (6th Cir. 2006) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Meanwhile,

"[d]emonstrating prejudice requires showing that the trial was infected with constitutional error." *Id.* Where there is strong evidence of a petitioner's guilt and the evidence supporting petitioner's claim is weak, the actual prejudice requirement is not satisfied. *See United States v. Frady*, 456 U.S. 152, 172, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); *Perkins v. LeCureux*, 58 F.3d 214, 219 20 (6th Cir. 1995); *Rust v. Zent*, 17 F.3d 155, 161-62 (6th Cir. 1994). Prejudice does not occur unless petitioner demonstrates "a reasonable probability" that the outcome of the trial would have been different. *See Mason v. Mitchell*, 320 F.3d 604, 629 (6th Cir. 2003) (citing *Strickler v. Greene*, 527 U.S. 263, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

Finally, a petitioner's procedural default may also be excused where a petitioner is actually innocent in order to prevent a "manifest injustice." *See Coleman v. Thompson*, 501 U.S. 722, 749 50, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Conclusory statements are not enough a petitioner must "support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See also Jones v. Bradshaw*, 489 F. Supp. 2d 786, 807 (N.D. Ohio 2007); *Allen v. Harry*, 497 F. App'x 473, 480 (6th Cir. 2012).

B. Application to Petitioner

Respondent asserts that Carter procedurally defaulted two of the Grounds in his habeas petition: his argument that the prosecution engaged in misconduct by making a race-based appeal to the all-white jury in rebuttal closing argument; and his assertion that the mandatory bindover from the juvenile court to the Court of Common pleas without an amenability hearing violates his right to due process and equal protection. (Doc. No. 6 at 32, 50.)

1. Prosecutorial Misconduct

First, Respondent assets that Carter procedurally defaulted part of the second ground of his habeas Petition: that the prosecution engaged in misconduct by making a race-based appeal to the all-white jury in rebuttal closing argument.[4] (Doc. No. 6 at 32-33.) He argues that Carter procedurally defaulted the claim by failing to object to the allegedly improper remark. (*Id.*)

Carter did not address the issue of procedural default in relation to the second ground of his petition in either his Petition or his Traverse. Therefore, the Respondent's argument regarding procedural default is unopposed.

The appellate court decision explicitly analyzed this claim under a plain error standard because Carter's counsel had failed to object during the trial:

> {¶66} Where the defense did not object to a statement in the prosecution's closing argument, we can review only for plain error. *State v. Ballew*, 76 Ohio St.3d 244, 254-255, 1996 Ohio 81, 667 N.E.2d 369 (1996). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Landrum*, 53 Ohio St.3d at 111, quoting *State v. Long*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804 (1978), paragraph three of the syllabus. An appellate court's invocation of plain error is discretionary and requires the existence of an obvious error which affected substantial rights. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22-23.

Carter, 96 N.E.3d at 1068.

The Sixth Circuit has explained, "it was a well-established and regularly followed practice in Ohio for appellate courts to deem as 'waived' or procedurally defaulted any claims of error not specifically objected to at trial." *Taqwiim v. Johnson*, 229 F.3d 1154 (table), No. 99-3425, 2000 WL 1234322, at *3 (6th Cir. Aug. 22, 2000) (*citing State v. Brown*, 528 N.E.2d 523, 534 (Ohio 1988))

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[4] Respondent does not assert that Carter waived his argument relating to the *Batson* challenge, the merits of which are discussed in the following section.

and overruled in part on other grounds by Thompson v. Keohane, 516 U.S. 99 (1995), and *Ylst*, 501 U.S. at 803-04). Further, Ohio's contemporaneous objection rule, which was enforced by the court of appeals in this case, constitutes an adequate and independent state procedural bar that may be relied on as grounds for rejecting a claim of error. *See, e.g., Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) ("Ohio's contemporaneous objection rule constitutes an adequate and independent state ground that bars federal habeas review absent a showing of cause and prejudice."); *Condon v. Wolfe*, 310 F. App'x 807, 813 (6th Cir. 2009).

Here, the state appellate court's review for plain error constitutes an enforcement of the state procedural bar by the reviewing court. *See, e.g., Condon*, 310 F. App'x at 813 ("By adopting a plain error review, the Ohio Court of Appeals acknowledged Condon's failure to object to the statement and held that the normal standard of review did not apply."); *citing Mason v. Mitchell*, 320 F.3d 604, 635 (6th Cir. 2003). The Sixth Circuit has made clear that, where an appellate court ruling is based on procedural default, "the Ohio Supreme Court's later unexplained decision summarily declining jurisdiction to hear the case must be presumed to rely on the same procedural default." *Taqwiim*, 2000 WL 1234322, at *3 (*citing Levine v. Torvik*, 986 F.2d 1506, 1517 n.8 (6th Cir. 1993)). Therefore, Carter's trial counsel's failure to object to the prosecutor's remark constitutes a procedural default which bars federal habeas review of his claim, unless he shows cause for the default, or actual innocence of the underlying offense.

In this case, Carter does not argue that his trial counsel was ineffective for failing to object to the prosecutor's racially charged closing argument. Regardless, this cannot provide cause for the default because he failed to raise such a claim in his state court appeals. Since he has no remaining state court remedy to exhaust an ineffective assistance of counsel claim based on the failure to

object, Carter has procedurally defaulted this claim and therefore it cannot serve as cause for his default. *See Edwards*, 529 U.S. 446 at 452; *Murray*, 477 U.S. at 488-89.

Carter also has not offered any new evidence of actual innocence to overcome the procedural default. Because there is no cause for the default, or new evidence of innocence, the prosecutorial misconduct claim asserted in Carter's second ground for relief is procedurally defaulted, and should be dismissed.

2. Mandatory Bindover

Respondent also asserts that Carter procedurally defaulted ground five of his habeas Petition, which asserts that the mandatory bindover from the juvenile court to the Court of Common pleas without an amenability hearing violates his right to due process and equal protection, because he failed to present this claim to the Ohio Supreme Court on direct appeal. (Doc. No. 6 at 50.)

Although Carter presented this claim on direct appeal to the Ohio Court of Appeals, it is undisputed that he abandoned it in his further appeal to the Ohio Supreme Court. To be considered fairly presented, a claim must be presented to the state's highest court. *See O'Sullivan*, 526 U.S. at 845, 848.

However, as discussed *supra*, a procedural default maybe excused with a showing of cause and actual prejudice. In this case, Carter did not address his procedural default or the issue of cause in his Petition. In his Traverse, he explains that he filed his Jurisdictional Brief with the Ohio Supreme Court *pro se,* and notes that his only state court remedy at this point would be to file a delayed-reopened appeal on the issue, "only to be denied jurisdiction as a virtual certainty." (Doc. No. 8 at 18-19.) Sixth Circuit precedent makes clear that Carter's "*pro se* status before the Ohio Supreme Court is insufficient to establish cause to excuse his procedural default." *Bonilla v. Hurley*,

370 F.3d 494, 498 (6th Cir. 2004) *citing Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995). Thus, his *pro se* status cannot constitute cause for this default.

Carter's fifth ground could still be considered if he provided new, reliable evidence of actual innocence, but he does not do so here. Although he challenges the sufficiency of the evidence supporting his conviction, as discussed below, Carter has not come forward with any new, credible evidence to demonstrate his innocence.

In the absence of a showing of cause or actual innocence to excuse the procedural default, Carter's fifth ground for relief should be dismissed.

IV. Review on the Merits

A. Legal Standard

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 337 (1997). The relevant provisions of AEDPA state:

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

28 U.S.C. § 2254(d) (1996).

Clearly established federal law is to be determined by the holdings (as opposed to the dicta) of the United States Supreme Court. *See Parker v. Matthews*, 567 U.S. 37, 132 S.Ct. 2148, 183

L.Ed.2d 32 (2012); *Renico v Lett*, 559 U.S. 766, 130 S.Ct. 1855, 1865-1866 (2010); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Shimel v. Warren*, 838 F.3d 685, 695 (6th Cir. 2016); *Ruimveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir. 2005). Indeed, the Supreme Court has indicated that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court." *Parker*, 567 U.S. at 48-49; *Howes v. Walker*, 567 U.S. 901, 132 S.Ct. 2741, 183 L.Ed.2d 612 (2012). *See also Lopez v. Smith*, 574 U.S. 1, 7, 135 S.Ct. 1, 4, 190 L.Ed.2d 1 (2014) (per curiam) ("Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced'") (quoting *Marshall v. Rodgers*, 569 U.S. 58, 133 S.Ct. 1446, 1450, 185 L.Ed.2d 540 (2013)).

A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. at 413. By contrast, a state court's decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id. See also Shimel*, 838 F.3d at 695. However, a federal district court may not find a state court's decision unreasonable "simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. at 411. Rather, a federal district court must determine whether the state court's decision constituted an objectively unreasonable application of federal law. *Id.* at 410-12. "This standard generally requires that federal

courts defer to state-court decisions." *Strickland v. Pitcher*, 162 F. App'x 511, 516 (6th Cir. 2006) (citing *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

In *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court held that as long as "fairminded jurists could disagree on the correctness of the state court's decision," relief is precluded under the AEDPA. *Id.* at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not "treat[ ] the reasonableness question as a test of its confidence in the result it would reach under *de novo* review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 785. The Court noted that Section 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Id.* (internal quotation marks omitted). Therefore, a petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786 87. This is a very high standard, which the Supreme Court readily acknowledged. *See id.* at 786 ("If this standard is difficult to meet, that is because it is meant to be.").

1. Ground One

The first ground of Carter's habeas Petition asserts that the trial court violated Carter's Sixth and Fourteenth Amendment rights in permitting a inmate Jonathan Queener to testify to an alleged out-of-court statement that DeJuan Thomas, Carter's deceased co-defendant, allegedly made while in prison. (Doc. No. 1 at 6.) Carter argues that the alleged statements were not credible, and that Queener was rewarded for his cooperation with probation and permission to move out of state. (*Id.* at 9.) Carter maintains that the statement constitutes inadmissible hearsay, and asserts that the trial

court's decision to permit the testimony violated his right to confront his accuser.

The court of appeals held that alleged hearsay statements fell under the "statement against interest" exception to the hearsay rules contained in Evid. R. 804(B)(3). *Carter*, 96 N.E.3d at 1059. Therefore, Respondent asserts that Carter's claim that the trial court erred in admitting the Thomas' statement in violation of Ohio's hearsay rules is not cognizable, because the admissibility of evidence is a state law issue not cognizable on habeas corpus review. (Doc. No. 6 at 20.)

The court of appeals addressed this ground as follows:

> {¶ 19} Appellant sets forth five assignments of error, the first of which states: "The Trial Court erred in permitting a jailhouse snitch to testify to an alleged out-of-court statement made by a co-defendant in the trial of Defendant Appellant as it both constituted inadmissible hearsay and violated his confrontation rights."
>
> {¶ 20} This assignment of error deals with the testimony of Mr. Queener as to what DeJuan Thomas told him while they were both incarcerated in the county jail. Specifically, Appellant contests the admission of testimony that Thomas said he and Appellant went to the victim's house with intent to rob the victim of money and drugs. Appellant raises a hearsay argument and then a confrontation clause argument.
>
> {¶ 21} Evid.R. 804(B) provides hearsay exceptions where the declarant is unavailable as a witness. A declarant is unavailable if he is deceased. Evid. R. 804(A)(4). One of the hearsay exceptions applicable to an unavailable declarant is the statement against interest exception contained in Evid.R. 804(B)(3), which provides:
>
> > Statement Against Interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.
>
> {¶ 22} Appellant does not contest the statement was against the interest of the

declarant, DeJuan Thomas. Rather, he argues this rule does not apply to a codefendant, citing ¶ 66 of the First District's Webster case and a concurring opinion in the Ninth District's Wilson case. In *Webster*, the court held this exception in Evid.R. 804(B)(3) does not apply to the defendant's attempt to introduce his own statement. *State v. Webster*, 1st Dist. No. C-120452, 2013-Ohio-4142, 2013 WL 5432082, ¶ 66 (and holding Evid.R. 801(D)(2)(a) cannot be used by a party to introduce his own statement but is for introduction of an admission by a party-opponent). The concurring judge in *Wilson* cited *Webster* for the proposition that Evid.R. 804(B)(3) does not apply to statements of a party to the action. *State v. Wilson*, 9th Dist. No. 26683, 2014-Ohio-376, 2014 WL 467499, ¶ 63. Neither the *Wilson* case nor the *Webster* concurrence stand for the proposition that Evid.R. 804(B)(3) cannot be used to admit the statement of someone other than the defendant on trial merely because the declarant was alleged to be a participant in the offense and/or was indicted as a co-defendant. DeJuan Thomas was not a party to the trial of this case.

{¶ 23} Regardless, the Ohio Supreme Court permits the admission of hearsay statements against interest made by co-defendants who are unavailable. In Yarborough, a woman testified her husband (the mastermind of a plan who died before trial) told her he paid the defendant to have the victim killed. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 41. In addition, a man testified this mastermind told him they should pay the defendant to kill the victim. *Id.* at ¶ 55. The Supreme Court found both statements were admissible under the statement against interest hearsay exception. *Id.* at ¶ 41 57. *See also State v. Issa*, 93 Ohio St.3d 49, 58 59, 752 N.E.2d 904 (2001) (where a subpoenaed co-defendant who refused to testify after pleading his rights under the Fifth Amendment was considered unavailable, his confession was admissible as a statement against interest). Appellant's initial argument is thus without merit.

{¶ 24} Appellant's next argument concerns the second part of Evid.R. 804(B)(3): "A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement." Appellant criticizes the credibility of Mr. Queener, emphasizing he testified in exchange for a generous resolution of his criminal case. However, the credibility of the witness providing the declaration of the unavailable declarant does not affect the statement's admissibility as the rule refers to "the truthworthiness of the statement," not the truthworthiness of the testifying witness. *State v. Landrum*, 53 Ohio St.3d 107, 114, 559 N.E.2d 710, 720 (1990) ("As the fact finder, the jury was responsible for assessing [his] credibility as a witness"), quoting Former Evid. R. 804(B)(3) (which used trustworthiness instead of truthworthiness as is used in the current rule).

{¶ 25} While the trial court was evaluating the admissibility of Mr. Queener's

statement before trial, the state pointed to the anticipated testimony of Ms. McKinnon (that Appellant indicated to her he knew about the robbery before they arrived) and the testimony of the lead detective. As Appellant points out, the state's projection of the detective's anticipated testimony did not end up being accurate. In arguing corroboration, the state said Appellant told the detective they went to the victim's house to "hit a lick." (Tr. 26). Yet, it was Ms. McKinnon who said Appellant told her he thought it would be an easy "lick" (which she understood to mean robbery). (Tr. 598). The detective testified Appellant told him they went for "a bop." (Tr. 727).

{¶ 26} In any event, Ms. McKinnon's statement provided corroboration. And, the detective's testimony, although not accurately portrayed in advance, also provided some corroboration, notwithstanding Appellant's insistence he used the word "bop" to mean drug transaction. The recovery of a .357 Magnum near the victim's fingertips is corroborative of the statement of Appellant's uncle to Mr. Queener. The DNA evidence demonstrating Appellant was shot while in the victim's bedroom where his body was found can be considered in conjunction with Appellant's own statement to police. Appellant's statement that his uncle robbed the victim just before the shooting was corroborative of his uncle's statement to Mr. Queener. Finally, in determining whether a statement is trustworthy, the Supreme Court has characterized as a corroborating circumstance the fact that a declarant "was not speaking to police and therefore was not trying to curry favor." *Yarbrough,* 95 Ohio St.3d 227, 767 N.E.2d 216 at ¶ 64. The Court recognized "jailhouse confessions to cellmates" may be "trustworthy and admissible." *Id.* (and then held the same cannot be said about a statement shifting blame from the declarant to others).

{¶ 27} The decision admitting the hearsay statement of the unavailable declarant pursuant to Evid.R. 804(B)(3) was within the discretion of the trial court. *Landrum,* 53 Ohio St.3d at 114, 559 N.E.2d 710. Under the totality of the circumstances in this case, the trial court did not abuse its discretion in finding Mr. Queener's testimony as to what DeJuan Thomas told him fell under the hearsay exception in Evid.R. 804(B)(3).

{¶28} Appellant also states the testimony violated his confrontation clause rights. The confrontation clause in the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In the past, an out-of-court declaration by an unavailable witness did not run afoul of the Confrontation Clause if it was accompanied by adequate "indicia of reliability." *See, e.g., Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (if the declaration "falls within a firmly rooted hearsay exception" or exhibits "particularized guarantees of trustworthiness").

{¶29} In 2004, the United States Supreme Court changed this test and held the

confrontation clause prohibits the introduction of "testimonial" statements by a non-testifying witness (unless the witness is unavailable to testify and the defendant had a prior opportunity for cross examination). *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Non-testimonial hearsay was left to the hearsay law of the states. *Id.* at 68. The definition of "testimonial" pertains "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

{¶30} To determine if statements were testimonial the Court developed the "primary purpose" test. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (consolidated cases involving statements made to law enforcement officer and to 911 operator). "Statements are nontestimonial when made in the course of [***19] police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id. See also Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) (clarifying how reviewing courts should consider all relevant circumstances; an ongoing emergency is only one factor in determining whether a statement was procured with a primary purpose of creating an out-of-court substitute for trial testimony). Notably, the Supreme Court described certain "statements from one prisoner to another" as "clearly nontestimonial" for the purposes of the confrontation clause analysis. *Davis*, 547 U.S. at 825.

{¶31} The Ohio Supreme Court has stated that in order to resolve confrontation questions for out-of-court statements made to those who are not law enforcement, Ohio adopted the "objective-witness test." *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 160-161, *citing State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph one of the syllabus. Under this test, a statement is testimonial if an objective witness would have reasonably believed her statement would be available for use at a later trial; the focus is on "the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations." *Stahl*, 111 Ohio St.3d 186 at ¶ 36, quoting *Crawford*, 541 U.S. at 52 ("under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.").

{¶32} Recently, the United States Supreme Court reversed the Ohio Supreme Court's exclusion of evidence under the confrontation clause where a three-year-old told his preschool teacher his mother's boyfriend caused his injuries. The Ohio Supreme Court found the preschool teacher was acting as an agent of the state for law enforcement purposes because teachers have a statutory dual capacity as mandatory reporters and concluded the primary purpose of the statement was to collect evidence for trial. *State v. Clark*, 137 Ohio St.3d 346, 2013-Ohio4731, 999 N.E.2d 592, ¶ 4.

{¶33} The United States Supreme Court addressed the issue of whether statements to persons other than law enforcement officers are subject to the confrontation clause. *Ohio v. Clark*, U.S. , 135 S.Ct. 2173, 2181, 192 L.Ed.2d 306 (2015). The Court declined to categorically exclude statements to non-law enforcement from the confrontation clause's protection and applied the same test as applied to law enforcement. *Id.* In accordance, a statement cannot fall within the confrontation clause unless its primary purpose was testimonial. *Id.* at 2180. If such primary purpose did not exist at the time the statement was made, admissibility is left to the rules of evidence. *Id.*

{¶34} The Court advised that statements to persons other than law enforcement officers "are much less likely to be testimonial than statements to law enforcement officers." *Id.* at 2181. The Court concluded, under all the relevant circumstances in the case, the child's statements to her preschool teacher "clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution. Thus, their introduction at trial did not violate the Confrontation Clause." *Id.*

{¶35} We note Justice Scalia wrote a separate concurrence (joined by Justice Ginsberg) wherein he agreed with employment of the usual test applicable to informal police interrogations and the result in the case. *Id.* at 2183-2184 (Scalia, J., concurring). Justice Thomas wrote a separate concurrence to express his standard position that the confrontation clause only protects statements bearing "sufficient indicia of solemnity to qualify as testimonial" such as "formalized" statements. *Id.* at 2186 (Thomas, J., concurring).

{¶36} Applying this precedent, the admission of DeJuan Thomas's statement to an old friend while both were incarcerated which incriminated himself and Appellant in a robbery and homicide would not implicate the confrontation clause as the primary purpose of the statement was unrelated to creating evidence for prosecution. Pertinent circumstances include the fact the statement was not made to law enforcement or other authority and the statement was made to an old friend while both were incarcerated. Ohio confrontation clause law does not lead to a different conclusion.

Carter, 96 N.E.3d at 1059-61. The court of appeals then cited numerous federal circuit cases holding that *Bruton* applied only to testimonial statements, and rejected Carter's claim that the admission of Thomas' statement violated the *Bruton* rule on the basis that it is not testimonial.[5] *Id.*

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[5] Further, because Thomas died before the trial began, he was not a co-defendant in the case, as contemplated by *Brunton*. A more through discussion of the application of the Supreme Court's *Brunton* decision to this case follows on p. 26, herein.

at 1061-1062.

This analysis is relevant here because Carter's claim that the admission of Thomas' out-of-court statement violated the Confrontation Clause is viable only if Thomas' statement was testimonial. As a general matter, the admissibility of evidence is a state law issue, and not cognizable on habeas corpus review. *See, e.g., Milone v. Camp,* 22 F.3d 693, 702 (7th Cir. 1994); *Serra v. Michigan Dep't of Corrections*, 4 F.3d 1348, 1354 (6th Cir. 1993); *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988). However, as the Sixth Circuit explained, "[w]hen an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). This is a narrow exception, and requires that an alleged violation meet a rigorous standard: "Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they 'offend [] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)).

In this case, Carter argues that the evidentiary ruling violated fundamental principles of justice because the admission of an uncorroborated statement from Queener, who Carter asserts was not a credible witness, deprived him of a fair trial. (Doc. No. 1 at 9-10.) The appellate court considered this argument, and disagreed. The court concluded that McKinnon's testimony and other evidence introduced at trial corroborated Thomas' statement. *Carter*, 96 N.E.3d at 1059. Carter's argument that Queener was not credible is based on a reduction in his sentencing in his criminal case in exchange for his testimony. (*Id.* at 9.) The appellate court concluded that Queener's credibility was not relevant to the application of the hearsay exception and in any event, was a matter for the

jury to decide. *Carter*, 96 N.E.3d at 1059. Therefore, the appellate court reasonably held that the trial court's admission of Thomas' statement did not deprive Carter of his right to a fair trial, and this ruling does not constitute a deprivation of due process sufficient to invoke habeas relief.

Next, Carter argues that the testimony violated his Constitutional right to confront his accuser. The Confrontation Clause of the Sixth Amendment, applicable to the states by way of the Fourteenth Amendment, guarantees the right of an accused "to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Bruton*, the Supreme Court held a defendant is deprived of his rights under the Confrontation Clause when a co-defendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the co-defendant. *Bruton*, 391 U.S. at 132. In *Crawford v. Washington*, the Supreme Court clarified the scope of the Confrontation Clause and held that it presents an absolute bar to the admission of out-of-court "testimonial statements" unless the person making the statement was (or now is) subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). *Crawford* and the cases that followed changed Sixth Amendment jurisprudence by making it clear that the Confrontation Clause protects only against "testimonial" statements. *See Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007); *United States v. Johnson*, 581 F.3d 320, 325 (6th Cir.2009). In the wake of *Crawford* and *Davis*, the Sixth Circuit has explained that "[b]ecause it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements." *Johnson*, 581 F.3d at 325; *see also United States v. Pugh*, 273 F. App'x 449, 455 (6th Cir. 2008) ("Because the statement at issue is nontestimonial in nature . . . an analysis under *Bruton* is unnecessary.").

In *Crawford* the United States Supreme Court left "for another day" the task of determining what constitutes a "testimonial" statement for these purposes. *Crawford v. Washington*, 541 U.S. at 68. Filling this gap, the Sixth Circuit explains the proper inquiry is whether the declarant "intend[ed] to bear testimony against the accused" to determine whether statements are testimonial. *United States v. Collins*, 799 F.3d 554, 577 (6th Cir. 2015) (quotation omitted). This analysis, "depends on whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." *Id.* (quotation omitted). One category of statement that has consistently been excluded is unwitting statements to a confidential informant, where speaker does not know that the informant is working with law enforcement. Multiple Circuit courts have found that such statements are not "testimonial" within the meaning of Crawford's Confrontation Clause rubric. *United States v. Johnson*, 440 F.3d 832, 843 (6th Cir. 2006) (holding that an unwitting declarant's secretly recorded statements to a longtime friend were nontestimonial); *see also United States v. Mooneyham*, 473 F.3d 280, 286 87 (6th Cir. 2007) (stating that co-defendant's out-of-court statements to an undercover officer whose status was unknown to the declarant were nontestimonial); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) ("[A] statement unwittingly made to a confidential informant . . . is not 'testimonial' for Confrontation Clause purposes."); *United States v. Hendricks*, 395 F.3d 173, 182 n. 9, 184 (3d Cir. 2005); *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004).

Here, the relationship between the declarant, Thomas, and the witness, Queener, was that of "old friend[s]," and both were incarcerated when Thomas made the statements that incriminated both himself and his nephew, Carter, in the robbery and homicide. *Carter*, 96 N.E.3d at 1059-61. There is no evidence that Thomas anticipated his old friend would report his statements to law

enforcement, and no basis for an objective witness reasonably to believe that the statement would be available for a later trial. Therefore, the primary purpose of the statements was unrelated to creating evidence for prosecution, which renders the disputed statements nontestimonial. As noted *supra*, nontestimonial statements do not implicate the Sixth Amendment, and cannot constitute a *Brunton* violation. Accordingly, the Court finds the state appellate court reasonably applied clearly established federal law when it considered Carter's argument that his constitutional rights were violated under *Bruton*.[6] It is therefore recommended the Court find Carter's first ground for relief is without merit.

2. Ground Two

The second ground of Carter's habeas Petition asserts that the trial court denied Carter equal protection of the laws and his rights under the Fourteenth Amendment as a result of its allowance of systematic removal of African-American jurors and the racially-based appeal of the prosecution. (Doc. No. 1 at 11.) As discussed *supra*, the second part of this ground, relating to the prosecution's race-based statement during closing arguments, is procedurally defaulted. However, Carter preserved the first part of this ground, relating to jury selection, by properly raising it at all levels of his state court appeal. He argues that the prosecution and the judge systematically removed the only

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[6] Carter's Traverse points to three Sixth Circuit cases which found trial testimony relating to informant statements was "testimonial" for purposes on the Confrontation clause: first, testimony by an officer about information he received from a confidential informant; second, the recorded police statement of an informing witness/accomplice; and third, two police officers' testimony that a confidential informant told them about a defendant's intent to commit a future crime. (Doc. No. 8 at 13-16; citing *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004); *Fulcher v. Motley*, 444 F.3d 791 (6th Cir. 2006); *United States v. Hearn*, 500 F.3d 479 (6th Cir. 2007).) These cases are inapplicable here for a number of reason, including that they all involved trial testimony from police officers about statements made to them, not testimony from a friend of the defendant speaking about a private conversation.

three African-Americans empaneled in the jury pool during the *voir dire* process, in violation of the Constitutional right to equal protection articulated in *Batson v. Kentucky.*

The Equal Protection Clause of the Fourteenth Amendment commands that "no State shall ... deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1. The Supreme Court long has held that the Equal Protection Clause prohibits states from trying a defendant before a jury from which members of his race purposefully have been excluded. *See, e.g., United States v. Harris*, 192 F.3d 580, 586 (6th Cir. 1999). The Court extended this principle in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), in which it ruled that the Equal Protection Clause precludes a party from using a peremptory challenge to exclude members of the jury venire on account of their race. *Batson*, 476 U.S. at 89. It explained that "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [Such procedures] undermine public confidence in the fairness of our system of justice." *Id.* at 87; *see also Miller El v. Dretke*, 545 U.S. 231, 235, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("When the government's choice of jurors is tainted with racial bias, that 'overt wrong ... casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.' "), quoting *Powers v. Ohio*, 499 U.S. 400, 412, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

In *Batson*, the Supreme Court articulated a three-step process for evaluating claims when a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. *Id.* at 96 98First, the court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. *Id.* at 96 97. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking

the juror in question. *Id.* at 97 98. "Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006), quoting *Purkett v. Elem*, 514 U.S. 765, 767 68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Indeed, "[t]he fact that a prosecutor's reasons may be founded on nothing more than a trial lawyer's instincts about a prospective juror does not diminish the scope of acceptable invocation of peremptory challenges, so long as they are the actual reasons for the prosecutor's actions." *United States v. Power*, 881 F.2d 733, 740 (9th Cir. 1989).

Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 98. "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice*, 546 U.S. at 338, 126 S.Ct. 969 (quoting *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769). In making this determination, the Sixth Circuit has observed, "the court presumes that the facially valid reasons proffered by the [party exercising the peremptory challenge] are true." *Braxton v. Gansheimer*, 561 F.3d 453, 459 (6th Cir. 2009) (quoting *Lancaster v. Adams*, 324 F.3d 423, 433 (6th Cir. 2003). The issue, therefore, "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible."); *Miller El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" *Id.*

The Supreme Court has emphasized that trial-court findings on the issue of discriminatory

intent must be afforded "great deference." *See Hernandez v. New York*, 500 U.S. 352, 364 66, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). This makes "particular" sense, it has explained, because

> [t]here will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Id. at 365, quoting *Witt, supra*, 469 U.S. at 428. In fact, "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Id.* at 367. Thus, the state court's determination of whether the prosecutor intended to discriminate is a "question of historical fact," which is presumed correct unless rebutted by clear and convincing evidence. *Lancaster v. Adams*, 324 F.3d 426, 429 (6th. Cir. 2003), citing *Hernandez*, 500 U.S. at 367.

Here, Carter raised a *Batson* claim regarding the jury selection process on direct appeal to both the state appellate court and the Supreme Court of Ohio. (Doc. No. 6 1, Exs. 7 & 18.) The state appellate court considered this claim on direct review and rejected it as follows:

> {¶ 44} Appellant protests the removal of the only three African American members of the jury pool, which we shall refer to as prospective jurors one, two, and three, corresponding to their order of removal. Appellant raises the test in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), mainly with regards to prospective juror two.
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> {¶ 45} As for prospective juror one, the trial court received information the prospective juror spoke to Appellant's mother outside of the courthouse after the first day of voir dire. Upon questioning the next day, prospective juror one said: he spoke to Appellant's mother because she looked like his cousin's mother; he thought he recognized her; he asked her if she knew someone he knew; she said she heard of the person; and she thought the prospective juror looked familiar as well. (Tr. 267 268, 272 273). Prospective juror one saw the woman in the courtroom that day but said he did not know she was Appellant's mother. (Tr. 269). Appellant was present during the conversation; he was sitting on the steps reading a newspaper while the prospective juror talked to his mother. (Tr. 269, 274). The court noted Appellant left

because he did not "want to hear any of the conversation after it began." (Tr. 274 275).

{¶ 46} The prosecutor asked the court to remove this prospective juror for cause. (Tr. 271). The defense expressed doubt the occurrence rose to this level of concern. The court excused the prospective juror. Defense counsel thereafter asked the record to reflect the prospective juror was one of three African Americans out of a panel of 35 or 40 people. (Tr. 275). Counsel stated he wished "to make sure this was not the beginning of a systematic attempt by the state to remove all people of color." The court rejected this suggestion, pointing out: "The impetus of this inquiry was by the court." The court emphasized the appearance of impropriety in speaking to the defendant's mother (especially after seeing her sitting in the courtroom separate from the jury panel) and expressed concern over the potential effect of this on the other jurors if this prospective juror were to remain on the jury. (Tr. 277). The judge also pointed out how court was adjourned early the day before to accommodate this very prospective juror who said he had to handle a family matter immediately (but then went outside and struck up a conversation with Appellant's mother). (Tr. 157, 276).

{¶ 47} As the state points out, the *Batson* test is inapplicable as this was not a peremptory challenge. *See State v. Lewis*, 7th Dist. No. 03 MA 36, 2005-Ohio-2699, 2005 WL 1300761, ¶ 60 (*"Batson v. Kentucky* applies to peremptory challenges, not challenges for cause"). The state challenged this prospective juror for cause. Various "good causes for challenge to any person called as juror" are listed in R.C. 2313.17(B)(1) (9). See also R.C. 2313.18(C) ("Each challenge listed in division (B) of this section shall be considered as a principal challenge, and its validity tried by the court."). For instance, there is good cause for challenge if "the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court." R.C. 2313.17(B)(9).

> In addition to the causes listed in division (B) of this section, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, *or other cause that may render the juror at the time an unsuitable juror.* The validity of the challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

(Emphasis added.) R.C. 2313.17(D). A trial court's ruling on a challenge for cause will not be disturbed absent an abuse of discretion. *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 94.

{¶ 48} The removal of this juror for cause was not unreasonable, arbitrary, or unconscionable. In any event, the court's decision on this one prospective juror does

> not appear to be independently challenged here. Rather, it appears the removal of this prospective juror is used to portray the context of cumulative events, including the peremptory challenge of prospective juror two.

Carter, 96 N.E.2d at 1063-64.

It is undisputed that juror one was removed for cause. As the state appellate court explained, *Batson* is inapplicable to the removal of jurors for cause. Further, since *Batson* is not applicable to challenges for cause, the state appellate court decision could not involve an unreasonable application of *Batson* with respect to juror one. The propriety of prospective juror one's removal for cause under state law is not a cognizable issue on habeas corpus review. *See* 28 U.S.C. § 2254(a); *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 854, 83 L. Ed. 2d 841 (1985) ("We noted that the question whether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; '[t]he respect paid such findings in a habeas proceeding certainly should be no less.'") However, when the court's decision results in an alleged violation of the defendant's constitutional rights, the court will examine the underlying issue. *Sinistaj v. Burt*, 66 F.3d 804, 808 (6th Cir. 1995); *Carnail v. Bagley*, No. 1:02CV1411, 2006 WL 1876546, at *12 (N.D. Ohio July 3, 2006). Thus, it merits discussion here.[7] The Court defers to the state appellate court's finding that the removal of juror one for cause was not unreasonable, arbitrary, or unconscionable, and offers no ground for a habeas appeal.

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[7] Although Carter has discussed the dismissal of this juror at every stage of his appeal, it remains unclear whether he is challenging the circumstances of this juror's removal, or merely using the fact this juror was removed to establish a pattern relating to the subsequent removal of the two other African-American jurors.

Next, the state appellate court considered Carter's assertion regarding the second potential African-American juror, who was dismissed after a preemptory challenge by the prosecution, and again rejected Carter's claim of bias:

> {¶ 49} Prospective juror two advised she was not comfortable with a certain example of complicity. When the court asked if she could follow the law provided to her by the court, she said she could. (Tr. 293). When the court asked if she could accept a certain principle of complicity, she answered no. The court said it appreciated her honesty. (Tr. 294). The court asked the prosecutor if she was going to ask to remove the prospective juror two for cause, at which point a discussion was held off the record. (Tr. 295). The court then prompted the juror to clarify that she said she could not apply the law on complicity to a person who did not "do" the shooting. She further stated she would not be able to find a person guilty even if his act constituted complicity under the law. (Tr. 296). Defense counsel then asked prospective juror two if she could follow the law, and she said she could. (Tr. 296 297). She then said she could find a driver guilty if he knew the principal was going in a store to rob it. (Tr. 297 299). She answered she would not want to find him guilty, but she could if she had to. (Tr. 300). The court overruled any challenge for cause.
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> {¶ 50} When the state exercised a peremptory challenge to remove prospective juror two, defense counsel pointed out this was an African American juror who indicated she could follow the law when questioned further. (Tr. 313 314). The prosecution explained: the prospective juror had confusion over the law provided to her; she plainly stated she does not want to comply with the law; her answer changed several times; and there were concerns about her ability to understand the law. (Tr. 315).
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> {¶ 51} The court agreed prospective juror two "made it clear that she would not want to find somebody guilty, even though the law required it." It was recognized she eventually said she could apply the law to find one guilty although she did not want to in certain complicity situations. (Tr. 316). The court overruled the *Batson* objection and expressed it did not believe the prospective juror's statements that she would employ the concept of complicity in accordance with the law. (Tr. 316 317). In so doing, the court found the prosecution's concerns credible.
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> {¶ 57} Appellant argues other prospective jurors (who were white) reacted similarly to complicity questions. The state responds by asserting no other prospective juror was unwilling to follow the law on complicity and urges this court to give great deference to the trial court's decision finding the prosecutor's reason was not pretextual. To show other (white) jurors expressed issues or confusion on complicity,

Appellant cites to various portions of the transcript.

{¶ 58} For instance, Appellant cites to pages 249 259. However, the prospective juror being questioned in those pages was in fact subsequently removed by a peremptory challenge exercised by the state. (Tr. 292). A different prospective juror cited by Appellant indicated she could understand and follow the law on complicity. (Tr. 336 337). Another prospective juror asked for clarification on a provided complicity scenario but then expressed understanding of the concept. (Tr. 152 154). The other example Appellant cites was a prospective juror who decided to tell a story from his youth and ask if he was complicit in a theft when he drove away knowing someone stole something after the fact. (Tr. 346 350). He then stated he understood the law and expressed, "I believe that it's maybe not a law that is totally fair, but it is what is; you know? That's for a legislator to change." (Tr. 351).

{¶ 59} This court concludes the reason provided by the prosecution for exercising a peremptory challenge as to prospective juror two was properly deemed to be race-neutral. At stage two of the *Batson* analysis, the state's explanation need not be "persuasive, or even plausible" (and can be silly or superstitious) as long as the reason is not inherently discriminatory. *Rice*, 546 U.S. at 338, 126 S.Ct. 969; Purkett, 514 U.S. at 768 769, 115 S.Ct. 1769 (an evaluation of the persuasiveness of the explanation does not arise until the third step). As for stage three of the Batson analysis, neither the prosecution nor the trial court believed the juror's answers to certain complicity questions. The court found the prosecutor's concerns (due to prospective juror two's abrupt turnabout) were credible, were honest, and were not pretextual. The trial court's decision in overruling Appellant's *Batson* challenge to the state's peremptory challenge of prospective juror two is not clearly erroneous.

Carter, 96 N.E.3d at 1064-65.

The Court finds the state appellate court's determination was neither contrary to nor an unreasonable application of clearly established federal law. Prospective juror two was removed with the prosecution's first peremptory challenge during *voir dire,* based on her response to the following:

Pros Juror Johnson:	About the guy driving the car. . . [a]nd the passenger, the person in the car. I don't think I don't think they should be charged. That's my opinion.
The Court:	You're saying the driver in the car, you don't think should be held to

the same accountability as the person who went in and shot somebody?

Pros Juror Johnson: Yeah. Right.

The Court: Well, what if I were to say to you, but that's the law, and I want you to apply that law to the facts, could you do that? . . . .

Pros Juror Johnson: Uh-huh. Uh-huh.

The Court: Okay. So in the case of the example that was given, if the driver of the car knew there was a gun and knew that there was going to be a robbery and didn't expect anybody to get shot, but somebody got shot, do you understand that the driver is as responsible as the person who shot somebody? DO you understand that?

Pros Juror Johnson: (Nods head.)

The Court: Can you accept that?

Pros. Juror Johnson: No.

(Doc. No. 6-3 at PageID 671-72.) After an off-the-record colloquey with both counsel, the trial court clarified the question:

The Court: The question is whether or not you can apply the law of complicity. When you find somebody who meets the requirements of complicity, although they didn't do the shooting, to be found guilty. And your answer to that was I thought no, you couldn't. Am I right or wrong?

Pros. Juror Johnson: You're right.

(*Id.* at PageID 673-74.) Further questioning that the prospective juror believed the driver could be guilty of the robbery, which he knew would occur, but not of the shooting, which he did not anticipate. (*Id.* at PageID 676.) After even more questioning, the potential juror expressed that while she would not want to find the hypothetical driver guilty of the shooting, she could "if you have to." (*Id.* at PageID 678.) The trial court denied the removal for cause, and permitted the juror

to be removed on a preemptory challenge. Defense counsel asserted that this dismissal was part of a systemic exclusion of African-American jurors, "there is no other race neutral reason for kicking her off and, in fact, contend that she's being kicked off because she's an African-American woman." (*Id.* at PageID 692.)

As the prosecution immediately asserted, since they were exercising their first preemptory challenge, there was no basis for finding a "systemic" exclusion of African-American potential jurors. Further, while other jurors expressed confusion or concern about the issue of complicity, some of them were also removed with preemptory challenges. Prospective juror two was inconsistent about whether she would apply the law on complicity and the prosecutor expressed concern about her reluctance to apply the law was therefore reasonable. Therefore, Carter has not shown that the state court was unreasonable in crediting the prosecutor's race neutral explanations for the *Batson* challenge.

There was a third potential juror who was African-American, and this juror was also excused for cause by the court. The state appellate court found that this, too, was a proper removal, after considering it as follows:

> {¶ 60} After this juror was removed, prospective juror three was addressed. She was the last remaining African American venireperson. She had previously advised the court her finals started that very week in the nursing program at Eastern Gateway, at which time the court called a sidebar and advised it would reserve making a judgment on her removal. (Tr. 81 82). Upon subsequently being placed in the jury box, prospective juror three explained: she had two nursing finals; she is not supposed to miss a final; she has no control over scheduling the finals; and her instructor advised she would provide a letter as proof. Prospective juror three advised she had class the next day, stating she would get kicked out of the program if she is not in class. (Tr. 320). The judge suggested he would call the school to ask the instructors to allow the juror to take both finals next week, instead of one this week and one next week. (Tr. 319 320). (We note the trial proceeded over the course of five days the first week and two days the next week).

{¶ 61} A discussion was held with counsel off the record. The court then told the juror it was "torn" between wanting her to go to school and wanting diversity on the jury. The court said it was calling a recess to make phone calls to her school to investigate rearranging her schedule. (Tr. 321 322). Prospective juror three asked to speak about other matters and she was heard on the record in chambers with Appellant and counsel present. She disclosed other issues with the case besides her school schedule. For instance, she stated: "I have a major problem with this case because I have two family members that's not even to top all my family members, that were murdered." (Tr. 323). In addition, she previously worked as a nurse at the jail and had to look at her cousin's murderer every day when she went to work. (Tr. 324, 326). When the court asked if she had resentment toward the defendant, she answered she did not want to be unfair to him. The court asked if she could fairly and objectively make a decision based on the facts of the case. She answered, "I can't honestly say that I could" and "It would be very hard for me." (Tr. 325 326).

{¶ 62} Upon questioning by defense counsel, prospective juror three reiterated, "because of my personal experiences that I cannot honestly say that I can sit here and listen to all the evidence and honestly say, okay he's innocent. I can't. I really can't do that." She then disclosed she also had a family member who drove a person who killed her other family member. (Tr. 327). She repeated her belief that her presence on the jury would not be fair to the defendant. (Tr. 328). The prosecutor noted it had already expressed the state's position that prospective juror three should be excused for her educational issues. (Tr. 329). When the court asked for the defense's position, defense counsel answered, "Nothing more, Your Honor." The court wished the prospective juror luck in school, essentially excusing her from service. At this point, she added she knew two of the witnesses from working at the jail and did not perceive them to be credible. (Tr. 329). Defense counsel voiced, "Then we do want her on, Your Honor." The court then excused the juror, again. (Tr. 330).

{¶ 63} On appeal, Appellant contends other prospective jurors expressed issues with work and commitments but were not removed, citing pages 79 through 88. However, within these pages, the court removed a juror who was leaving on a driving trip that week and a juror who did not want her child getting off the bus alone, without objection; other jurors' concerns were alleviated by the prediction of how long the trial would take. (Tr. 84, 87).

{¶ 64} In addition, prospective juror three was not only excused due to her college schedule (she would miss what seemed to be her last class before finals plus two final examinations, which would be valid considerations), she was removed for other reasons as well, which are not argued to constitute invalid considerations. As the state points out, the court excused juror three for cause, making *Batson* inapplicable. The trial court expressly made every effort to keep prospective juror three on the jury, and she kept providing new reasons to be removed. Considering the entire exchange,

there is no indication the court abused its discretion in removing juror three.

Carter, 96 N.E.3d at 1065-68.

The Court finds the state appellate court's determination was neither contrary to nor an unreasonable application of clearly established federal law. As discussed *supra, Batson* is inapplicable to challenges for cause, and the appellate court's decision that the trial court's dismissal did not amount to an abuse of discretion is a state law issue. *See Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001) ("a state trial court's alleged abuse of discretion, without more, is not a constitutional violation"); *Barnette v. Bunting*, No. 4:15CV2226, 2016 WL 8578116, at *7 (N.D. Ohio Aug. 29, 2016), *adopted*, 2017 WL 1079088 (N.D. Ohio Mar. 22, 2017). None of the evidence presented here overcomes the deference due to the trial court, which has the unique opportunity to interact with the potential jurors. *Wainwright v. Witt*, 469 U.S. at 428. It is therefore recommended the Court find Carter's second ground for relief is without merit.

3. Ground Three

The third ground of Carter's habeas Petition asserts that Carter was denied the effective assistance of counsel based on what he alleges are the trial counsel's multiple failures to meet his basic duties to Carter, including:

- failure to move to suppress any or all of Carter's statements to the police, including a videotaped statement played at trial;
- failure to file a motion *in limine* seeking to prevent Queener from testifying as to hearsay statements allegedly made by deceased co-defendant Thomas;
- failure to objected to or otherwise attempted to exclude the testimony of a detective that "Bop" really means robbery, although the detective had not been qualified as an expert; and
- failure to cross-examine or otherwise challenge the conclusion of the prosecution's

ballistic expert that three weapons were used in the crime.

(Doc. No. 1 at 17-20.)

In order to establish ineffective assistance of counsel, a petitioner must demonstrate that his counsel's conduct was so below acceptable standards of representation that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner also must demonstrate that a trial counsel's performance prejudiced the petitioner's defense to such an extent that it rendered the proceeding unfair. *Id.* To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In other words, a counsel's deficient performance must have "caused the defendant to lose what he otherwise would probably have won" and it must have been "so manifestly ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

In assessing claims of ineffective assistance of counsel, courts apply the familiar standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1998), which requires a petitioner to demonstrate both that his counsel's performance was deficient, and that the allegedly ineffective assistance caused him prejudice:

> 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 made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a

breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Where, as here, a state court correctly identifies *Strickland* as the standard for assessing a petitioner's ineffective assistance claim, in order for the petitioner to receive habeas relief, the state court's ruling must be an unreasonable application of the *Strickland* standard. *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009) ("The question is not whether a federal court believes the state court's determination under *Strickland* was incorrect but whether that determination was unreasonable a substantially higher threshold.") (internal quotation marks omitted). When reviewing a state court's ruling on an ineffective assistance of counsel claim, federal habeas courts must employ "a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 134 S.Ct. 10, 13, 187 L.Ed.2d 348 (2013); *see also Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) ("Our review of the [state court's] decision is thus doubly deferential. We take a highly deferential look at counsel's performance through the deferential lens of § 2254(d).") (internal citations and quotation marks omitted).

The United States Supreme Court has emphasized that, in determining whether counsel performed deficiently under *Strickland*, "[w]e begin with the premise that 'under the circumstances, the challenged action[s] might be considered sound trial strategy." *Pinholster*, 131 S.Ct. at 1404 (quoting *Strickland*, 466 U.S. at 689). Indeed, *Strickland* commands reviewing courts to "affirmatively entertain the range of possible 'reasons [defense] counsel may have had for proceeding as they did,'" *Pinholster*, 131 S.Ct. at 1407, and "indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment."

Strickland, 466 U.S. at 689-90, 692.[8] *See also Holmes v. Goodrich*, No. 1:13cv421, 2015 WL 127925 at *16 (N.D. Ohio Jan. 8, 2015) ("Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective.") The mere fact that a trial strategy was unsuccessful is not sufficient to support a conclusion that trial counsel's performance was deficient. *See Kelly v. Lazaroff*, No. 5:14cv1217, 2015 WL 4546996 at *11 (N.D. Ohio July 28, 2015). *See also State v. Conway*, 848 N.E.2d 810, 832 (Ohio 2006) ("That this strategy was unsuccessful and the jury ultimately found [defendant] guilty . . . is not a basis for finding ineffective assistance of counsel. Trial counsel's strategic choices must be accorded deference and cannot be examined through the distorting effect of hindsight.").

Respondent asserts the state appellate court reasonably determined Carter's trial counsel was not ineffective. (Doc. No. 6 at 41-43.) For the following reasons, the Court agrees.

a. Statements to the Police

The state appellate court rejected the argument that Carter's trial counsel was ineffective based on his failure to file a motion to suppress five statements he made to police and failed to object

[8] Like federal law, Ohio law regarding ineffective assistance claims requires reviewing courts to be highly deferential of trial counsel's strategic decisions. *See State v. Carter*, 651 N.E.2d 965, 977, 72 Ohio St.3d 545, 558 (Ohio 1995) ("Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel. To justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy."); *State v. Smith*, 731 N.E.2d 645, 652, 89 Ohio St.3d 323, 328 (Ohio 2000) ("Yet, even if we viewed counsel's trial strategy as questionable, such a strategy should not compel us to find ineffective assistance of counsel. In these situations, we normally defer to counsel's judgment.").

to his tape recorded statement at trial which contained a portion of his final statement, as follows:

> {¶ 79} Appellant's ineffective assistance of counsel argument is based on his claim that he was not *Mirandized* before his initial statements made in the hospital. Appellant's first statement was made to a police officer in the hospital while waiting for his arm to be treated: he said he was walking on Norwood Avenue when an unknown person in a car shot him. (Tr. 462 462). Appellant's second statement, which was made to a detective in the emergency room, was consistent with the first statement. (Tr. 492). In both instances, Appellant was reporting he was the victim of a crime. Appellant is presuming *Miranda* warnings were not given before these two statements due to the absence of testimony on the topic; however, testimony on warnings is not required at trial, and the police officer and the detective were not asked at trial whether *Miranda* warnings were provided before these two statements. In any event, there is no indication a reasonable person would have believed a custodial interrogation was occurring, which is the trigger for *Miranda* rights. *State v. Mason*, 82 Ohio St.3d 144, 153 154, 694 N.E.2d 932 (1998), citing *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).
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> {¶ 80} Appellant's third statement was made to the lead detective in the emergency room. Appellant's mother was present. (Tr. 726). Appellant proclaimed he lied to the other officers and stated his uncle called him so they could go to Elm Street "for a bop." Since the detective understood this to mean a robbery, he stopped the conversation and went to his vehicle to retrieve a *Miranda* rights waiver form. (Tr. 727). The detective read Appellant his rights in the presence of his mother and made sure they both understood the rights being waived. (Tr. 727 729). Appellant stated they went to the victim's house for a drug buy and the victim robbed his uncle resulting in a shoot-out.
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> {¶ 81} As for the portion of the statement made prior to the *Miranda* waiver, Appellant had reported he was the victim of a drive-by shooting. There is no indication this statement, made when the lead detective first approached Appellant in the hospital, could be considered a custodial situation so as to trigger the application of *Miranda*. *See Mason*, 82 Ohio St.3d at 153 154, 694 N.E.2d 932. Police are not required to administer *Miranda* warnings to everyone they question, even if the subject has become a suspect. *State v. Biros*, 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997).
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> {¶ 82} In the morning, the detective heard multiple messages from Appellant asking him to come back to the hospital, and the detective complied. The detective *Mirandized* Appellant again. Appellant then stated DeJuan Thomas robbed the victim; Appellant said he did not know this was going to occur. (Tr. 734 735). The detective asked him to memorialize this statement in a recording after he was released from the hospital. (Tr. 735). On May 2, 2013, Appellant arrived at the police

station with his parents, was *Mirandized,* and provided a similar statement on video in the presence of his father. (Tr. 744).

{¶ 83} Appellant does not detail an issue with the *Mirandized* statement he provided upon summoning the detective back to the hospital. We notice the statement of facts section of his brief describes this statement and adds, "apparently in the absence of any parent." Appellant provides no law mandating a parent's presence during Miranda warnings or disposing of the totality of the circumstances test. Regardless, there is no indication this encounter could be viewed as a custodial interrogation. Appellant, who was 17.5 years old, summoned the detective back to the hospital. In addition, Appellant was previously *Mirandized* a few hours earlier in the presence of his mother, who was also advised about the rights being waived.

{¶ 84} There is no indication a suppression motion would have been successful. Furthermore, counsel could have made a tactical decision to not seek suppression because he wanted the jury to hear Appellant's claim that he did not know a robbery would be committed by his uncle. The final statement Appellant gave from the hospital resulted in and was memorialized in the subsequent video-statement, which counsel may have wished the jury to see so they could view his client telling his story without having to testify at trial and being subject to cross-examination.

Carter, 96 N.E.3d at 1071-72. In sum, Carter's first two statements to the police stated that he was the victim of a crime. As the state appellate court observed, it is not clear whether *Miranda* warnings were given before these two statements, however, this is irrelevant since *Miranda* warnings are not required for voluntary statements by crime victims or witnesses.

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The privilege against self-incrimination applies to the States through the Fourteenth Amendment. *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The privilege against self-incrimination prohibits the government from using any statement against a criminal defendant "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694

(1966). In *Miranda*, the Supreme Court held:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning ... [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 478 79. *Miranda* warnings are intended to guard against the coercion inherent in a police-dominated environment where the interplay between interrogation and custody would "'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Rhode Island v. Innis*, 446 U.S. 291, 299, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (quoting *Miranda*, at 457 58, 86 S.Ct. 1602).

The procedural safeguards set forth in *Miranda* "are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Innis*, 446 U.S. at 300. In this case, of Carter's first two statements were made at the hospital, where Carter was receiving treatment for a gunshot wound. There is no evidence the police viewed him as a suspect, and ample evidence that they believed he was - as he purported to be - the victim of a crime. Therefore, *Miranda* warnings were neither necessary or appropriate.

Carter's next disputed statement was also made at the hospital, but this time he indicated that he might say something incriminating, by using the phrase "for a Bop," the meaning of which is discussed further at subsection c, below. The detective taking the statement immediately stopped Carter, went to his squad car, and retrieved a *Miranda* waiver, which he then explained to Carter and his mother. (Doc. No. 6-5 at PageID 1143-45.) Carter then voluntarily made a statement, part of which he later acknowledged was untrue.

Carter called the detective and made an additional voluntary statement the next morning, changing critical facts from his prior statement. (*Id.* at PageID 1150-51.) The detective asked him to memorialize this statement in a recording after he was released from the hospital. (*Id.* at PageID 1151.) On May 5, 2013, Carter arrived at the police station with his parents, was *Mirandized*, and provided a similar statement on video in the presence of his father. (*Id.* at PageID 1160.) Carter alleges that his trial counsel failed to review this video before the trial, and alleges that this was the reason he did not object to the portion of the statement that was played at trial. (Doc. No. 1 at 20.) However, the state appellate court found evidence that counsel had reviewed the video statement during discovery,[9] and concluded that it was a reasonable trial tactic for the defense to use the video to allow Carter to tell his story without being subject to cross-examination. The state appellate court held that the recorded statement was not subject to objection based on hearsay or relevancy under Ohio's evidentiary rules. *Carter*, 96 N.E.3d at 1072. This court is bound by the state appellate court's interpretation of Ohio law. *Bradshaw*, 546 U.S. at 76. Further, we must "strongly presume [defense counsel] to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S., at 690, 104 S.Ct. 2052. Considered in light of that presumption of competence, Carter's trial counsel's decisions, although unsuccessful, were not unreasonable.

b. Testimony of Queener

Next, the state appellate court addressed Carter's assertion that his trial counsel was

[9] For example, in colloquy, the court reporter recorded defense counsel telling the trial judge "Your honor, obviously I've watched this video." (Doc. No. 6-5 at PageID 1161.) The issue was that he could not recall from memory exactly what portions of the 36 minute edited statement he believed were irrelevant, which trial counsel attributed to the fact he was unaware it would be used at trial.

inadequate due to his failure to file a motion *in limine* to exclude the testimony of witness Queener, discussed in section IV.A.1. The state appellate court rejected this argument for the following reasons:

> {¶ 74} Related to the first assignment of error, Appellant complains defense counsel failed to file a written motion *in limine* and failed to thoroughly argue against the admissibility of the "jailhouse snitch" who presented the hearsay statement of the deceased co-defendant. The state filed a notice of intent to use evidence in the form of Mr. Queener's testimony as to what DeJuan Thomas told him in jail. At the beginning of the trial, the court noted it had researched the law on the topic. (Tr. 20). The state argued the declarant was clearly unavailable as he was dead and there was nothing to indicate the declarant should have anticipated his statement would be used in a prosecution when he spoke to his friend in jail, concluding the statement was not testimonial. (Tr. 24 25). The state then made arguments concerning the credibility and corroboration of the declarant's statement. (Tr. 26 27).
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> {¶ 75} Defense counsel made arguments concerning the credibility of the "jailhouse snitch" and a witness whose testimony was used as corroboration of the declarant's statement. (Tr. 29, 31 34). The court concluded these would be credibility issues for trial. (Tr. 30, 34). Mid-trial, defense counsel asked the court to reconsider its ruling on admissibility. He provided the 1983 Ohio Supreme Court *Storch* case, discussed above, and argued the Ohio Constitution precludes testimony at trial without face-to-face confrontation. (Tr. 499 504). Prior to Mr. Queener's testimony, defense counsel renewed his objection again. (Tr. 558).
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> {¶ 76} Defense counsel made arguments against admissibility of the disputed testimony before and during trial. These arguments were reiterated in Appellant's brief. Although other arguments were added on appeal, they are without merit. Considering the resolution of the first assignment of error, this ineffective assistance of counsel argument fails.

Carter, 96 N.E.3d at 1069-70. As the state appellate court noted, the record indicates that Carter's trial counsel argued against the admissibility of the statement both in pre-trial proceedings and mid-trial, when defense counsel provided the trial court with a copy of the Ohio Supreme Court *Storch* ruling, and argued the Ohio Constitution precludes testimony at trial without confrontation. (Doc. No. 6-2 at PageID 388, 390-93; Doc. No. 6-4 at PageID 896-900.) The fact that these arguments

were ineffective is not evidence of Carter's trial counsel's inadequacy. Nor does Carter cite any authority that his counsel was required to pursue these arguments in any particular form, such as a motion *in limine*. Further, as discussed in section IV.A.1, *supra,* the hearsay and Confrontation clause arguments that Carter asserts should have been pursued were not compelling. Trial counsel's choice not to advance weak arguments is neither incompetent nor prejudicial.

c. The meaning of "Bop"

Next, the state appellate court considered Carter's assertion that his trial counsel was inadequate because he failed to object to a detective's testimony that the term "bop" meant a robbery because the detective had not been qualified as an expert witness. (Doc. No. 1 at 21.) It rejected this argument for the following reasons:

> {¶ 87} Next, Appellant complains defense counsel did not object to the lead detective's testimony that a "bop" was a robbery as the detective had not been qualified as an expert under Evid.R. 702. The lead detective first visited Appellant, who was accompanied by his mother, in the emergency room. Appellant disclosed he received a call from his uncle and "was going to pick him up to bring him over to Elm Street for a bop." (Tr. 727). The detective testified he stopped speaking to Appellant and went to retrieve a Miranda waiver form because he knew the word "bop" to mean a robbery. (Tr. 727 728). He said Appellant advised he meant drug deal by the term "bop." The detective explained: "Over my years of experience and working different types of crimes, including robbery, that's the slang that I'm accustomed to that usually people come in that describe a robbery describe it as a bop. It's just street slang." (Tr. 733). He had already testified he worked for the Youngstown Police Department for 23 years. (Tr. 720).
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> {¶ 88} A witness may testify as an expert if: (A) the testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education on the subject matter; and (C) the testimony is based on reliable scientific, technical, or other specialized information. Evid.R. 702 (with additional rules for test results). A lay witness can also provide an opinion. Evid.R. 701 provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the

perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶ 89} "[A] police officer is permitted to testify concerning his own expertise as to the behavioral and language patterns of people commonly observed on the streets, including people associated with criminal activities, in a manner helpful for the jury's clear understanding of the factual issues involved." *State v. Barnett*, 10th Dist. No. 92AP 345, 1992 WL 246000 (Sept. 22, 1992) ("In particular, the police officer's knowledge of the slang terminology usually accompanying drug transactions is permissible."). *See also State v. Mason*, 5th Dist. No. 2003CA00438, 2004-Ohio-4896, 2004 WL 2070367, ¶23 35 (detective was permitted to testify that "40" in certain context referred to $40 worth of crack cocaine). State v. Scott, 10th Dist. No. 90AP 255, 1990 WL 140548 (Sept. 27, 1990) (police officer could relate his knowledge of the slang terminology, nods, and gestures accompanying drug transactions).

{¶ 90} Counsel was not ineffective in failing to object to the detective's testimony as to what he believed the slang word "bop" meant on the street. In fact, it appears defense counsel made a tactical decision to wait to cross-examine the detective on the subject as he asked the detective, "Have you ever heard that a bop is * * * a blow job? * * * a woman who gives a good blow job * * * to take off? * * * to hit something? * * * a girl is a bop?" (Tr. 759).

Carter, 96 N.E.3d at 1072-73.

As the state appellate court explained, Ohio R. Evid. 701 and 702 and Ohio case law, the court concluded that the detective was properly offering testimony "concerning his own expertise as to the behavioral and language patterns of people commonly observed on the streets." *Id.* at 1072-1073, citing *State v. Barnett*, 10th Dist. No. 92AP 345, 1992 WL 246000 (Sept. 22, 1992). This court is bound by the state court's interpretation of its own law. *Bradshaw*, 546 U.S. at 76. Further, Carter's trial counsel did not ignore the issue of the disputed meaning of "bop," but instead of pursing what would most likely have been a futile objection, he instead cross-examined the detective on the meaning of "bop." Again, this choice of trial tactic is not grounds for a finding of ineffective assistance of counsel.

d. Testimony of the ballistics expert

Finally, the state appellate court evaluated Carter's claim that his trial counsel was ineffective because he "did not cross-examine or otherwise challenge" the conclusion of the state's ballistic expert that three weapons were used in the crime. (Doc. No. 1 at 21.) Specifically, Carter argues that his counsel should have cross-examined the state's ballistics expert regarding the possibility that the single bullet core found at the crime scene which was not from one of two identified guns may have predated the crime. (*Id.*) The state appellate court rejected this claim for the following reasons:

> {¶ 91} Lastly, Appellant claims counsel rendered ineffective assistance by refraining from cross-examining the ballistics expert from the BCI who concluded three firearms were used in producing the ballistics evidence recovered from the scene. A bullet core with the different direction of twist and rifling style was found lying on the floor near the body of a homicide victim who had been shot eleven times. Appellant urges the expert's conclusion was ripe for challenge as the bullet core may have predated the crime and there was a tampering with evidence charge related to the crime scene. Notably, Appellant is not contesting the conclusion that three firearms produced the evidence sent to BCI; rather, he is contesting the investigative conclusion as to the time and place of the third firearm's production of the bullet core. In accordance, defense counsel raised these issues during cross-examination of the lead detective. (Tr. 774, 779 782). Counsel should not be second-guessed as to his decision on which witness he chose to ask about alternative explanations for the existence of a projectile fired from a third firearm.

Carter, 96 N.E.3d at 1073.

Carter's trial counsel did not raise this issue with the ballistic's expert, but did address these issues during cross examination of an investigating detective in the following exchange:

Q: You've got a document that says that there's a third bullet that's lying in the middle of the floor; correct?

A: Yes.

Q: And it doesn't go to the cowboy gun?

A: Yes

Q: And it doesn't go to the Glock that we think Dejuan Thomas had?

A: Yes.

Q: So it goes to something?

A: Yes.

Q: And that's the information that you just I think testified puts a gun in my client's hands?

A: Yes.

Q: And you don't have any notation in your documents, your reports that says when you got that report? Yes or no?

A: No.

Q: Okay. So you can't tell this jury, other than the fact someone from the State of Ohio tells someone from Youngstown that hey, you have a third bullet here, and you don't know anything about it?

A: I don't know I do know about it when it gets delivered to me, sir.

(Doc. No. 6-5 at PageID #: 1191-2.) Further cross-examination established the detective received information about the third bullet sometime between May and October, and that the expert could not determine when the bullet was shot. (*Id.* at PageID #: 1192-93.) Thus, the issue was raised in trial, and the choice of which witness to cross-examine on this subject is clearly within the trial counsel's discretion.[10]

Accordingly, and for all the reasons set forth above, it is recommended that the Court find the Carter's third ground for relief lacks merit, and should be denied.

4. Ground Four

[10] Since the defense did not dispute that the single bullet at issue was fired from a third gun, it was arguably more relevant to raise this issue with the detective than the ballistics expert, who did not attempt to date any of the bullets.

Finally, Carter's asserts that his convictions violate the Fourteenth Amendment to the United States Constitution because they are not supported by sufficient evidence. (Doc. No. 1 at 22-23.) Specifically, he argues that the state failed to present evidence establishing that Carter intended to cause the death of another, which is an intrinsic element of the charges of Aggravated Murder and Complicity to Aggravated Murder. (*Id.* at 23.) He argues that the only evidence of "purpose" was the presence of a distinct bullet indicating a third gun was involved in the crime. (*Id.*)

The state appellate court disagreed with Carter's assessment of the evidence and rejected this argument for the following reasons:

> {¶ 100} The evidence, if believed, was sufficient to prove Appellant's purpose to cause the victim's death. *See Yarbrough,* 95 Ohio St.3d 227 at ¶ 82, 767 N.E.2d 216; Murphy, 91 Ohio St.3d at 543, 747 N.E.2d 765. Viewed in the light most favorable to the state, the evidence shows: Appellant intended to go to the victim's house with his uncle to rob the victim of money and drugs; Appellant picked up his uncle, drove to the victim's house, and entered the house; Appellant admitted his position near the bed; his blood was found on the bed and spattered behind it, confirming his location when he was shot at very close range, an apparent contact wound; Appellant stated the shot knocked him into the corner; the victim had a revolver near his fingertips which contained five fired cartridges and one bullet remaining; Appellant's DNA was found on the handle of this revolver; the victim was shot eleven times with entry wounds on multiple sides of his body; the ballistics evidence demonstrated three different firearms produced the evidence collected; the single bullet core showing the presence of a third firearm was found lying on the floor near the body; multiple casings were clustered in a location consistent with being ejected from a firing semi-automatic handgun located near Appellant's position; Appellant fled after the victim was killed, dropping his uncle off in critical condition at one emergency room and then driving to a different emergency room to have his own massive gunshot wound to the arm treated; and Appellant told various progressive stories to police, ending with a retraction.
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> {¶ 101} The question is merely whether any rational mind (with an emphasis on any) could find the disputed element was established by the direct and circumstantial evidence. *State v. Getsy,* 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998). Upon viewing the evidence in the light most favorable to the prosecution, a rational juror could have found the elements of the contested offense proven beyond a reasonable doubt. *See Goff,* 82 Ohio St.3d at 138, 694 N.E.2d 916. Appellant's sufficiency

argument is overruled.

Carter, 96 N.E.3d at1075-76.

A habeas petitioner who claims that the evidence at trial was insufficient for a conviction must demonstrate that, "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. *See also Scott v. Mitchell*, 209 F.3d 854, 885 (6th Cir. 2000). The role of the reviewing court in considering such a claim is limited:

> A reviewing court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor has been observed by the trial court. It is the province of the factfinder to weigh the probative value of the evidence and resolve any conflicts in testimony. An assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims. The mere existence of sufficient evidence to convict therefore defeats a petitioner's claim.

Matthews v. Abramajtys, 319 F.3d 780, 788-89 (6th Cir. 2003) (internal citations omitted). Moreover, it is well established that "'attacks on witness credibility are simply challenges to the quality of the government's evidence and not to the sufficiency of the evidence.'" *Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002) (quoting *United States v. Adamo*, 742 F.2d 927, 935 (6th Cir. 1984)).

Consistent with these principles, the Supreme Court has emphasized that habeas courts must review sufficiency of the evidence claims with "double deference":

> We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, 'it is the responsibility of the jury not the court to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.' *Cavazos v. Smith*, 565 U.S. 1, , 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (per curiam). And second, on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the

> evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.' " *Ibid.*

Coleman v. Johnson, 566 U.S. 650, 132 S.Ct. 2060, 2062, 182 L.Ed.2d 978 (2012). Under this standard, "we cannot rely simply upon our own personal conceptions of what evidentiary showings would be sufficient to convince us of the petitioner's guilt," nor can "[w]e . . . inquire whether any rational trier of fact would conclude that petitioner . . . is guilty of the offenses with which he is charged." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). Rather, a habeas court must confine its review to determining whether the state court "was unreasonable in its conclusion that a rational trier of fact could find [petitioner] guilty beyond a reasonable doubt based on the evidence introduced at trial." *Id.* (emphasis in original) (citing *Knowles*, 129 S.Ct. at 1420).

Upon careful review of the trial transcript, the Court finds Carter's conviction for aggravated murder is supported by substantial evidence. Ohio Rev. Code § 2903.01(B) defines Aggravated Murder[11] as follows:

> No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

Here, the evidence presented by the state, if believed, establishes all these elements. At trial, the state presented evidence of Carter's intent to commit a robbery, with death as a forseeable result, including the testimony of a detective that he testified to this intent, ballistic evidence that he brought

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[11] Although Carter also challenges the sufficiency of the evidence supporting his convicion for Murder, this, like all the other charges, was merged for the purposed of sentencing. (Doc. No. 6-1 at PageID117.) Further, evidence sufficient to support a conviction for Aggravated Murder is also sufficient to support a conviction for Murder.

a gun, physical evidence that he was in the room where the murder occurred and had handled one of the guns, and the testimony of his close friend, McKinnon, that he intended to rob the victim. Because a rational juror could have found beyond a reasonable doubt that Carter had committed Aggravated Murder, it is recommended that the Court find the Carter's fourth ground for relief lacks merit, and should be denied.

V. Conclusion

For all the reasons set forth above, it is recommended that the Petition be Dismissed.

Date: September 30, 2020

s/ Jonathan Greenberg
Jonathan D. Greenberg
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days after the party objecting has been served with a copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).